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Washington Office of Superintendent of
PUBLIC INSTRUCTION
Chris Reykdal, Superintendent

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BULLETIN NO. 063-24 LEGAL AFFAIRS

TO: Educational Service District Superintendents
School District Superintendents
Charter School Directors
School District Business Managers
School District Human Resource Managers
School District Civil Rights Compliance Coordinators
School Principals

FROM: Chris Reykdal, Superintendent of Public Instruction

RE: Reminders About School District Employees' Free Speech Rights

CONTACT: Sarah Albertson, Managing Attorney, Equity and Civil Rights
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PURPOSE/BACKGROUND

The Office of Superintendent of Public Instruction (OSPI) is issuing this bulletin to remind school districts of protections that educators and staff members have regarding speech, including in the classroom and on social media, as well as a district's obligations to address speech that could constitute discriminatory harassment. In response to global conflicts and upcoming elections, school districts may face increased questions about the scope of educator free speech rights. This guidance is intended to remind school districts about the general rules that govern educator and employee speech, including in the classroom and on social media.

Given the complexities of the laws related to free speech, OSPI encourages school districts to consult with their legal counsel about specific situations or circumstances.

SPEECH RIGHTS OF PUBLIC-SCHOOL EMPLOYEES

The First Amendment to the United States Constitution protects the right to free speech and

expression. However, in the context of public-school employment, that protection is more limited as public schools have broad authority to regulate educators' speech within their duties of their job.¹ A school district employee's speech on school grounds is generally considered speech on behalf of the district, and therefore is not entitled to First Amendment protection. This is because school districts have authority to control curriculum and activities of the school, including course content and teaching methods.² However, educators and staff members still do retain certain First Amendment protections. As long as the school has no legitimate interest in restricting speech, and the speech is related to the curriculum, educators and staff are generally protected.³

When school personnel are off school grounds, the First Amendment protects an educator's speech if they are speaking as a private citizen on a matter of public interest or concern. For example, posting a comment on a social media site favorable to a particular candidate or cause would most likely be protected. Additionally, if the speech takes place while they are working but not engaged in official duties (lunch break, time in between classes, etc.), there may be some First Amendment protections as well.

However, if the school district can show that the speech could adversely affect the school's ability to function or the teacher's effectiveness, the First Amendment may not provide protection regardless of when or where the speech took place.⁴ Additionally, the First Amendment does not provide the same protection to an educator's speech off campus or on social media if they made comments about students, schools, or other work-related matters, or engage in conduct that might be considered impairing them as an educator.⁵ A school district may further restrict such speech or impose disciplinary action if the speech is discriminatory and creates a hostile environment at school. Such restrictions must be even-handed and may not favor or silence one side of viewpoints.

Speech goes beyond spoken and written words—it can also include clothing, classroom décor, and various forms of symbolic expression.⁶ In addition to having control of course content and teaching methods, school districts may also have authority to restrict what may or may not be posted or worn by employees in the classroom or on school grounds.

¹ *Pickering v. Board of Educ. Of Tp. High School Dist.* 205, 391 U.S. 563 (1995).

² *Pickering* 391 U.S. at 574 (1995); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011).

³ *Id.*; *Connick v. Myers*, 461 U.S. 138, 146 (1983).

⁴ *Craig v. Rich Township High Sch. Dist.*, 736 F.3d 1110 (7th Cir. 2013).

⁵ *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Cir. 2009)

⁶ *Johnson* 658 F.3d at 969-970; *Downs v. Los Angeles Unified School Dist.*, 228 F.3d 1003 (9th Cir. 2000).

It is important to note that each situation is unique and should be evaluated on a case-by-case basis. School districts are strongly encouraged to engage with legal counsel in their analysis of each situation and respond accordingly.

School Districts' Obligations to Address Discriminatory Harassment

Discriminatory harassment is not protected speech under the First Amendment. Federal and state laws and regulations prohibiting discriminatory harassment are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution.

Discrimination is the unfair or unequal treatment or harassment of a person based on their race, color, national origin, religion, creed, sex, disability, sexual orientation, gender expression, gender identity, veteran or military status, and use of a trained dog guide or service animal.

To rise to the level of discriminatory harassment that is prohibited under federal and state law, the harassment must include something beyond the mere expression of views, words, symbols, or thoughts that some persons find offensive. The conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.

State law outlines the school district's obligation to respond to discriminatory harassment. When the school district is on notice of the alleged discriminatory speech made by an educator on campus, off campus, or on social media, the district must investigate according to their nondiscrimination policies and procedures and ensure students, families, and staff have notice about how to report concerns or submit written complaints.

Interim supportive measures may be necessary to ensure students feel safe and welcome at school while the school district is investigating.

INFORMATION AND ASSISTANCE

For questions regarding this bulletin, please contact Sarah Albertson, Managing Attorney, Equity and Civil Rights, at 360-725-6162 or email sarah.albertson@k12.wa.us. The OSPI TTY number is 360-664-3631.

This bulletin is also available on the [Bulletins](#) page of the OSPI website.

Tennille Jeffries-Simmons

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