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Living Education Law in 2017: How Facebook, Prayer, Toilets, and Guns Impact Today's Teachers

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ABSTRACT

Survival for public school teachers goes beyond curriculum design, discipline and other skills. School law is critical for teachers to face the areas of challenge that are currently present. There are two types of common legal mistakes made by teachers: a) failing to take disciplinary action when they should, and b) unintentionally violating students rights. Social media, religion, the rights of transgender students and the possibility of teachers right to carry a weapon are all within the realm of rapidly changing public school law. Teachers should stay well-informed, so they are ready to protect students and their own constitutional freedoms.

KEYWORDS

Teachers; education law; social media; transgender rights; weapons

Today's public school teachers enter schools with a variety of skill sets—curriculum design, management skills, and a variety of other survival tactics to make it through a school year. However, in light of the everchanging nature of education policy and law, today's teachers need to have a steady grip on the current state of education law. A lack of education law expertise is often an area of anxiety that is not necessary for today's teachers. If teachers understand some basic issues about school law and its evolving nature, they will be more confident when faced with potential challenges. This article details four examples of the fluid nature of education law as we see it today and demonstrates the importance that today's teachers remain informed of the types of changes that can directly impact teachers' jobs.

To begin, there are two types of common mistakes made by teachers: (a) failing to take disciplinary action when they should; and (b) unintentionally violating student rights when they should not. These two categories summarize the vast majority of current

case law—that is, teachers generally behave in one of two ways that then causes litigation to ensue. The “failure to act” is sometimes captured in the common school fight setting wherein a teacher does not break up fistfights between his third-grade students because he’s been warned to “never touch the students.” As a result, the teachers lives in trepidation because he is afraid that if a student is injured as a result of his intervention, he could be sued, disciplined, and lose his job. The second broad category is the violation of student rights. Teachers need to understand that they are part of the “government” and when they require a student to stand during the Pledge of Allegiance, search a student’s backpack for possible contraband without reasonable suspicion, or punish students for political statements in class, the Constitution is invoked. This article will address topics that are important in today’s teachers within the education law landscape and will provide several newsworthy events that have the potential to impact the daily lives of teachers if fully implemented by the federal government: the dangers of social media, the use of public school restrooms by transgender students, and the potential for guns and grizzly bears to cross paths within the hallways of a public school.

The dangers of social media

The First Amendment of the Constitution includes freedoms of speech, expression, association, and religion (US Constitution, Amendment I). The use of social media by teachers can be somewhat troublesome when done without thoughtful consideration. Some teachers claim “My Facebook page is ‘mine’,” yet proceed to air their complaints about their employer or students. The teacher who claims that publicly complaining about her students’ performance is a “First Amendment right” is misinformed. Today, students, parents, and teacher regularly communicate via apps, class pages, and social media channels. In fact, the lack of access to technology can be a hindrance to learning and connectivity. However, the ease of using social media has also seen an increase in inappropriate posts that have caused teachers to face dire consequences. Teachers have been disciplined for posting photos of drug and alcohol use, people in various stages of undress, comments about getting drunk or high, negative comments about students, inappropriate relationships with students, or complaining about school supervisors. The balance of a teacher’s personal constitutional rights and freedoms with state and federal laws can be a delicate one. If speech, expression, association, or religion interferes with the governmental operation (like the peaceful, daily operation of a school), per the US Supreme Court, it can be suppressed and regulated. Thus, a teacher’s outburst on social media that causes a buzz among students in the classroom the following day can be subject to disciplinary action. However, speech by non-employees cannot be inhibited under the same standards, so students and parents have a great deal more latitude to air their non-threatening public complaints within these online settings.

While there is not yet a consistent legal framework for cases involving social media and public schoolteachers, there are some cases that we can rely upon for free speech analysis of social media. *Garcetti v. Caballos* (2006), *Pickering v. Board of Education*

(1968), and *Connick v. Myers* (1983) are three of those that are used as a guide when analyzing a teacher's actions. In sum, these cases consider whether suppressed speech was made within the scope of an employee's job duties. If it was, the speech, including posts on social media, is not protected. If not, *Pickering* then leads us down another line of questioning including: is the employee's interest in sharing the content of the speech in question greater than the school's interest in suppressing it? The *Pickering* court looked at whether the speech disrupts co-worker relationship, erodes a close working relationship premised on personal loyalty and confidentiality, or interferes with the speaker's performance or duties. The courts have generally ruled that employee speech that is derogatory toward students, parents, or co-workers or that provides an avenue for inappropriate relationships between teachers and students can be suppressed.

The right to freedom of speech is not without limitation for public schoolteachers. In *Munroe v. Central Bucks School District* (2015), a public schoolteacher's online rant in her personal blog that included disparaging remarks about her students, parents of her students, and co-workers was found to be disruptive to the operation of the school and suppression of the speech was allowed. So, while teachers do maintain the ability to host personal social media sites, case law would support the notion that complaining or sharing about matters related to the daily functions of being a teacher might best be avoided topics of conversation on social media. Teachers do not lose all freedoms just because of their status as a teacher, so they are able to share their political beliefs, endorsements, and personal histories without fear of repercussion, but even so, this is not clearly delineated. Some cases have indicated that teachers' personal social media pages might be considered private speech and protected under the First Amendment, so this is certainly an area in which to tread carefully and exercise common sense when posting on social media.

The confusion surrounding student religions practices

Students attempting to engage in religious practices at public schools during the school day are another area of relevance for today's teachers. The First Amendment of the US Constitution contains two essential clauses regarding religion: the Establishment Clause and the Free Exercise Clause (US Constitution, Amendment I). The Establishment Clause prohibits states from passing laws that aid or show a preference for one religion over another. As a state actor funded by taxpayer funds, public schools must remain neutral and teachers cannot promote one religion over another. When school personnel are not acting in their official capacity as teachers they are free to practice whatever religion they choose.

One timely issue in 2017 is prayer in public schools. This issue, legally, goes back to *Engle v. Vitale* (1962). Prior to this time, prayer was routinely conducted in public schools. The United States Supreme Court held that the district's required reading of a schoolsponsored, non-denominational, voluntary prayer violated the First Amendment. Nationwide, courts have been somewhat consistent in holding that private devotional

activities initiated by students with no involvement from school personnel that do not disrupt school activities are permissible. That is, students are not prohibited from saying a prayer at their desk before a big test or sharing a group prayer among friends in the hallway. Whether prayer in public schools is allowed is based upon who schedules it and who is involved. In *Wallace v Jaffree* (1985), the United States Supreme Court held that a period of silence set aside for voluntary prayer or meditation in public schools is a violation of the First Amendment because it was a school-sanctioned activity. This case affirmed that teachers must refrain from endorsing any school-sanctioned silent prayer or meditation. Prayer at larger, mass school events in was a violation of the Establishment Clause as well. In the landmark case, *Lee v. Weisman* (1992), the Court invalidated a school district's policy that allowed clergy to be invited to deliver invocations and benedictions at middle and high school graduation ceremonies as a violation of the Establishment Clause. A student-led prayer at a high school football game was deemed a constitutional violation because it was given over the public address system and therefore could be construed as a public endorsement of prayer by game-goers (*Santa Fe v. Doe* 2000). Beyond prayer at school events, issues arising within the past decade have included the influx of student religions that proscribe prayer or meal accommodations that sometimes impact or interfere with student learning. Schools more recently have started to dismiss religious students in order to accommodate specific prayer times during the day or began offering adjusted meal choices in order to accommodate religious practices. The battle can be contentious in communities where religious struggles are already part of community dialogue. Teachers should continue to monitor case law regarding the difficult boundary between endorsing and silencing religion.

Everyone uses the same restroom (or not)?

Some issues within the field of education law are not clearly settled in case law or Constitutional boundaries. Two current topics illustrate the volatility and the puzzling nature of education law—transgender bathroom policies and teachers possessing guns in schools. In May 2016, a letter of guidance issued by the Departments of Justice and Education called on public schools to allow transgender students to use the restroom of their choice in public schools, essentially allowing students to use the restroom with which they most closely identified to their own gender (United States Department of Justice and Department of Education; Neb. Rev. Stat. 1994). Citing Title IX, and indicating compliance with federal law as a provision of receiving federal funds, the letter indicated schools were in jeopardy of losing federal money for failing to comply with the guidance. Courts across the country began to see cases where transgender students litigated under a violation of this interpretation of Title IX, the law that prohibits sex-based discrimination to schools receiving federal funds (Archibald 2016) while other districts began to implement policies allowing students to access restrooms consistent with their gender identity (Idaho School District Adopts Gender Inclusion Policy 2016).

While the letter of guidance was being implemented and simultaneously contested across the country, the US Supreme Court agreed to hear the case of a transgender teen, Gavin Grimm, who was prevented from using the boys' restroom at his public school even though that was the restroom matching his gender identity. The Gloucester County, Virginia school board faced complaints from parents for allowing Grimm to use the boys' restroom for several weeks in 2014 and then passed a policy requiring students to use a restroom corresponding to their biological gender or to use a private, single-stall restroom. Grimm pursued his claim in federal court citing Title IX and the Obama administration's letter of guidance (*G.G. v. Gloucester County School Board* 2016). Until February 2017, the case was set to be argued at the US Supreme Court in March 2017.

In February 2017, President Trump's administration rescinded the letter citing the ongoing legal questions raised regarding the letter of guidance and noting the importance of local control by states and school districts for making such important decisions (Peters, Becker, and Davis 2017). As a result, the US Supreme Court rejected Gavin Grimm's case and instead remanded it to the 4th US Circuit Court of Appeals to resolve two questions: first, whether transgender students are protected under Title IX's definition of "sex" and second, how much control the federal government should have on enforcing and interpreting Title IX within public schools (*Gloucester County School Board v. G.G.* 2017). As it stands today, there is still no clear answer. School districts are permitted to enact policies that allow students to use restrooms according to their gender identity, but they are not legally required to do so per federal law. Should Title IX be litigated to the point where the definition of "sex" includes the protection of transgender students, the legal landscape may change, however, this appears to be a local and state issue and will be heavily determined by courts across the country.

Guns and Grizzlies

Another recent issue that caused a buzz about education law in recent news was the issue of guns in public schools. Firearms have been prohibited on public school grounds for any school receiving federal funding since 1994 under the Gun-free Schools Act (1994) and under a later revision requiring states to implement similar laws that act in concert with federal requirements. In addition, the Gun-free Schools Zone Act (1994) prohibits any member of the public from carrying or discharging a weapon on school grounds. This legislation was aimed at preventing school violence and provided some hope of a deterrence in that students faced stiff penalties if found to be carrying weapons on school grounds.

There is some debate about the effectiveness of these laws in practice. While the attempt to prevent firearms from entering school grounds may be a good-hearted and somewhat effective attempt by the state and federal systems to mitigate school violence, in 2016 ABC News reported there were "141 students killed in mass murders or attempted mass murder" since the Columbine school shooting in 1999 (Pearle 2016). While the legislation may be a deterrent, it certainly has not been a failsafe method of

keeping all students safe from weapons. Thus, politicians and educators continue to debate the best way to keep schools safe.

During her confirmation hearings in early 2017, Secretary of Education nominee Betsy DeVos faced questions about her stance on the Gun-free Schools Act and whether she believed guns should be prohibited on public school campuses (Merica 2017). Her response was that based on earlier testimony from a Wyoming senator describing a situation in his state wherein a fence was erected to protect elementary children from wildlife in the area, including grizzly bears, it was possible that there may be schools needing firearms to protect students from similar circumstances. This became public fodder when it went viral on the internet (Filipovic 2017). While her response may have been interpreted as a criticism of the Guns-free Schools Act, DeVos clarified her stance noting that she felt decisions about firearms in public schools should be a local decision. Regardless of where the now-Secretary stands on the issue, guns and firearms are still largely restricted and prohibited by students and members of the general public on public school campuses nationwide, but questions remain about whether the federal government will continue to mandate this stance or whether local laws allowing concealed carry for teachers or other school personnel may soon be enacted.

There has been a recent attempt to provide the latitude under federal law for teachers to carry weapons within school. While both gun-free schools legislative actions are preventative in nature, neither actively could prevent someone from walking onto a school campus and discharging a weapon. The argument arises that if teachers are carrying firearms, perhaps an attempted school shooting might be prevented. This year, Kentucky Congressman, Thomas Massie, introduced HR 34 deemed the "Safe Students Act" (Massie 2017) wherein the Congressman's office proclaimed, "Gun-free school zones are ineffective. They make people less safe by inviting criminals into target-rich, norisk environments. Gun-free zones prevent law-abiding citizens from protecting themselves, and create vulnerable populations that are targeted by criminals" (Massie 2017). The proposed legislation would allow teachers and administrators to carry firearms in order to defend themselves and students. At the date of publication, the bill is under review in the US House of Representatives.

To date, public schools remain areas that are gunfree. Until the Gun-free Schools Act is repealed or modified, or something like the "Safe Students Act" is enacted, neither school personnel nor students are lawfully allowed to be armed while at school. However, by allowing local districts to control this issue we may begin seeing a very different landscape in regards to school violence attempts and prevention.

Conclusion

This article highlighted four areas of education law that are rapidly changing within the political and legislative arenas. Today's teachers must remain vigilant to processes and decisions that directly impact student learning in order to maintain a clear set of procedures and processes that protect both the learning environment and student

rights. While public schoolteachers cannot be experts in education law, they can be aware consumers of the laws that impact their daily lives and can be advocates for sensible education reform. While today's teachers are called upon to do and know more than ever before, they also have more access to resources and information than ever before. Thus, the ultimate protectors of constitutional freedoms and individual liberties are the nation's guard of public school teachers.

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