

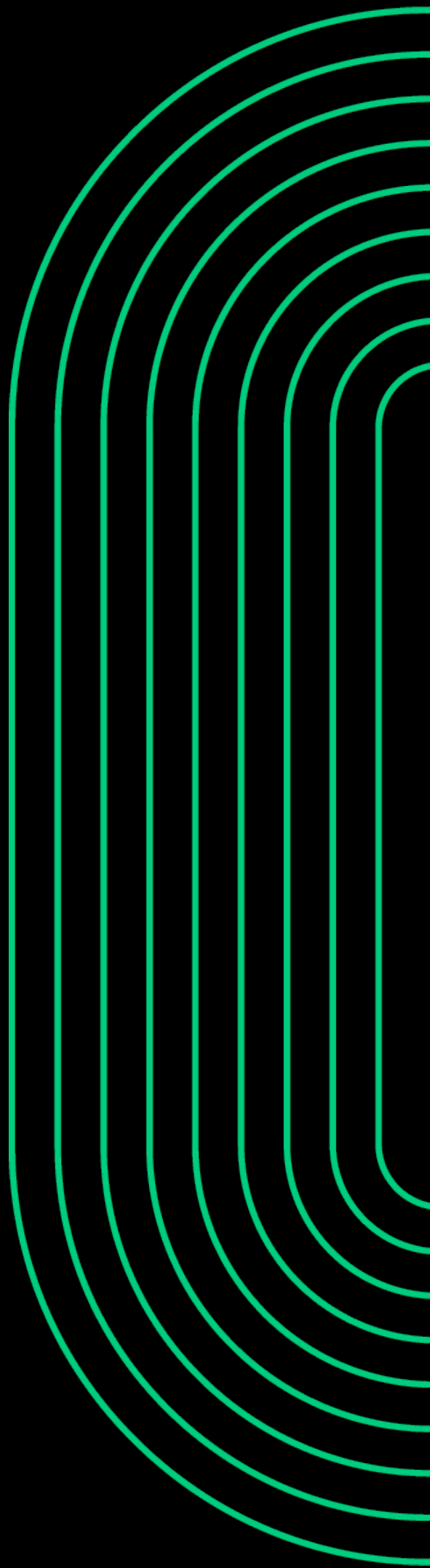


Social Media Policies and Procedures

87th MSBO Annual Conference

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Agenda

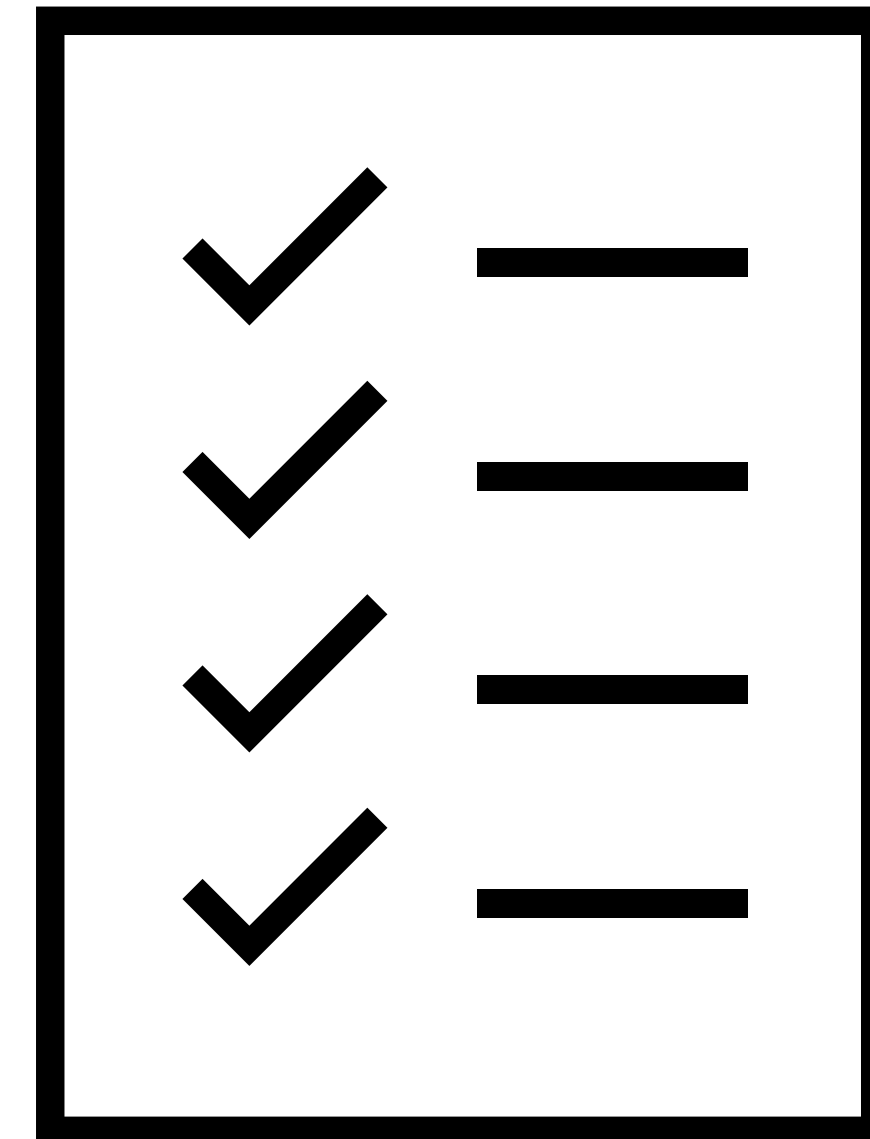
What is your Forum?

Speech and Students

- Student Speech Laws and Your Policies
- Speech and Social Media
- Hate Speech, Threats, and Other Concerns
- *Policy and Practice Pointers*

Speech and Staff

- Public Employee Speech Laws and Your Policies
- Retaliation and Free Speech
- *Policy and Practice Pointers*



Importance of Policies

- Policies are important because they represent agreement, in advance of a crisis, about how the school district will react and around what rules will govern subsequent action.
- It is important to adopt and update policies as a general rule, but specific to First Amendment issues, the following policies are important to review, update and seek to clarify:
 - Social Media
 - Acceptable Use
 - Limited Open Forum
 - Advertising
 - Facility Use
 - Communications
 - Student Expression
 - Student Code of Conduct



What is Your Forum?



OPEN FORUM: Anything is allowed – no right to regulate unless can show a compelling governmental interest. (For schools, an open forum includes a sidewalk)

LIMITED FORUM: The forum is open to third parties and expression PROVIDED the expression is consistent with the Mission of the Public Entity. If the message violates the mission, then the public entity can regulate the speech. If the message is consistent with the mission, then the public entity must be viewpoint neutral – it cannot discriminate against speech based on its content.

CLOSED FORUM: The public entity controls, regulates and can censor the speech.



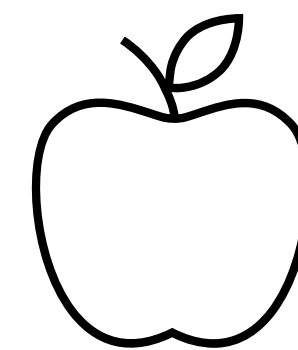
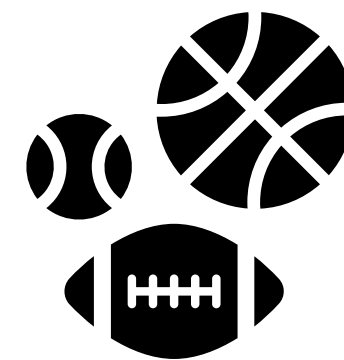
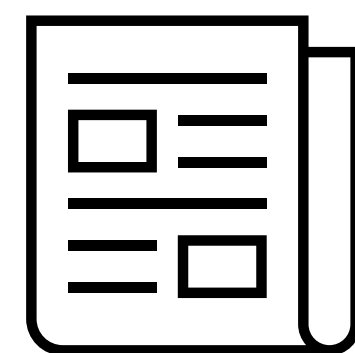
Limited Open Forum

A public school district can open a forum for a limited purpose. In a limited open forum, the public school district can require that the speaker's use and messaging are consistent with the public school's mission and values as reflected in the school district's and/or board's policies.

Examples of a limited open forum are the school newspaper, advertising allowed on athletic fields, use of facilities by outside individuals or use of facilities by school club organizations.

VIEWPOINT NEUTRAL! A school district can regulate a limited forum, but it still cannot discriminate based on the viewpoint if the viewpoint is consistent with the school's mission and policies.

Michigan Revised School Code, MCL 380.1299 – Limited Forum in the School Code



Forum Erosion

Forum erosion is why your **policies and practices** are important!

Actions or inactions that are inconsistent with a closed or limited forum can erode the nature of the forum and transform it into a public forum.

Factors that contribute:

- No policy defining the nature of a particular method or mode of public expression.
- No guidelines or regulations that control access to the form of expression that is used in connection with the limited or closed forum.
- Allowing expressions that are inconsistent with the stated policy or regulations.
- No regulation or exercise of control over the form of expression exercised in the particular forum.



The Classroom is a Closed Forum

- Typically, a classroom is considered a closed forum. Classrooms are intended to convey instruction consistent with the Board and school administration's curriculum and course of instruction.
- What if a teacher displays a rainbow flag?
- What if a teacher displays a poster asserting a safe zone for LGBTQ students?
- What if a teacher displays a black lives matter poster?



Johnson v Poway Unified School District, 658 F3d 954 (CA9, 2011): School can prohibit banners in classroom: (1) "In God We Trust; One Nation Under God; God Bless America; and God Shed his Grace on Thee" and (2) "All men are created equal, they are endowed by their CREATOR."

STUDENTS AND SPEECH



Our Starting Point: Student Speech

Tinker v Des Moines and **Substantial Disruption**

In 1965, students planned to wear black arm bands at school to passively protest the Vietnam War. The school sent them home and suspended them and would not allow them to return until they did so without arm bands.

They filed a lawsuit against the public school district claiming the denial of their freedom of expression under the First Amendment.

The majority opinion ruled that, under the constitution, persons possessed the fundamental right to express their opinions. To override this right, the school district must present evidence **forecasting a substantial disruption of or material interference with school activities.**



Refresher: Student Speech Basics

- ***Tinker v Des Moines Indep Sch Dist, 393 US 503 (1969)***

Schools can limit student speech and conduct that might be “***reasonably predicted to cause a material and substantial disruption or invasion of the rights of others.***”

Other Important Speech Cases

- ***Bethel School District v Fraser, 478 US 675 (1986)***

Schools may prohibit ***lewd, profane, indecent, and defamatory speech.***

- ***Morse v Frederick, 551 US 393 (2007)***

The Supreme Court ruled that schools may regulate speech that ***advocates illegal activity.***

- ***Hazelwood v Kuhlmeier, 484 US 260 (1988)***

The Supreme Court ruled that the school district had the right to regulate and even censor speech that was part of ***a school sponsored activity*** when the speech ***contradicted the education and mission values.***



Student Speech and Social Media

In 2021, the U.S. Supreme Court addressed student speech on social media in *Mahanoy v. B.L.*

Student did not make the varsity cheerleading squad for a second straight year – JV only.

She vented on Snapchat:

“F-Cheer. F-Softball. F-School. F-Everything.”

Included a picture of her holding up middle finger.

She also complained about the unfairness of decisions and younger students making varsity.

Things on Snapchat are designed to disappear. Posted this off-school property on her own device, on a weekend. The post was screenshotted and shared with coaches. B.L. was suspended from cheerleading for one year for violating the “Cheerleading Constitution.”



Danna Singer/Washington Post



Student Speech and Social Media

Schools' ability to regulate off-campus speech exists *but is diminished*.

The US Supreme Court held that the speech fell outside the school's disciplinary authority and *Tinker* did not apply. Why?

- She used words that were vulgar, but not obscene.
- No fighting words.
- No threats, harassment or bullying.
- It didn't last long – Snapchat disappears.
- The Court was not convinced that there was any substantial disruption to team cohesion. The testimony of one of the cheerleader coaches verified this.
- Every case depends on the specific FACTS!



Hate Speech and Threats of Violence

- Courts have held that when student speech is violent or threatening to members of the school, a school can reasonably foresee substantial disruption under *Tinker*.
- ***JC ex rel RC v Beverly Hills Unified School District (CD CA, 2010)***
 - A student posted a videoclip on YouTube that included derogatory, sexual, and defamatory comments about a 13-year-old classmate.
 - The court upheld the school district's decision to discipline the student based on foreseeability of a substantial disruption.
 - The court emphasized the fact that the student encouraged other pupils to watch the video and specifically alerted the classmate about it, making it reasonably likely that someone would alert the school officials about the video.

Policy and Practice Pointers

What do you need in your policies to address student speech?

- Do you designate your school district as a “limited public forum” or “nonpublic forum”?
- Do you define what is considered school sponsored publications/media and productions?
- Do you address substantial disruption to the educational environment (*Tinker*)?

Remember Mahanoy: authority over off-campus speech exists but is diminished.

- Do you address forms of speech that can be regulated (e.g., illegal activity, school sponsored media, speech that violates state or federal law, bullying or cyberbullying)?
- Do you identify when school officials may review and reject publications/productions? For example, when it involves poor grammar or involving unprotected speech.
- Ensure that students sign acceptable use policies regarding the use of digital platforms.



PUBLIC EMPLOYEES AND SPEECH



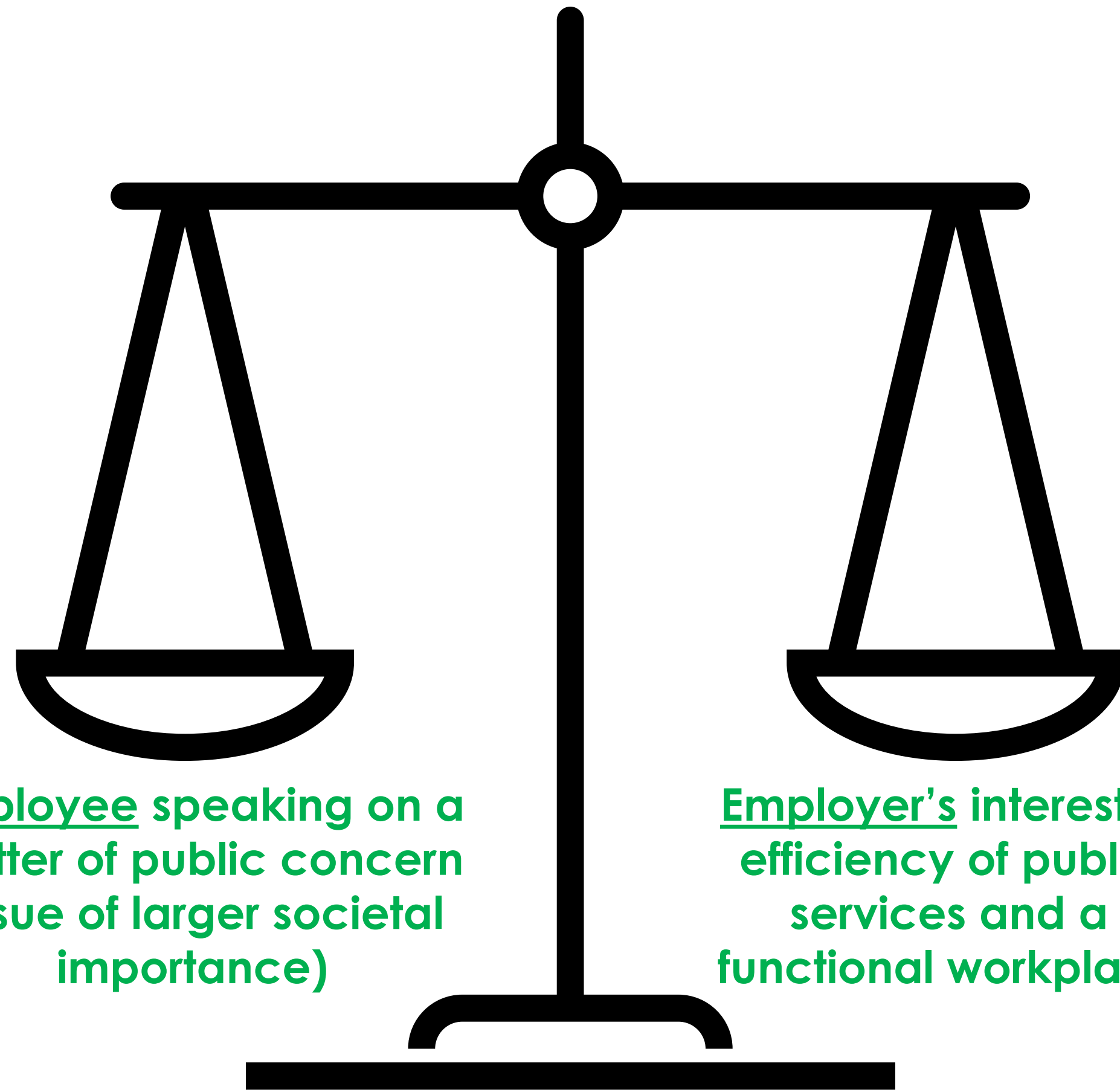
Pickering's Fact-Sensitive Balancing Test

Pickering v Board of Education of Township High School District 205, 391 US 563 (1968).

A school district terminated a teacher for sending a letter to the local newspaper critical of the way the Board of Education and superintendent handled past property tax proposals to raise revenue.

The U.S. Supreme Court ruled in favor of the teacher since his freedom of expression dealt with matters of general public concern.

However, the Supreme Court developed a balancing test recognizing that a public employer has an interest in promoting the efficiency of public services that it performs through its employees. In weighing this test, the teacher's speech was insubstantially involved with his employment.

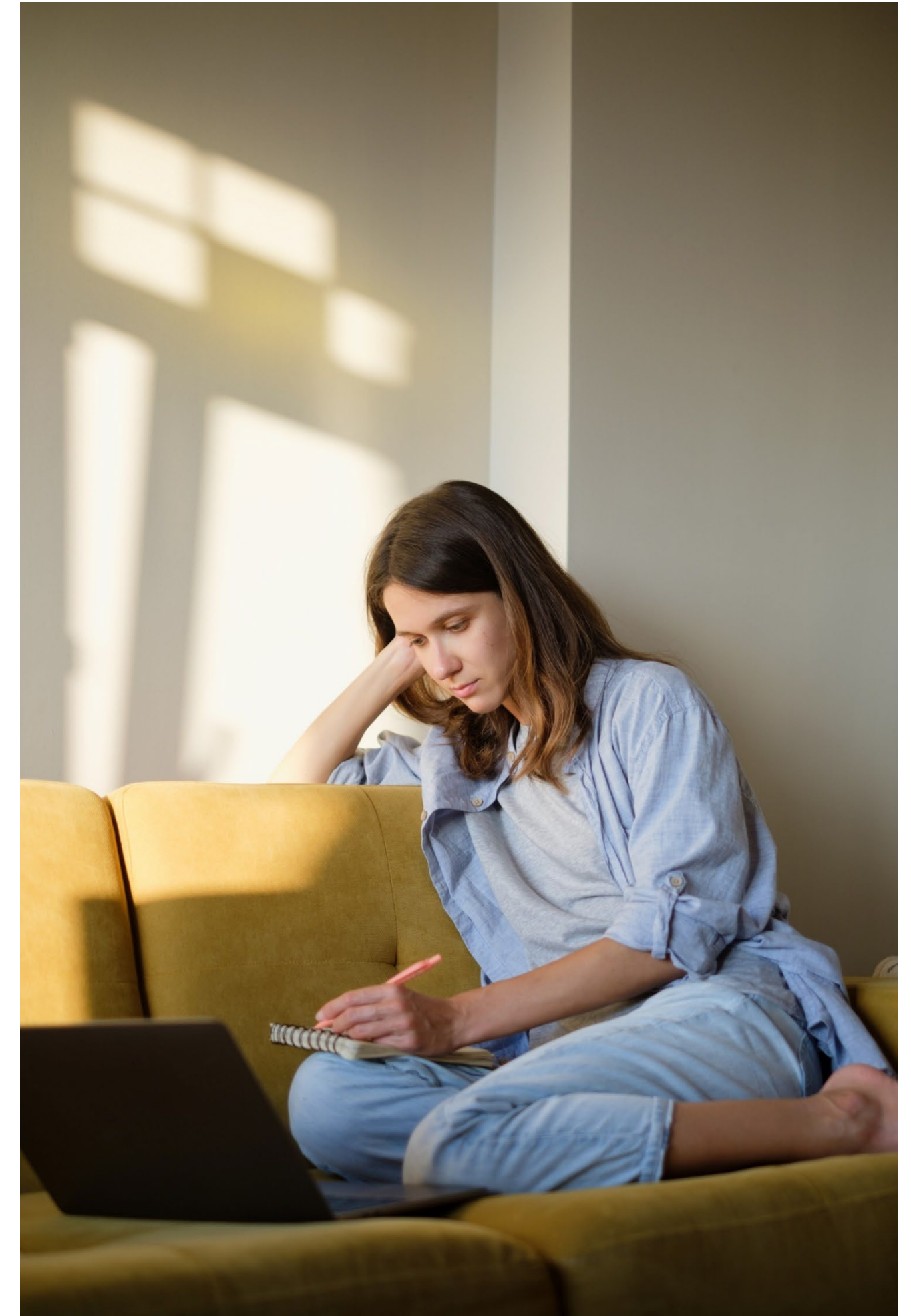


Employee speaking on a matter of public concern (issue of larger societal importance)

Employer's interest in efficiency of public services and a functional workplace

When is Speech a Matter of Public Concern?

- The Court emphasized the importance of the “public concern” criterion. **Speech addresses a matter of public concern if it relates to political, social, or other concern to the community or when it is the subject of legitimate news interest or a subject of general interest and of value and concern to the public.** Courts consider the content, form and context of the speech. *Connick v Myers*, 461 US 138 (1983).
- In *Connick*, an assistant district attorney disagreed over her transfer her to a different department. She expressed her views to others and distributed a questionnaire to other attorneys regarding the office transfer policy, morale, confidence in the supervisors, and other topics. She was later terminated.
- A public employee’s **personal grievance** or matter of a personal interest to the employee is not a matter of public concern, and as a result, **First Amendment protections do not apply** to this type of speech.



The Public Employee Must Speak as Private Citizen

***Garcetti v Ceballos*, 547 US 410 (2006)**

- When a public employee **makes a statement pursuant to their official duties**, the employee is not speaking as a citizen for First Amendment purposes, and their speech is not protected under the First Amendment.
 - For example, in *Garcetti*, a prosecutor who wrote a legal memorandum in connection with a case and recommended dismissal of the case. He provided the memo to supervisors, who criticized his handling of a case. He was later transferred and did not receive a promotion. He alleged retaliation against him for the memo.
- To engage in protected speech under the First Amendment, the public employee must speak as a private citizen about a matter of public concern.
- Ceballos wrote his memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance and manage their operations. Ruling otherwise would “displace managerial discretion.”

Tying Retaliation and Public Concern, Private Citizen & Balancing Test Together

Bennett v Metropolitan Government of Nashville, 977 F 3d 530 (CA 6, 2020)

- A former public service employee alleged that she was a victim of retaliation under the First Amendment when she was terminated for responding to a social media statement on Facebook about President Trump's 2016 election. She used racially derogatory language when commenting about who did and did not vote for Trump.
- This employee worked as a dispatcher for the City of Nashville, TN public safety department. She had a clean disciplinary record after 15 years of employment.
- The City received complaints about her post. She deleted the post and told her employer that her statements were "sarcastic."

Bennett v Metropolitan Government of Nashville

The “pertinent considerations” for the balancing test are whether the statement:

(a) impairs discipline by superiors or harmony among co-workers,

(b) has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary,

(c) impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or

(d) undermines the mission of the employer.



Bennett v Metropolitan Government of Nashville

The court found that this statement obviously related to a matter of public concern – the presidential election. The statement was made on her personal social media, so the public employee is speaking as a private citizen. The post, however, was public.

However, the court found that **the statements created a disruption in the workplace.**

When considering the prior factors, the Court focused mainly on harmony among co-workers and the detrimental impact on close working relationships (factors A and B).

Her statement created disharmony among co-workers and caused “nonstop conversation”; she refused to apologize or acknowledge others’ feelings; and others questioned whether they could rely on her as part of the team or whether she would treat callers fairly.

Additionally, the employee’s comments were public, and she was in a public-facing role that implicated the government and police department. The Court emphasized the need for public trust and operating in a manner that is fair, even-handed, and without bias.

Therefore, the speech was not protected.



Matrix for School Employees' Constitutionally Protected Speech

	Matter of Public Concern	Matter of Private Interest
Spoken as a Private Citizen	<i>Protected Unless Actually Disruptive, etc.</i>	<i>Not Protected</i>
Spoken as part of Employee's Official Duties	<i>Not Protected</i>	<i>Not Protected</i>



Policy and Practice Pointers

What do you need in your policies to address employee speech?

- Do your policies address the *Pickering* balancing test (matter of concern vs. employer's interest in efficiency)?
- Do your policies address the classroom as a closed forum?

Academic freedom is more limited in K-12 than higher education. Instruction should adhere to academic standards and goals, not a teacher's personal views.

- Do your policies address viewpoint neutrality?
- Ensure that staff sign acceptable use policies regarding the use of digital platforms.



Questions?



Thank You



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