

Sample
Checklist
Inside



School Employee First Amendment Rights – Will Your District be Embroiled in the Next Free Speech Controversy?

Over the past year, the right to freedom of speech under the First Amendment of the U.S. Constitution has been the subject of national headlines and debate. From NFL players taking a knee during the National Anthem, to college students shouting down “offensive” campus speakers, groups and individuals are asserting and discussing free speech rights. Public school students and faculty across the county have jumped into the free speech fray as well, weighing in on the NFL National Anthem protests,¹ the Charlottesville protest violence,² and immigration policy.³

1 “High School Conservatives Sue School District Over Free Speech,” Fox News Insider, December 10, 2017, at <http://insider.foxnews.com/2017/12/10/high-school-conservatives-sue-school-district-over-anthem-protest-free-speech>; “Two Texas Students Sue Schools to Freely Protest the Pledge,” New York Times, October 30, 2017, at <https://www.nytimes.com/2017/10/30/us/student-pledge-protest.html>.

2 “Protesters rally against Cherokee teacher who targeted Trump T-shirts,” Atlanta Journal and Constitution, September 27, 2017, at <http://www.ajc.com/news/local/protesters-rally-against-cherokee-teacher-who-targeted-trump-shirts/uAWtRWyIIPXBr6sr4IT3H/>.

3 “Teachers protest immigration crackdown, defend public education,” San Jose Mercury News, May 1, 2017, at <https://www.mercurynews.com/2017/05/01/teachers-protest-immigration-crackdown-defend-public-education/>.

With so many Americans clamoring to voice their right to free speech, it can be easy to forget that the First Amendment does not protect all types of speech for ordinary citizens, much less for public employees. True threats, incitement, libel, and child pornography are all categories of speech that fall outside the protection of the First Amendment. When it comes to public employees, the law is clear that a government employee does not give up all First Amendment rights otherwise enjoyed by a citizen just because of his or her employment. However, it is just as clear that when the government acts as an employer, it has greater powers to regulate speech than when it acts a sovereign.

But how far does a school district's ability to control speech of its employees go? Must a school district permit its football coach to take a knee during National Anthem? What about if a teacher talks politics in biology class? What about a teacher's speech outside of the classroom?

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate..."

United States Supreme Court in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969).

With the ongoing societal debate about free speech rights as a backdrop, we at SLRMA tackle this complicated topic with a new resource for our members: the School District Employee Speech and First Amendment Self-Evaluation Checklist. This resource provides school leaders with a legal framework for understanding school district employee speech. The topics addressed include speech related to employee official duties, speech related to private grievances of the employee, and speech related to matters of public concern. In addition, this new resource contains self-evaluation questions to help school districts understand their current policies on employee speech, consider providing training to

school leaders on free speech, and develop incident response plans specific to free speech.

The issues involved in free speech cases are highly fact- and circumstance-dependent. Considerations of other Constitutional, federal, and state laws may be needed in a free speech matter. Accordingly, consultation with counsel is advised and encouraged when your school district faces situations involving free speech.

Fast Facts: U.S. Supreme Court Free Speech Cases Impacting Public School Employees

1943 - *West Virginia State Board of Education v. Barnette*, 319 U.S. 624: requirement that all teachers and students to salute the U.S. flag as part of all activities in public schools was a violation of free speech rights.

1968 - *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563: teacher's letter to newspaper editor complaining about a defeated school board proposal to increase school taxes was protected free speech.

1983 - *Connick v. Myers*, 461 U.S. 138: district attorney's complaint about her transfer and questionnaire distributed to other employees was not protected free speech.

1995 - *United States v. National Treasury Employees Union*, 513 U.S. 454: federal law that prohibited federal employees from accepting an honorarium for making an appearance, speech, or writing an article, either related or unrelated to employees' official duties, was a violation of employees' free speech rights.

2004 - *City of San Diego v. Roe*, 543 U.S. 77: police officer's lewd video of himself in a police uniform that he sold that resulted in his termination from police force was not protected speech.

2006 - *Garcetti v. Ceballos*, 547 U.S. 410: statements made by employee of district attorney's office informing defense counsel of a false affidavit presented by a sheriff were not protected free speech.

Recent Updates from the Newsroom Available on SLRMA.org

Due Process Requirements for Out-of-School Suspension – Self-Audit Checklist and Best Practices

October 13, 2017

When a school initiates disciplinary proceedings against a student such as out-of-school suspension, a student's right to due process is invoked. Not affording students appropriate due process can have significant legal consequences.

U.S. Department of Education Changes Course on Title IX Responsibilities for Sexual Misconduct

October 9, 2017

On September 22, 2017, the U.S. Department of Education Office for Civil Rights issued a Dear Colleague Letter withdrawing the statements of policy and guidance reflected in two key documents about Title IX and sexual violence issued under the Obama administration: the Dear Colleague Letter on Sexual Violence dated April 4, 2011, and the Questions and Answers on Title IX and Sexual Violence, dated April 29, 2014.

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2017 Top 4 Downloads

- 1) **Due Process Requirements for Out-of-School Suspension – Self-Audit Checklist and Best Practices**
- 2) **Electronic Data Self-Audit Checklist, 2016 Update**
- 3) **Electronic & Information Technology Accessibility Self-Audit Checklist**
- 4) **Cybersecurity & Privacy Risk Management for Cloud Computing – Self-Audit Checklist and Best Practices**

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The Mission of the School Leaders Risk Management Association (SLRMA) is to assist public school districts (K-12) with supplemental risk management support. We help you accomplish your own mission of risk avoidance in a number of ways.

- We provide pro-active, timely tools to help prevent unwanted and unwarranted school board legal liability claims.
- We keep members informed of the current legal issues that will likely affect your school district through our work with the Federal Legislation Insurance Committee (FLIC).
- We give members access to special reports featured in our Newsroom. The topics are specific to the School Board Legal Liability school boards face today and will in the future.

Members are equipped with an array of self-audits and checklists to help ensure you are in compliance with the latest requirements and guidelines which govern school boards and school districts. We are a not-for-profit and are governed by a Board of Directors. The Board consists of current Executive Directors of State School Boards Associations.

Checkout slrma.org to see all the benefits of membership.

SCHOOL LEADERS RISK MANAGEMENT ASSOCIATION
School District Employee Speech and First Amendment Self-Evaluation Questions

These self-evaluation questions are intended for use by public school district personnel who wish to assess their district's handling of issues related to employee speech. Given the law's unsettled and fact-intensive nature, the questions that follow are not a compliance checklist. Rather, they are designed to help a school district understand its current approach to employee speech and to issue-spot. Evaluating a school district's approach before a controversy erupts can help avoid a controversy altogether or improve a school district's response.

In completing the questions, check the appropriate boxes and fill in the appropriate lines.

Name of School District _____

_____ Name of Person Completing Self-Audit Checklist	_____ Date of Completion
---------------------------------------------------------	-----------------------------

Attorney Assisting District on First Amendment issues (if applicable) _____

<u>School Policies</u>	<u>Yes</u>	<u>No</u>
♦ Has our school district adopted personnel or other policies that address our expectations with respect to employee speech?		
♦ If so, do the policies generally align with the three-part framework outlined in part II? If not, in what respects and why?		
Response: _____ _____ _____ _____ _____		
	<u>Yes</u>	<u>No</u>
♦ Has our school district analyzed whether our policies and their application would pass Constitutional muster under the lower court cases in our jurisdiction? For example and without limitation:		
♦ Do our policies account for any recent decisions that define when speech is "pursuant to . . . official duties" under Garcetti and therefore not subject to First Amendment protection?		
♦ Do our policies impose blanket prospective limits on unofficial speech on matters of public concern (e.g., under a social media policy)? If so, has our counsel reviewed such policies under the First Amendment?		

	<u>Yes</u>	<u>No</u>
<p>◆ Has our school district analyzed what laws and policies other than the Free Speech clause of the First Amendment apply with respect to employee speech (for example, the Free Exercise Clause, federal anti-discrimination law, state labor and employment law and collective bargaining agreement obligations)?</p>		
<p>◆ If so, describe.</p>		
<p>Response: _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p>		
<p>◆ Has our school district analyzed whether our policies and their application comport with applicable laws and policies other than the First Amendment?</p>		

<u>Training</u>	<u>Yes</u>	<u>No</u>
<p>◆ Does our school district train employees regarding our expectations with respect to employee speech and an employee's rights and responsibilities?</p>		
<p>◆ Does our school district offer employees training on "best practices" for use of social media by professionals?</p>		
<p>◆ Does our school district train principals, managers and supervisors regarding how to respond to employee speech that seems sanctionable?</p>		
<u>Incident response</u>	<u>Yes</u>	<u>No</u>
<p>◆ Do principals, managers and supervisors know who to contact with a question about employee speech that seems sanctionable?</p>		
<p>◆ Do our school district's policies and/or practices define who has authority to take an adverse employment action as a result of an employee's speech?</p>		
<p>◆ Especially if the speech involves a matter of public concern, does our school district ordinarily require the consultation of legal counsel?</p>		
<p>◆ Describe who has authority to take an adverse employment action as a result of an employee's speech? Describe whether and under what circumstances such actions ordinarily require the consultation of legal counsel.</p>		