Policy & Legal News

HELPING SCHOOL DISTRICTS TRANSLATE LAW INTO ACTION

STAFF EXPRESSION AND THE FIRST AMENDMENT

ALSO IN THIS ISSUE:

ADVERTISING AND FREEDOM OF SPEECH

WSSDA 100 Years of Leadership

APRIL 2023

WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

Policy Classifications

ESSENTIAL

- Policy is required by state or federal law; or
- A specific program requires a policy in order to receive special funding.

ENCOURAGED

- While not required by law, policy is intended to reflect the spirit of existing state or federal law thus inuring districts to potential litigation;
- While not required by law, policy has potential to benefit the health, safety, and/or welfare of students, employees, directors, and/or the local community.

DISCRETIONARY

- Policy addresses an action likely deemed important by the board; or
- Policy would likely be deemed appropriate due to special circumstances of the board; or
- Policy communicates district philosophy that a board may want to promote to employees and/or the community.

Free speech exists when everyone can express their opinion – including views that are critical of government – without facing threats, violence, prison, or other such consequences. American statesman, Carl Schurz said, "If you want to be free, there is but one way; it is to guarantee an equally full measure of liberty to all your neighbors. There is no other." We recognize the truth of his observation immediately, and we have federal and state constitutions that protect the freedom of speech. Nevertheless, actually preserving free speech rights, while still being able to function as a society is immensely challenging – emotionally, intellectually, and legally.

Why is it so difficult? Some speech is flat-out rude. Emotionally, we want to stop it. Yet we know that one person's insult is another's truth. Not every opinion is accurately informed, let alone learned. The espousal of what appears to be misinformation can be more than frustrating; it can be dangerous if widely adopted. Yet we know that rather than suppress speech, it is (generally) better to respond to erroneous speech with the countervailing view. Speech can also force us out of our comfort zone, making us grapple with new ideas or unpleasant circumstances. We don't like it, but we know it is worth the struggle if it leads to tackling systemic issues, addressing abuse of power, or improving and innovating.

Balancing the constitutional rights and interests of all involves a convoluted legal analysis that sometimes leads to surprising outcomes. This edition of *Policy & Legal News* addresses these complex constitutional considerations in two articles. The first is Staff Expression (see **page 3**), which considers the scope of the school district's authority over the speech of its employees. The second is Advertising and Freedom of Speech (see **page 9**), which considers how best to preserve the school district's control of outside speech on school district property, while generating revenue via advertising. We hope these articles support your district in honoring constitutional rights while fulfilling its crucial duty of providing students with a quality education.

Public schools don't simply teach about democracy, they also model it, and are crucial to its perpetuation. Indeed, United States Supreme Court Justice Stephen Breyer said, "America's public schools are the nurseries of democracy." The very quotable basketball coach, John Wooden advised, "Consider the rights of others before your own feelings, and the feelings of others before your own rights." School boards are striving to do just that. Thank you, school directors, for safeguarding your school district's ability to serve your students and preparing them for the democracy they inherit.

Best,
Abigail Westbrook, J.D., Editor

Mahanoy Area School District v. B.L. (2021)

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HELPING SCHOOL DISTRICTS TRANSLATE LAW INTO ACTION

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★ UPDATES TO MODEL POLICY

WSSDA has developed, revised, or retired the following model policies and procedures. Subscribers can find marked-up and clean versions of these documents (as applicable) in their subscriber portal on the WSSDA website by visiting wssda.org/login.

ESSENTIAL

3530P – Fundraising Activities Involving Students
4210 – Regulation of Dangerous Weapons on School Premises
5001 – Hiring of Retired School Employees

ENCOURAGED

0560R – District Reopening Plan (Retired)
0561R – Academic and Student Well-Being Plan (Retired)

DISCRETIONARY

4060/4060P – Distribution of Information
5161 – Civility in the Workplace (NEW)
5254/5254P – Staff Expression (NEW)
5521/5521P – Teacher Assistance Program (Retired)
6111 – Tuition
6815/6815P – Advertising on District Property (NEW)

LIST OF SERIES INCLUDED IN UPDATES

0000 Series – Planning
3000 Series – Students
4000 Series – Community Relations
5000 Series – Personnel
6000 Series – Management Support

WSSDA 100 Years of Leadership

APRIL 2023

WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

Staff Expression AND THE First Amendment

School districts have seen passion and anger displayed on their campuses. As cultural conflict continues to express itself in various arenas, including the schoolhouse, school boards might well be wondering where the line is when it comes to a school district's authority to regulate speech. How can school districts balance their employees' right to express their views on matters of public concern with employers' right to maintain order in the workplace? Like so many things, this important legal topic is contested and evolving. Even after unpacking the key concepts and complex considerations, ambiguity, uncertainty, and rocky terrain persist.

The First Amendment to the United States (U.S.) Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." These constitutional guarantees grant everyone broad speech and religious rights that have limited exceptions.

NEW MODEL POLICY
5161
Civility

NEW MODEL POLICY & PROCEDURE
5254/5254P
Staff Expression

The legal framework helps us understand the exceptions to constitutionally protected speech, but before we lay out the framework, a quick reminder about the word, "speech." In this context, speech is more than verbal expression. The term "speech" is interpreted broadly to

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include written words, posters and other images, choice of clothing, and various forms of symbolic expression, for example, taking a knee during the national anthem.

Legal Framework

In a series of cases across decades,[1] the U. S. Supreme Court has addressed the free speech rights of public employees. When read together, these cases provide the framework for understanding a public employer's permissible regulation of the speech of its employees. We can understand the framework through a set of three questions.

The first question is whether the employee spoke as a private citizen or a public employee. Purely private speech is not subject to employer regulation. In contrast, employers have the right to control the speech of their employees when those employees are speaking as employees or on behalf of the employer or if that speech would reasonably be perceived as being on behalf of the employer. In the school district context, speech that is part of an employee's official duties is not constitutionally protected, meaning it is subject to school district regulation. For a district employee to speak as a private citizen, the speech itself cannot have been made as part of the employee's ordinary duties. When evaluating this factor, consider the speech at issue from all perspectives, including whether the speech relates to the public employee's job duties, whether it occurred while on or off duty, or during what would reasonably be considered a private moment.

The next question is whether the speech is a matter of public concern. Even when speech occurs as a public employee, the employee retains some First Amendment protections to speak on matters of public concern. To determine whether a school district employee's speech is a matter of public concern, courts examine the content, form, and context of a given statement. Speech about broad public issues, such as social or political issues or other current events, will likely be deemed a matter of public concern. In contrast, speech about personal issues or workplace grievances is not likely to be found as issues of public concern.

The third question is whether the employer's regulation of employee speech was appropriate under the circumstances. As noted above, employees' speech rights vary depending on whether they are speaking as a private citizen or public employee, and also vary depending on whether speaking about a public or private concern. Balanced against the employee's speech rights is the public employer's interest in providing efficient public service. The court will consider the actual effect of the school district employee's speech. Was it disruptive, and if so, how disruptive? The court will also consider the actual regulation implemented by the school district, considering whether it fit the circumstances or in contrast, unnecessarily prohibited non-disruptive speech.

In sum, school districts can regulate employee speech that substantially disrupts school, undermines supervisory authority, destroys working relationships, or substantially impairs the school district's ability to perform some other duties. Even employee speech that is private and occurred outside the school, such as posting on social media during the evening, might be subject to permissible school district regulation if the district can show the social media post created a substantial adverse impact on school functioning.

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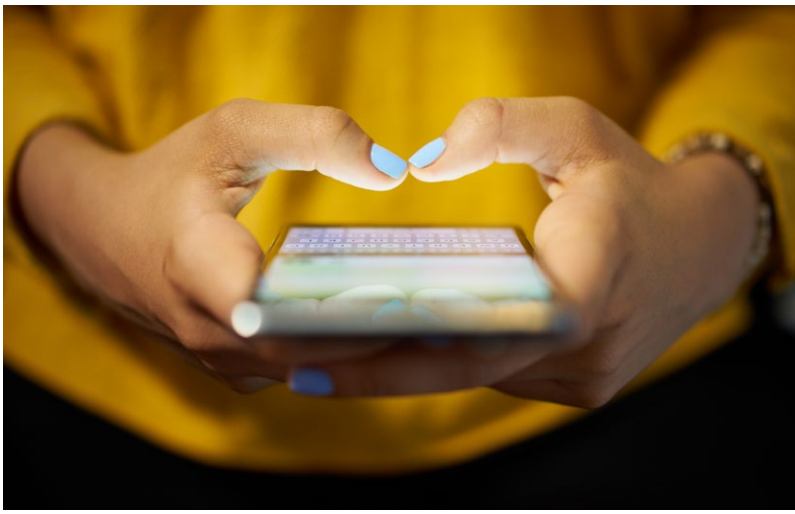

[1] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers. In Connick*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

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The Framework in 2023

You're likely aware of *Kennedy v. Bremerton*,[2] which emanated from Bremerton, Washington and was decided by the U.S. Supreme Court in a 6-3 decision in June 2022. That decision ruled that the Bremerton School District violated the constitutional rights of assistant high school football coach Joseph Kennedy by disciplining him for kneeling at midfield after football games to pray. The decision has also further complicated and muddled the existing legal framework. In part, this is because of the two starkly different versions of what occurred as described by the majority and the dissenting opinions. The majority, and hence the binding decision, describes Kennedy's speech as offering a quiet, private prayer of thanks. But the three dissenting Justices countered that, "to the degree the Court's majority portrays . . . [the coach's] prayers as private and quiet, it misconstrues the facts . . . [because] the record reveals that. . . [the coach] had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field . . . [and] consistently invited others to join his prayers and for years led student-athletes in prayer at the same time and location."

Regardless of whether the majority's portrayal of the facts was accurate, the majority opinion governs the legal framework. But remember, what governs the legal framework is the holding based on an assumption that those facts are accurately portrayed. So, if we remember the first question of the legal framework, whether the speech was as a private citizen or government speech (speech attributable to the school district), the Court concluded that the coach's speech was private, therefore not government speech, because he was not engaged in speech "ordinarily within the scope of his duties as a coach. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the district paid him to produce as a coach." The Court rejected the decision of the two lower courts that the coach served as a role model who remained on duty after games, describing it as an "excessively broad job description by treating everything teachers and coaches say in the workplace as government speech subject to government

control . . . On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aid from praying quietly over lunch in the cafeteria."

In a stark departure from decades of previous decisions, the Court's majority found that the school district had neither the right nor the obligation to preclude the coach from expressing himself through prayer. The Court ruled that the district's actions were discriminatory and not evenhanded because it permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls, but did not permit the coach to kneel at the 50-yard line to engage in a moment of personal prayer.

We're still learning how to incorporate the jurisprudence from *Kennedy v. Bremerton*, but we now have some court rulings based on *Bremerton* that help us understand. One such case is *Beathard v. Lyons*,[3] in which Illinois State University (ISU) terminated football coach Kurt Beathard.

Here are the facts of the case. ISU students and athletes

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[2] *Kennedy v. Bremerton*, 142 S. Ct. 2407 (06/27/2022).
[3] *Beathard v. Lyons*, U.S. District Court Central District (Aug. 11, 2022).

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were demanding that the ISU Athletic Department publicly support the Black Lives Matter movement. ISU's athletic department printed Black Lives Matter posters for the athletic department staff, and many staff members put the poster on their office doors. One poster was placed on Beathard's office door, but he removed it and replaced it with his own handmade sign that said, "All Lives Matter To Our Lord & Savior Jesus Christ." The head football coach asked Beathard to remove that poster and Beathard did. However, an image of Beathard's replacement poster made its way to ISU football players, and the players boycotted practices.

ISU terminated Beathard from his position, stating it was because of the direction of the offense, and replaced Beathard with two new coaches. However, Beathard alleged that he was terminated because of his speech and that ISU infringed on his First Amendment free speech rights. ISU moved to dismiss Beathard's claim, arguing that the University's interest outweighed those of Beathard. Beathard then countered, claiming that he was not acting in his official capacity when he posted the replacement poster to his door.

Relying primarily on *Kennedy v. Bremerton*, the U.S. District Court denied ISU's motion to dismiss the Complaint. The Court found that Beathard's actions were not taken in furtherance of his official job duties. In putting up the replacement poster, Beathard was expressing his personal views, which in a way, "owed their existence" to his responsibilities as a public employee.[4] The Court stated that Beathard was not paid by the University to decorate his door or to use it to promote a particular viewpoint; he was employed to coach football.

The Court went on to say:

> While the opinion Beathard posted on his door may have been different than that of the majority, the [Black Lives Matter] movement was not a sanctioned school movement. Just as the ISU Athletic Department and staff were able to hang posters supporting the [Black Lives Matter] movement, Beathard had the protected right to create and hang his own poster, supporting his own message. There was no school policy prohibiting Beathard decorating his door in whichever fashion he might choose. Further, Beathard was not required, as a term of his employment, to either refrain from decorating his door or to decorate it in a certain way. Here, Beathard was not acting in his official job duties when he placed the poster on his door, and therefore, this was private speech protected by the First Amendment, satisfying the first of the two elements of a prima facie case of retaliation.

Although the Court denied ISU's motion to dismiss because there was a prima facie case of retaliation, it

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[4] See *Kennedy*, 142 S. Ct. 2407, at 2424.

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also remanded the case to the trial court for a balancing of interest test (question three in the legal framework). In other words, was ISU's regulation of Beathard's private speech appropriate when balancing Beathard's interest and ISU's interests. There has yet to be a decision, and when there is, that decision will surely be appealed. Nonetheless, the reshaping of the legal framework is important and instructive.

Safeguarding the School Environment from Disruption

You may have noted the references in *Beathard v. Lyons* to the University's adopted policy (or lack thereof). It is vital to review your existing board policies to understand how they shape your district's legal landscape. To begin, your board might want to review **2331 – Controversial Issues – Guest Speakers**; this is a Discretionary policy, which WSSDA is not currently revising. Note that there are two distinct components of this policy (1) controversial issues and (2) guest speakers. Although these two issues might travel together (i.e., a guest speaker is speaking on a controversial issue), they also might not (a teacher is addressing a controversial issue as part of regular class time).

There is nothing unusual about the latter circumstance, as controversial issues are an inherent part of a robust education. If your board's policy follows the model policy, it acknowledges such and, to quote the model policy, "encourages staff members to provide for the free and orderly flow and examination of ideas so that students may gain the skills to gather and arrange facts, discriminate between facts and opinion, discuss differing viewpoints, analyze problems, and draw their own tentative conclusions." The model procedure includes steps requiring obtaining approval of a guest speaker and for considering providing for the presentation of opposing views.

Another policy to review is **2340 – Religious Related Practices and Activities**; this is an Encouraged policy, which WSSDA is not currently revising. Although this policy is primarily focused on students, it is also pertinent to staff. For example, it sets out the expectation that schools will be free from sectarian control or influence.

An additional policy and procedure to review is **4400/4400P – Election Activities**; this is an Essential policy, which WSSDA is not currently revising. When election time rolls around, it is particularly helpful to review the procedure, as it sets out crucial principles regarding employee speech connected to election activities.

In addition to these existing model policies, WSSDA has developed two new model policies to support school districts in safeguarding their schools from disruption based on employee speech. The first is **NEW Model Policy and Procedure 5254 – Staff Expression**; this is a Discretionary policy. The overall goal of 5254 – Staff Expression is to provide staff with notice of district expectations regarding staff speech, in a variety of media, and to address staff speech that falls outside those expectations. The new policy and procedure focus on employee speech that occurs as a result of the employee's employment with the school district (i.e., "while performing job responsibilities, using district facilities as employees, or appearing to be acting in their role as a district staff member").

We also grounded this new policy/procedure in preexisting school district policies and procedures where possible (i.e., "Employees must act consistent with district policies and procedures."). By incorporating existing model policy and procedure by reference, we avoid needing an exhaustive list of permitted and non-permitted speech, and ensure that implementing this policy will not conflict with your preexisting policies and procedures. However, this approach does underscore the need to review the related policies you have in place.

5254 – Staff Expression does not attempt to list permitted and non-permitted speech specifically or exhaustively, but it does articulate a basic standard of permitted and non-permitted speech. The permitted speech identified in the policy is limited to speech that would be broadly agreeable across Washington's school districts (i.e., curricular, district-approved, or context-appropriate civil personal expression). Similarly, the non-permissible speech identified in the policy is based

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on known case law and/or statutory law.[5]

Although the overall thrust of **5254 – Staff Expression** is to address speech that occurs as a result of the employee's employment, it also includes language intended to provide staff with notice that off-duty speech may be subject to discipline. This is a key policy component for school districts because your surrounding community might understandably struggle to separate a staff member's role within the school district, where many school staff regularly interact with children, from an employee's private speech.

The second new policy WSSDA has developed that relates to staff speech is **NEW Model Policy 5161 – Civility in the Workplace**; this is a Discretionary policy. Please note that although this policy incorporates aspects of staff speech, the primary purpose of **5161 – Civility in the Workplace** is to create a work environment that is safe, civil, and grounded in both orderly conduct and mutual respect so as to contribute to a quality educational environment for students. WSSDA developed this model policy based on requests for a model policy, articulating a value statement that would define and promote civility in the workplace – something much needed for some school districts. **5161 – Civility in the Workplace** can be immensely helpful in circumstances where staff struggle to get along or to be respectful but where the behavior does not rise to the level of actual harassment. As the employer, school districts have the legal authority, through adoption of board policy, to establish a viewpoint-neutral policy of civility.

Students

When thinking about speech rights, don't confuse students and staff. In the schoolhouse context, students have more First Amendment protections than staff do.[6] This is because, whereas staff are paid to perform duties, attendance laws require students to attend. It is also because most people aren't likely to think that a student is speaking on behalf of the school district. Generally, students have the right to speak out, hand out flyers and petitions, and wear expressive clothing in school — as long as they don't disrupt the functioning of the school or violate school policies that don't hinge on the message expressed.

What counts as "disruptive" will vary by context, but a school disagreeing with a student's position or thinking the student's speech is controversial or in "bad taste" is not enough. Courts have upheld students' rights to wear things like an anti-war armband, an armband opposing the right to get an abortion, and a shirt supporting the LGBTQ community. School districts can have rules that have nothing to do with the message expressed, such as dress codes. For example, a school district can prohibit a student from wearing hats — because that rule is not based on what the hats say — but it can't prohibit a student from wearing only pink pussycat hats or pro-NRA hats.

If your board/superintendent team wants a refresher on its policies related to student speech, you might want to look at **3224/3224P – Student Dress**, which is a Discretionary policy that WSSDA is not currently revising. Another policy and procedure to review is **3220/3220P – Freedom of Expression**, which is an Essential policy. Note that there are two distinct components addressed in **3220 – Freedom of Expression** (1) student publications and (2) student distribution of materials. Constitutional provisions protect a student's right to distribute materials generally. In addition to those constitutional protections, Washington has adopted specific laws protecting student expression in the context of school-sponsored media.[7]

[5] *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) identifies obscene, lewd, or vulgar expression; *Valdez-Zontek v. Eastmont Sch. Dist.*, 154 Wn. App. 147 (2010) identifies libelous or slanderous expression; RCW 28A.600.477 addresses the violation of Harassment Intimidation and Bullying policies; RCW 28A.642.010 addresses non-discrimination policy; RCW 42.17A.555 addresses promoting or opposing candidates, campaigns, parties or ballot propositions; *Marsh v. Chambers*, 463 U.S. 783 (1983) addresses proselytizing or disparaging religious or irreligious beliefs.

[6] The primary intent of this brief, non-exhaustive look at student speech rights is to contrast student speech rights with those of staff. Please do not mistake this quick summary for a full analysis.

[7] RCW 28A.600.027

Advertising and Freedom of Speech

MODEL PPROCEDURE
3530P
Fundraising Activities Involving Students

NEW MODEL POLICY &PROCEDURE
6815/6815P
Advertising on District Property

MODEL POLICY & PROCEDURE
4060/4060P
Distribution of Information

For many school districts, additional revenue is not merely desirable, it is needed. This helps to explain why school districts consider offering advertising – they're motivated, often highly, to explore new and innovative ways to raise funds. However, school board members might be surprised by some of the legal implications of advertising on school district property. If your board is considering offering businesses the opportunity to advertise or if your district has already been doing so, but without a governing policy, it is crucial to understand the legal landscape and possible legal snafus of this ever-evolving topic. Some risks are worth taking, but make informed decisions.

When we hear "freedom of speech," we likely don't think about advertising. Instead, we think about an individual's right to personal statements of opinion or belief. It is true that the First Amendment to the U.S. Constitution does protect an individual's personal statements, but there is a spectrum of protections associated with the constitutional declaration, "Congress shall make no law... abridging the freedom of speech."[1] These protections vary depending upon the speaker, the message, and the location of speech, and they extend (at least in some measure) to the commercial speech of advertising.

Forum Analysis

To begin, we need to understand the categorical approach known as the "public forum doctrine" that the courts use to determine whether speech restriction on government property is constitutional. There are four types of forums for First Amendment purposes: traditional public, designated public, limited public, and nonpublic.

A traditional or open public forum — the forum most open to public speech — includes public places traditionally used for public assembly, speech, and debate, such as streets, parks, and sidewalks.[2] In a traditional public forum, the government can enforce regulations on the time, place, and manner of speech, but any restrictions on

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[1] U.S. Const. Amend. I.

[2] Now that Washington's Open Public Meetings Act (OPMA) requires public comment period at every regular school board meeting, the portion of your regular school board meetings that are set aside for public comment period are an open public forum.

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the content of speech must satisfy strict scrutiny. In other words, any restriction must be content-neutral, necessary, and narrowly tailored to serve a compelling government interest.

A designated public forum is public property that is not traditionally open for public speech, but which the governmental entity has opened as a place for public speech, comment, and expressive activity. Although the governmental entity may choose whether to designate a forum as public, once it does so, it is limited in how it can restrict speech at that location. The government entity's restrictions are subject to the same strict scrutiny as restrictions in a traditional public forum.

A limited public forum is public property that the government allows certain groups to use or is dedicated solely to the discussion of certain subjects. Restrictions on speech in a limited public forum must meet a lower, separate standard than that for an open or a designated public forum. Specifically, restrictions must be reasonable in light of the forum's purpose and be viewpoint neutral, i.e., not discriminate based on the speaker's point of view. Your school board meetings, other than the portion set aside for public comment, are a limited public forum.

A nonpublic forum is public property that the public does not traditionally use for public communication. Public schools are considered a nonpublic forum. This means that third parties have no constitutional right to speech within the schools. Therefore, in addition to time, place, and manner regulations, the governmental entity, in this case the school district, may reserve the forum for its intended purpose, provided that doing so is reasonable and not a pretense for suppressing views with which the government disagrees.

Although public school property is initially presumed to be a nonpublic forum, a school district can open its forum, thereby creating a limited public forum. One way this happens is by allowing third parties to advertise or to present information on school district property. "Allowing" includes both the school board's policy and the school district's practice. Note that the creation of a limited public forum in one specific location does not automatically extend to all of the district's property. For example, if the board adopts a policy that permits advertising only on the football stadium's fence signs, a limited public forum exists in those areas, but the remainder of the district's property remains a nonpublic forum.

As noted above, opening also occurs based on a school district's actual past practice, even if the school board has adopted policy that states something to the contrary. Where a district's practice differs from its policy, the practice will likely be the determinative factor. For instance, if a district has a policy prohibiting advertising, but the athletic department has traditionally allowed advertising at its events, and the school district has not stopped that practice, then a limited public forum exists at the district's athletic events.

Although past practice has this legal impact on the forum, no one is recommending that you intentionally take this approach. As you can likely surmise, trouble brews where school administrators permit flexibility that board policy or other rules do not allow. Unfortunately, many school boards and administrators do not realize the legal impact of actual practice, in this case, the creation of limited-public-forum status. If a school district wants to pursue advertising, it is important that the school board adopt definitive policy language and that the district adhere to those policies consistently. This ensures that these designations and their legal implications are determined by the school board, are clear, and remain accurate.

Limits on Restricting Speech

Remember, even though there are limitations, school districts may still impose some restrictions on speech in a limited public forum. Additionally, "commercial speech" receives fewer constitutional protections than forms of private speech, such as student speech, meaning that school districts can exercise greater control of commercial speech than private speech.

Commercial speech has not been precisely defined by the courts, perhaps because distinguishing commercial speech from other forms of speech can be tricky. In fact, the line between commercial and private speech can be so blurry that the courts have recognized a hybrid type of speech called "mixed message" speech, which occurs when commercial speech is intermingled with private speech in a single ad. For example, the sale of religious literature might include elements of both commercial speech and religious speech. The fact that the speech has a commercial purpose doesn't negate elements of other more protected

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speech, nor does it undo those protections. If the message is inextricably intertwined, the courts afford the speech the greater level of protections.

What Could Go Awry – A Cautionary Tale

In case you were wondering why there needs to be all this fuss in the first place, the following cautionary tale is illustrative of what can go awry when school districts advertise. Note, this cautionary tale is not fictional. It unfolded in Florida a few years back. If it were made it up, you'd think it took creative license too far. Also note, in addition to representing what legal issues might emerge, this case study is also interesting because it involves a school district's creative approach to re-framing advertising as acknowledging business partners in an effort to preserve greater control over the speech of advertisers.

The Palm Beach County School District began allowing its schools to hang banners on their fences to visually recognize business that had provided the school a set amount of money. A few years later, the school board adopted a governing Banner Program policy, but to avoid thorny legal issues related to advertising, the board took a different approach. It's adopted policy stated that the banners were "not considered advertising," and contributions from business partners "are treated as donations." The policy put some conditions on displaying banners, including that school principals were required to use their discretion in approving business partners that were consistent with the school district's educational mission, the values of community, and the appropriateness of the age group represented at the school. The banners could not use photographs or large logos, but could include the name, phone number, web address, and logo of the business partner. Finally, the banners had a uniform size, color, and font, and included a message thanking the sponsor as a "Partner in Excellence."

One of the business sponsors in the banner program was Mr. Mech. He operated a math tutoring service named The Happy/Fun Math Tutor. Mr. Mech was a qualified tutor. He had secondary-level teacher certification in Florida and taught mathematics at Palm Beach State College. Mr. Mech paid the required minimum donation and asked to have banners displayed for The Happy/Fun Math Tutor at three schools. The schools hung the banners, which declared The Happy/Fun Math Tutor as a "Partner in Excellence" with the school.

The "partner" relationship worked well for a few years, until several parents learned that the business owner of the Happy/Fun Math Tutor, as seen on district property, was the same individual who owned and operated (at the same address) another business that produced pornography. After the parents complained to the school district, the district promptly removed the banners for the Happy/Fun Math Tutor. Mr. Mech sued the board in federal court, alleging that removing the banners for his business violated his rights under the First Amendment's Free Speech Clause.

The federal district court held in favor of the board, reasoning that there was no First Amendment problem because the board did not remove the banners based on content, but because of the association between the two businesses. On appeal, the Eleventh Circuit also ruled in favor of the board, but under an entirely different legal theory. This time, the court concluded that the banners fell under the "government speech"[3] doctrine. That means a reasonable bystander could conclude that the banners were the school district's speech, which the board had authority to regulate without violating the First Amendment's Free Speech Clause. The federal appeals court relied heavily on the term "partner," and its positive association, rather than a mere advertiser. Mr. Mech

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[3] Analysis for government speech has been based on three factors. (1) The history of the mechanism of speech (here school banners), (2) whether a reasonable person would believe the governmental entity endorsed the speech, and (3) whether the governmental entity controls the message.

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petitioned for rehearing but was unsuccessful. He then submitted a writ of certiorari to the United States Supreme Court, asking that court to hear the case, but was denied. The case seemed over.

Only weeks later, the banner program had a new legal challenge based on the appeal court's finding that the banners were government speech. The challengers were advocates for the separation of church and state. They noted that at least two of the banners on school district property were for places of worship and argued that because the banners were government speech—that is, the school districts' own speech—the banners recognizing places of worship amounted to a prohibited endorsement of religion.[4] Not long after receiving notice of the new legal challenge, the district received an application for a new banner at one of the district's high schools recognizing The Church of Satanology and Perpetual Soiree as a "Partner in Excellence."

The board did not accept the application for a Church of Satanology banner. Neither did the board immediately remove the existing banners for places of worship. Instead, the board issued a temporary moratorium on new banners for religious entities and made several substantive revisions to its Banner Program policy. The policy revisions included adding a list of types of entities that were prohibited from engaging in the Banner Program. This lengthy list included prohibiting churches and organizations that seek to promote or establish a religious tenet or a position about religion, including atheism. Eventually, the board determined that rather than proactively removing the existing banners for religious entities, those banners would be phased out by not renewing them.

This different approach to removing banners did not sit well with Mr. Mech, who sent a letter to the board through his legal counsel. His letter asserted that the board's differing reactions to complaints about Mr. Mech's banners compared to complaints about church banners triggered yet another constitutional claim. This time, a claim of Equal Protection under the Fourteenth Amendment's Clause.[5] An Equal Protection claim can arise based on differential treatment that appears intentional and arbitrary or is based on the other party's exercise of constitutional rights.

In response, the board made further revisions to the Banner Program policy. They included a provision to address the consistency of deciding to enter into a partner relationship. This was an attempt to avoid future claims of arbitrary decision-making. Specifically, the revisions added another level of review, requiring a regional superintendent to concur with the school principal's decision. Another revision was to address the other party's contract rights. Specifically, the revisions added language expressly stating the district could remove banners for any or no reason and that the partner had no contract rights to the display of the banner.

To the best of our knowledge, and the Florida district's relief, the district's Banner Program was not the subject of further litigation. While this cautionary tale comes to an end, it gives all school boards plenty to ponder.

Policy and Practice Protect

Although the framework of "partner" rather than "advertiser" earns points for creativity, it did little to prevent the district from being embroiled in multiple legal issues. Understandably, school districts might prefer to sidestep the creation of a limited public forum so that the district would retain a greater degree of control over the content of ads and who they associate themselves with. But as unfolded above, this very control can be perceived as endorsement, leading to a legal mess. In a litigated scenario under the government speech doctrine, the courts could be troubled by school districts excluding potential business partners because of their otherwise lawful and constitutionally protected conduct.

This brings us back to calling an ad an ad (not an expression of appreciation) and using the limited public forum framework to allow for commercial advertising. The key to reducing the legal complications of advertising on school district property is a combination of well-crafted board policies, district adherence to policy-defined practices, and protective contracts. This way, the district

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[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" U.S. Const. amend. I.

[5] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

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can show it opens its forum in only a limited fashion for the express purpose of making money for the district, not as an outlet for other forms of expression.

As noted above, school districts should be aware that savvy advertisers might seek to include some non-commercial speech and prepare for that scenario via board policy. In addition to the constitutional problems discussed above, you'll remember that a separate issue is a potential claim for a breach of contract should your district need to remove an advertiser's sign in the middle of the school year. Again, school districts should plan for such a scenario via protective language in both its board policy and its written contracts with advertisers.

To support school boards considering the option of advertising on school district property, WSSDA has developed **NEW 6815/6815P – Advertising on District Property**;[6] this is a Discretionary policy. Some people misunderstand the categorization of model policies and think that the categorization has to do with importance. This is erroneous. The categorization of model policies reflects whether adoption is mandatory. Here, your board can decide not to pursue revenue through advertising, meaning that it will not permit advertisements in any form on school grounds, and by default, your district retains full control of its property. Even if your district does pursue revenue through advertising, there is no law requiring you to adopt a governing policy – it is just tremendously advisable that you do so. Don't confuse discretionary with importance.

However, the value of the governing policy is in the details. **NEW 6815 – Advertising on District Property** specifies that the school district has not created an open public forum and narrowly limits the forum created. The model policy restricts types of advertisement based on permissible, viewpoint-neutral subject matter restrictions. It includes a list of the types of advertisements with which the district will not engage, regardless of the stance or viewpoint being espoused. The model policy also includes protective language affirming the district's right to remove banners for any reason.

In addition to **NEW 6815 – Advertising on District Property**, WSSDA has revised and re-titled the Discretionary policy **4060/4060P – Distribution of Information** (formerly titled Distribution of Materials). This policy is about the valuable social, recreational, and educational opportunities available to students and families through nonprofit organizations and governmental entities. Many districts want to facilitate community awareness of these opportunities with outside organizations and help communicate these opportunities to students and families. But as with accepting advertising, school districts should be aware that by facilitating communications with some outside organizations, other organizations could claim the district has opened its forum.

The revisions to **4060/4060P – Distribution of Information** protect the district from inadvertently creating an open public forum by adding language that reserves the district's right to cease providing any information that impedes or detracts from the district's educational purpose or program. The revisions also add governmental entities to the organizations that may seek to have the school district distribute their information. Additionally, the revisions shift the method of distribution from a physical delivery of printed information to posting on the district's website. This saves time and reduces the amount and weight of paper students carry home.

For similar reasons, WSSDA has also revised **3530P – Fundraising Activities Involving Students**. The policy associated with this model procedure is an Essential policy, however the model policy itself has not been revised. The revisions add language restricting the types of sponsorship opportunities based on permissible, viewpoint-neutral subject matter restrictions. It now includes a list of types of sponsorship with which the district will not engage, regardless of the stance or viewpoint being espoused.

[6] Don't confuse 6815 – Advertising on District Property with existing WSSDA Model Policy 4237 – Contests, Advertising, and Promotions, which serves a whole other purpose. Specifically, 4237 – Contests, Advertising and Promotions requires any club, association, or other organization to obtain the school district's prior approval before students may participate in any contest or promotion, which might include an advertising campaign. This model policy did not need revision and has not been revised.

OTHER UPDATES

Resolution 0560R–District Reopening Plan
Category: **UNCATEGORIZED**

WSSDA has retired this model resolution, which was specific to the 2020-2021 school year and included language stating it would sunset after that time.

Resolution 0561R–Academic and Student Well-Being Plan
Category: **UNCATEGORIZED**

WSSDA has retired this model resolution, which was specific to the 2020-2021 and 2021-2022 school years and included language stating it would sunset after that time.

Policy 4210–Regulation of Dangerous Weapons on School Premises
Category: **ESSENTIAL**

After receiving feedback that the "exceptions" section of the model policy was unclear, WSSDA has revised both the model policy and procedure. The revisions clarify that a person with a concealed weapons permit may carry a weapon on school property, but only outside of school buildings, or when picking up/dropping off students, or when attending a board meeting off-campus. This clarification aligns with House Bill 1630 (2022), which is now incorporated in RCW 9.41.280(3)(e).

Policy 5001–Hiring of Retired School Employees
Category: **ESSENTIAL**

WSSDA has revised this model policy to correct a scrivener error. Specifically, in a few places, the policy stated, "one calendar year" when it was supposed to state, "one calendar month."

Policy and Procedure 5521/5521P–Teacher Assistance Program
Category: **DISCRETIONARY**

The regulation directing the Teacher Assistance Program has been repealed and other statutes/regulations have not incorporated provisions specific to the teacher assistance program. Therefore, WSSDA is retiring this policy and procedure.

Policy 6111–Tuition
Category: **DISCRETIONARY**

WSSDA has revised this policy to remove outdated language regarding tuition for kindergarten and to better track the law cited in the policy's legal references.

Policy & Legal News

Policy & Legal News is published quarterly by the Washington State School Directors' Association to provide information of interest to school directors and the education community. The views expressed in opinion articles appearing in *Policy & Legal News* are those of the writers and do not necessarily represent WSSDA policies or positions.

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VISION

All Washington School Directors effectively govern to ensure each and every student has what they need to be successful within our state's public education system.

MISSION

WSSDA builds leaders by empowering its members with tools, knowledge and skills to govern with excellence and advocate for public education.

BELIEFS

WSSDA believes:

- Public education is the foundation to the creation of our citizenry, and locally elected school boards are the foundation to the success of public education.
- High-functioning, locally elected school boards are essential to create the foundation for successfully impacting the learning, development and achievement of each and every student.
- Ethical, effective and knowledgeable school directors are essential for quality public schools.
- Focusing on and addressing educational equity is paramount to assure the achievement of each and every student.
- Public school directors are best served trough an innovative, responsive, and flexible organization that provides exceptional leadership, professional learning, and services in governance, policy, and advocacy.

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