

# TEACHERS' RIGHTS

## KNOW YOUR RIGHTS



## FREE SPEECH RIGHTS of PUBLIC and CHARTER SCHOOL TEACHERS and STAFF in UTAH

*Like students, public school teachers and staff retain First Amendment rights in school settings. However, because teachers and school staff are public employees, these rights are not as broad as those of students. Below is a short guide on free speech rights of teachers and employees at public and charter schools in Utah. **Nothing in this document should be construed as legal advice.** If you have a specific concern, please reach out to the ACLU of Utah or an attorney.*

### School Employees and Free Speech

Teachers and staff at school have free speech rights, but there are many limitations, especially for those who work in a K-12 setting. The extent to which the First Amendment covers teachers and staff depends on a variety of factors. Generally, the First Amendment protects your speech if you are speaking as a private citizen on a matter of public concern.<sup>1</sup> It also protects political speech outside of work.<sup>2</sup> If you are speaking as part of your job duties, however, your speech does not have the same protection.<sup>3</sup> School districts can regulate employees' speech made in the course of their duties: what you say or communicate inside the classroom or in school settings is considered speech on behalf of the school district, so that speech is not protected by the First Amendment.<sup>4</sup> A school employer is permitted to discipline or dismiss teachers and staff for work-related speech or expressive activities that violate policy. Such speech includes speech in official communications and classroom instruction. Additionally, a school may be able to impose discipline for speech and expressive activities by staff and teachers that is outside of work if the school shows that the speech created a substantial adverse impact on school functioning or is related to job duties.<sup>5</sup>

### Protected vs. Non-Protected Speech

Teachers and staff cannot be disciplined for speech that is protected by the First Amendment. Some examples of protected versus unprotected speech are provided below.

Examples of incidents where Courts have found speech to be protected by the First Amendment:

- Attending a protest on the weekend<sup>6</sup>
- Posting on a personal Facebook page an article in support of a specific political candidate<sup>7</sup>
- Publishing an op-ed that is critical of the school board for one of its actions or ideas.<sup>8</sup> The court viewed the opinion piece as expressing an opinion on a matter of public concern, and protected the teacher's speech the same as any other member of the public.

Examples of incidents where Courts could find speech is not protected by the First Amendment:

- Posting a "joke" on Facebook about students being lazy.<sup>9</sup> The courts have viewed this speech as potentially creating an adverse school environment, and thus in the scope of speech for which a school could impose discipline.
- Reading the Bible silently as students work and having multiple books of a specific religious

denomination displayed throughout the classroom. The School District may require removal of these items from the classroom and an end to this practice to avoid any perception that the school district or staff endorses religion or a specific religion.<sup>10</sup>

Other types of situations:

- You are instructed not to discuss with students your personal opinion on certain political matters. In a classroom discussion on global events, you let your students know that you have recently participated in an anti-war demonstration. This speech may not be protected. Both public and charter school districts have control over classroom content, displays, curriculum, and teaching methods. Courts have found that teachers can be disciplined for departing from the curriculum adopted by the school district, and courts could conclude that inserting personal experience as a protester is such a departure.<sup>11</sup> It is not as clear, however, whether the First Amendment protects teachers who had not been specifically instructed to refrain from expressing personal political beliefs. Some courts have ruled that schools may not discipline teachers for sharing certain controversial words or concepts in class that bear on the district's curriculum.<sup>12</sup>
- A teacher publishes an online book containing explicit sexual passages. Even though this is speech in the teacher's private capacity, i.e., not part of official duties, and could be on a matter of public concern, a court might find that the school employer may impose discipline for it. In this kind of situation, courts balance the school's interests and the teacher's free speech rights and might determine that the explicit sexual content has a substantial impact on the teacher's ability to teach and the school's functioning.<sup>13</sup>

If you are facing discipline for expressing your views on non-school matters outside of school, you may want to let the ACLU of Utah or an attorney know about it because there is a potential free speech problem.

## **Speech Inside of School**

Speech in the classroom does not have the same First Amendment protection as speech by a private individual outside of a school setting.<sup>14</sup> School districts have the authority to control the content, curriculum, and methodology adopted by school staff. This authority extends to classroom decorations, posters, or displays. Courts have recognized that school districts can require staff to remove banners and displays that may be perceived as conveying religious, political, and patriotic views.<sup>15</sup> Sorting out the limits on this authority can be a murky area.

Some courts have ruled that schools cannot discipline teachers or staff for sharing words or concepts that are controversial as long as (a) the school has no legitimate interest in restricting that speech, and (b) the speech is related to the curriculum.<sup>16</sup> Courts have recognized, however, that public schools have broad discretion to control the curriculum and methodologies in classroom instruction if that control is tied to legitimate pedagogical purposes. In general, teachers should exercise caution with speech in the classroom or in the course of their duties to avoid the appearance that you advocate a particular religious or political view in the classroom, as these can be viewed as state endorsement of religion.<sup>17</sup> Examples of this kind of speech include prayers and, in some contexts, moments of silence.

### ***Q: Is my speech to colleagues during breaks or casual conversations protected?***

Generally, yes. But, if the school can show that your speech would be harmful to your workplace functioning or is disruptive, the First Amendment is not likely to protect you.<sup>18</sup>

### ***Q: Can I wear items conveying political or religious opinions in the classroom?***

The right of teachers and school staff to express their views in school on public matters is subject to limits and will depend on the specific facts relevant to each situation. As a general matter, courts have said that if the items are not disruptive, they are protected as free speech.<sup>19</sup> For example, wearing a necklace with a religious symbol on it is likely protected as an expression if it is not accompanied by active endorsement of religion. On the other hand, courts have ruled that public schools can bar teachers from wearing buttons supporting a current political candidate. T-shirts with political messages or slogans could also be considered “disruptive.”<sup>20</sup> The same rules apply to classroom decorations or displays. It is best to avoid any appearance that you are advocating a particular religious or political view.

### **Speech Outside of School**

Generally, speech outside of school that is not related to your work and is on a topic of public importance is protected by the First Amendment.<sup>21</sup> If school officials can show that your speech could adversely affect school functions or your effectiveness as a teacher or staff member, however, the First Amendment may not protect you.<sup>22</sup>

Utah law also prohibits discipline for lawfully expressing your religious, political, or personal beliefs, including beliefs about marriage, family, or sexuality outside of the workplace unless such speech/beliefs are in direct conflict with “essential-business related interests” of the school.<sup>23</sup>

### **Speech and Social Media**

The same rules that apply generally to speech and expression outside of schools apply to social media. As such, the question of whether a school employer may discipline teachers and staff over social media posts depends on the situation, including whether the posts were within the scope of employment and the content of the posts. If you use social media in connection with your employment duties, the school employer is generally able to regulate content and discipline for your activities in that context. Social media posts unrelated to your job, made in private capacity, and expressing your beliefs on matters of public concern receive First Amendment protection, subject to the same caveats as other such speech.<sup>24</sup> That is, a school may discipline you if something you posted implicates the schools’ legitimate interests that outweigh your interest in the speech. You may also be subject to discipline if the posts are not about a matter of public concern and the school has a rational basis for imposing the discipline. Examples where the First Amendment may not protect you include if you make comments about students, school, or other work-related matters, or if you engage in conduct on social media that can be shown to impair your functioning as a teacher.

*Examples of incidents when Courts have upheld discipline against a teacher for social media speech:*

- Demotion of a teacher who posted derogatory comments about a school administrator on her blog<sup>25</sup>
- Dismissal of a teacher who posted offensive comments about her students on her personal Facebook page<sup>26</sup>
- Firing of a teacher who communicated with students through social media inappropriately<sup>27</sup>
- Firing of a teacher who posted sexually explicit Craigslist ads (“immoral conduct” made him unfit to teach).<sup>28</sup>

In some circumstances, schools are able to gain access to a teacher or staff member’s personal social media accounts. Teachers do have some privacy protections in Utah related to their personal online activities. Utah law (Utah Code Ann. §§ 34.48.101 – 34.48.301) prohibits employers from obtaining your passwords or

username to your personal online accounts. An employer may request your username or password to gain access into an electronic device supplied by your employer, however, or an account provided by the employer that is used for employer's business purposes. An employer may also require access to a personal account in the course of an investigation into work-related misconduct. You should also be aware that school authorities may be able to access content that you post on social networking sites without having direct access to your personal profile. Even when you maintain a "private" page on a social networking site, someone with access could repost or share your statements with third parties, including the school.

---

<sup>1</sup> Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).

<sup>2</sup> Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016).

<sup>3</sup> Garcetti v. Ceballos, 547 U.S. 410 (2006). See also Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 2016).

<sup>4</sup> Garcetti v. Ceballos, 547 U.S. 410 (2006). See also Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 2016).

<sup>5</sup> Richerson v. Beckon, 337 Fed. Appx. 637 (9th Cir. 2009).

<sup>6</sup> Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).

<sup>7</sup> Connick v. Meyers, 461 U.S. 138 (1983).

<sup>8</sup> Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968).

<sup>9</sup> Richerson v. Beckon, 337 Fed. Appx. 637 (9th Cir. 2009). See also Munroe v. Central Bucks School District, 805 F.3d 454 (3rd Cir. 2015).

<sup>10</sup> Roberts v. Madigan, 921 F.2d 1047 (10<sup>th</sup> Cir. 1990).

<sup>11</sup> Mayer v. Monroe County Community School Corporation, 474 F.3d 477, (7th Cir. 2007).

<sup>12</sup> Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). See also Lee v York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

<sup>13</sup> Craig v. Rich Township High School District, 736 F.3d 1110, (7th Cir. 2013).

<sup>14</sup> Garcetti v. Ceballos, 547 U.S. 410 (2006).

<sup>15</sup> Johnson v. Poway Unified School District, 658 F.3d 954, 966 n.12 (9th Cir. 2011). See also Lee v York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

<sup>16</sup> Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). See also Lee v York Cnty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

<sup>17</sup> U.S. Constitution, Amendment 1.

<sup>18</sup> Montle v. Westwood Heights School District, 437 F. Supp. 2d 652, 656 (E.D. Mich. 2006).

<sup>19</sup> James v. Board of Education, 461 F.2d 566, 573 (2d Cir. 1972).

<sup>20</sup> Weingarten v. Board of Education, 591 F. Supp. 2d 511 (S.D.N.Y. 2008); Montle v. Westwood Heights School District, 437 F. Supp. 2d 652, 656 (E.D. Mich. 2006).

<sup>21</sup> Heffernan v. City of Paterson, 136 S.Ct. 1412 (2016).

<sup>22</sup> San Diego Unified School District v. Commission on Professional Competence, 194 Cal. App. 4th 1454, (Cal. Ct. App. 2011). See also Dempsey Keach Ballard v. Indep. Sch. Dist. No.4 of Bryan Cnty., 320 F.3d (10th Cir. 2003).

<sup>23</sup> Utah Code. Ann. § 34A-5-112(2)

<sup>24</sup> Stroes v. Town of Davie, No. 18-62760-CIV-MORE, \*35 (S.D. Fla. May 22, 2019).

<sup>25</sup> Richerson v. Beckon, 337 Fed. Appx. 637 (9th Cir. 2009).

<sup>26</sup> In re O'Brien, 2013 WL 132508, \*4-5 (N.J. Super. Ct. App. Div. Jan 11, 2013).

<sup>27</sup> Spanierman v. Hughes, 576 F. Supp. 2d 292, 313 (D. Conn. 2008).

<sup>28</sup> San Diego Unified School District v. Commission on Professional Competence, 194 Cal. App. 4th 1454, 1458 (Cal. Ct. App. 2011).