

**2026 SCSBA  
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CONVENTION  
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**Presented by**

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# **Employee Social Media Posts About Public Matters Or Persons – When Do They Cross The Line?**

***What School District Employers Can—And  
Cannot—Do about Employee Speech In A  
Volatile Climate***

# WHAT IS SPEECH?

- **Verbal communications**
- **Written expressions:**
  - Emails, text messages
  - Social media posts
  - Social media reaction (“likes”)
  - Social media re-shares
- **Gestures (“thumbs up”)**
- **Images (pictures, hats, flags, t-shirts)**

# IS ALL SPEECH PROTECTED?

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**No! – Not all speech is protected under the First Amendment**

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Examples:

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True Threats

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Incitement to imminent lawless action

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Solicitation to commit a crime

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Defamation

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# WHEN IS PUBLIC EMPLOYEE SPEECH PROTECTED/NOT PROTECTED?

*Pickering v. Board of Education*, 391 U.S. 563 (1968)

## The “Pickering Balancing Test”

An Illinois school teacher was fired for sending a letter to the editor of a local newspaper complaining about his school board’s budgetary priorities—athletics over academics (some things never change!).

The Supreme Court overturned the board’s action and established the general rule as to when a public employee’s speech is and is not protected under the First Amendment.

# WHEN IS PUBLIC EMPLOYEE SPEECH PROTECTED/NOT PROTECTED?

## *Pickering v. Board of Education*

When the public school employee speaks in his/her capacity as a private citizen, not as an employee, on a matter of public concern, the speech is protected



**UNLESS** the disruptiveness of the speech outweighs the school employee's speech rights under the First Amendment.

## EXAMPLES OF TOPICS THAT MAY INVOLVE MATTERS OF PUBLIC CONCERN

- School District's Budget
- School Funding or Financial Mismanagement
- Administrative or Board Action on General Issues of Management and Policy
- School, Staff, or Student Safety
- Employee or Student Discipline Practices in General

# WHEN IS PUBLIC SCHOOL EMPLOYEE SPEECH NOT PROTECTED?

## *Pickering v. Board of Education*

**When the public school employee speaks in his/her capacity as an employee (within the course and scope of performing their job duties) about a purely personal grievance or complaint.**

### Examples:

- **personal attacks on administrators, board members, or other employees;**
- **grievances and complaints relating to individual personnel action or treatment under personnel rules; personal writings;**
- **sexually explicit videos of the public employee in work attire**

# WHEN IS PUBLIC SCHOOL EMPLOYEE SPEECH PROTECTED?

## *Pickering v. Board of Education*

Protected, **UNLESS** the disruptiveness of the speech outweighs the employee's speech rights

The Court in *Pickering* concluded the teacher's speech was about a matter of public concern and was not directed toward any person with whom *Pickering* came in regular contact with in his daily work; thus no question of maintaining either discipline by immediate superiors or harmony among coworkers.

Court said *Pickering's* statements were critical of his employer but were not shown in any way to have impeded performance of his daily duties in the classroom or to have interfered with the regular operations of the schools generally.

# WHEN IS PUBLIC SCHOOL EMPLOYEE SPEECH NOT PROTECTED?

## *Pickering v. Board of Education*

**When it is shown or can reasonably be expected to significantly impair the employee's ability to perform his/her duties, disrupt the school, undermine supervisor authority, and/or destroy close working relationships.**

# “HECKLER’S VETO”

*Pressure from parents, students, and other community members to punish staff members who have posted or made controversial statements.*

**General rule: government may not silence speech protected by the First Amendment just because others with differing viewpoints loudly object to it.**

**But: in the K12 context, that rule does not account for the unique relationship between the teacher as a role model and his/her audience in the school community, whose members are not merely outsiders heckling the teacher into silence but participants in public education without whose cooperation public education cannot function.**

# THE INAPPROPRIATE OR CONTROVERSIAL NATURE OF THE SPEECH

**Is not relevant to whether it touches on matters of public concern.**

**It is only a factor in evaluating its disruptiveness during the *Pickering* balancing analysis**

**In *Rankin v. McPherson* (483 U.S. 378 (1987)), the public employee was fired after she participated in a conversation about an assassination attempt on the President of the U.S. and stated, in part, “shoot, if they go for him again, I hope they get him.” The Court reasoned that the statement was made in the course of a conversation addressing the policies of the President’s administration and was a matter of public concern.**

# **SOCIAL MEDIA POSTS FOLLOWING THE MURDER OF CHARLIE KIRK**

**“Where was all this concern when the politicians in Minnesota were shot? . . . I have no thoughts or prayers for this hate-spreading nazi”**

**“If anyone thinks that a reasonable price for the second amendment is countless innocent lives, and then that person has the cold-heartedness and audacity to say that empathy is likened to a social disease, they will get no protracted sympathy from me.”**

**“Karma is a bitch . . . that shot was “tight . . . excellent shooting.”**

**CASE DECISIONS:**  
***Misjuns v. City of Lynchburg* (4th Cir. 2025)**

**A fire department captain was terminated for making offensive social media posts attacking transgender individuals. During off hours, he posted several times on his public Facebook page offensive cartoons of transgender women with the caption**

**“Biden Erased Women – coming to your daughter’s high school locker room in the near future.” Citizens saw the posts and complained to the city. Mr. Misjuns sued the city for violation of his free speech rights.**

**The federal trial court dismissed the suit, and the Fourth Circuit upheld the dismissal.**

**CASE DECISIONS:**  
***Misjuns v. City of Lynchburg* (4th Cir. 2025)**

**Concurring in the Fourth Circuit majority's decision, Judge Wilkinson said:**

**“The Plaintiff has every right to express his views, hateful though they be. But he has no right to impair the fire department's work and efficiency. His transparently bigoted remarks gave rise to a reasonable apprehension on the part of Lynchburg's citizens that the fire department's emergency response tasks would not be carried out in an even handed and unbiased way.”**

# CASE DECISIONS

**In another case, the court held that although a special education teacher's speech concerning a special ed confidentiality policy was a matter of public concern, she was not entitled to First Amendment protection from firing because her continued expressed opposition to the policy caused disharmony and disruption in the work place; impaired her working relationships with other employees; and impeded her ability to perform her duties.**

# CASE DECISIONS

**In another case, the court upheld the termination of a first-grade teacher at a heavily-minority school who posted on her personal Facebook page, “I’m not a teacher – I’m a warden for future criminals! and “They had a scared straight program in school – why couldn’t I bring first graders?” The teacher argued that her comments were protected by the First Amendment since she was speaking about a matter of general public concern – students’ classroom behavior.**

**The court rejected that argument because the comments were so likely to impair the teacher's effectiveness with her students and their parents that the district’s interests took precedence.**

# CASE DECISIONS

**In yet another case, a guidance counselor was fired for a profanity-laced speech at a state capitol rally denouncing gender ideology and transgenderism and their impact on children. She identified herself as a counselor at the school and vowed that “not a single” student at her school “will ever, ever transition” on her watch. In upholding the firing, the court stated that the speech was at odds with her duty and obligation to build student and parent trust when counseling children who struggle with gender-identity concerns and fostering respect for and humane treatment of these children by other students.**

# TAKE-AWAYS

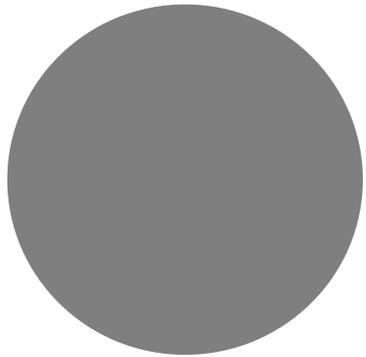
**School staff on their own time enjoy considerable freedom to speak their minds on controversial matters and events playing out on the national stage, political and other hot-button issues largely removed from the daily operations of the district.**

**Their speech and posts on such matters generally receive the highest constitutional protection, and under the balancing test, substantial proof of disruption may be required to justify discipline.**

**Consider how the statement relates to the employee's role or ability to perform his/her job duties in the district. Is the position one requiring public trust and confidence to be effective? Does the speech single out and demean segments of the school community with whom the employee regularly interacts?**

**Remember that offensiveness is not by itself enough to impose discipline.**

**Since First Amendment litigation is a high-stakes matter financially, review your insurance coverage to be sure you are adequately protected.**



# COMMENTS/QUESTIONS

