



PACE
SAFETY • SERVICE • STABILITY
A Trust Built for Students

FREE SPEECH GUIDANCES

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STUDENT SPEECH RIGHTS

What is speech?

Speech can be verbal, written (e.g. email, text message, social media post, social media reaction, and social media re-share), gestures (e.g. sign language, thumbs up, head nods, clapping, etc.), images (e.g., pictures, hats, flags, posters, t-shirts, zoom background images, etc.), or expressive conduct (e.g. walkouts, protests, kneeling, refusing to kneel, refusing to salute the flag, wearing an armband, or wearing a particular color when such action is intended to express a message).

Is all speech protected?

No, not all speech is protected. There are several categories of speech that courts have found to be **not protected** such as true threats, defamation, incitement to imminent lawless action, and solicitation to commit crimes, among others.

When can a public-school discipline a student for their speech?

A public school can discipline a student for their speech if the speech is not protected such as when a student makes a true threat or incites others to lawless action.

Even in situations where the speech itself is protected, the school can discipline if the speech inside or outside the school “materially disrupts classwork or involves substantial disorder or invasion of the rights of others...” *Tinker v. Des Moines*, 393 U.S. 503 (1969). Courts have held that schools do not need to wait for a disruption to occur, they may discipline for speech in situations where the school reasonably expects a substantial disruption to occur.

Schools are advised to consult with legal counsel in determining whether speech is protected, whether protected speech may cause or is causing a substantial disruption, or is invading the rights of others, and whether to discipline a student for their speech. This is an extremely fact specific inquiry with potential for significant liability.

In situations where school officials do not have time to consult with legal counsel, they should make decisions based on their best judgement regarding student and staff safety.

Can schools discipline students for off-campus speech such as off-campus social media posts?

Yes, schools can discipline students for off-campus speech, but their ability to discipline for off campus speech is “diminished.” *Mahanoy Area School District v. B. L.*, 594 U.S. 180 (2021). Schools retain the ability to prevent and address harassment, threats, and bullying of students and staff. Schools are advised to consult with legal counsel when disciplining students for off-campus speech.



What do we do if students walk out of class, or school as a form of speech?

Generally, schools should treat this as any other situation where students leave class without permission. This will likely include accurately recording the students' attendance and possibly an attendance-related consequence.

Can we discipline students for a speech related walk out?

You can discipline for activity that causes a substantial disruption to the educational program. Walking out of class, or school may or may not create a substantial disruption depending on the situation. If the school would typically discipline for the conduct, then the school can discipline for the conduct even if the conduct is a form of speech. School officials must be careful not to discipline for the content of the speech or the purpose of the speech, rather discipline must be fairly and consistently imposed based on the conduct, i.e. walking out without permission.

Is an absence due to a student walkout considered excused?

The term "excused absence" is used several times in statute, but it is never defined. The law allows an absence to be excused if "caused by the pupil's sickness, by the sickness of some member of the pupil's family or by an emergency" and grants schools discretion in excusing additional absences. ORS 339.065.

Schools should follow their attendance procedures and past practices in situations involving student walk outs. Some districts allow parents to excuse a child for any reason; others allow certain students to excuse themselves. In determining whether or not to allow the absence to be excused, schools should consider what they generally excuse, i.e. attending athletic activities, vacations, visiting colleges, attending the legislature, etc.? Where, if at all, does a speech related walk out fit into the reasons the school allows excused absences?

Can staff participate in a walk out?

Staff are generally prohibited from participating in political activity during work time and district resources generally cannot be used to promote political activity. ORS 260.432. Staff participation in a walk out may be unlawful engagement in political activity depending on the circumstances (please see the Secretary of State's [*Restrictions on Political Advocacy by Public Employees*](#) manual for more information about prohibited political activity). Consequently, staff members should remain at their assigned location during a walkout and perform their assigned tasks. Staff members can participate in speech outside of work time such as outside of work hours, or if the staff member utilizes vacation leave so long as the staff speech does not significantly impact the school's operations. See also OSBA's Employee Speech Rights guidance document for more information.

All this being said, staff also have a responsibility to ensure student safety. If staff believe student safety is at risk during a student walk out, staff can and should do their best to ensure continuing student safety during school hours, this may require staff to call law enforcement, call parents, and potentially accompany students outside to ensure they do not unsafely enter roadways, or other unsafe locations.



Can a school allow a protest on school property?

Yes, but the school should consider the following:

- **Viewpoint discrimination.** If the school allows a gathering or protest on one side of an issue, and a group with a differing perspective requests to have a gathering or protest, the school must allow all viewpoints the opportunity for a gathering or protest.
- **Supervision.** If the school is allowing an activity on district property, during school hours, it is going to be a school-sponsored activity, and the school must provide supervision and maintain control of the situation. Do you have adequate staff to supervise? If the activity is taking place outside of school hours, regular facility use procedures should be utilized.
- **Non-student participation.** Depending on where the gathering or protest is taking place, the school may have non-students joining. The school may want to limit who can attend.
- **Political speech.** School staff are generally prohibited from engaging in political speech while on the job and are generally prohibited from using district resources for political speech. ORS 260.432.

Are we setting precedent by what we allow?

Yes. If you allow one group to use district property for a protest, you may have to allow other groups in the future to avoid viewpoint discrimination.

What can we do to prepare for a student walkout or protest?

- **Review your current practices.** Do you have applicable policies or handbook provisions? What are the procedures and past practices around excusing absences? What has been done in the past if there was a walk out or protest? How do you treat students who leave class for non-political reasons? Your practices may vary by school within the district.
- **Develop a plan.** What are you going to do if students walk out? What if students congregate on school property? Is staff supervision needed? What will happen if non-students come to the school to participate?
- **Communicate expectations to students, staff and parents.** What will be the consequences for walking out? What expectations do you have of students who join a protest on school property? What would result in discipline? What needs to be done to excuse an absence? Can the student make up missed work? Will students be supervised?
- **Collaborate with law enforcement.** This is not to punish students, but to keep everyone involved safe. Any time there is a walkout or protest, there is the potential for a counter-protest and potential unsafe environments, including violence. Law enforcement can help ensure the safety of those involved.
- **Instruct.** Use this as an opportunity to talk to students about rights. Classes (including social sciences) may discuss the issues, review historical events and other relevant civics issues. The school could hold assemblies or community nights, invite community leaders and encourage students to understand and exercise their rights appropriately. Students can be instructed on the process for lawfully obtaining a permit to occupy a public space for a protest.



Applicable cases: *Tinker v. Des Moines*, 393 U.S. 503 (1969); *Bethel v. Fraser*, 106 S.Ct. 3159 (1986); *Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Mahanoy Area School District v. B. L.*, 594 U.S. 180 (2021); *Karp v. Becken*, 477 F.2d 17 (9th Cir. 1973); *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014)

Which OSBA sample policies apply to student speech?

- ACB - Every Student Belongs (*last revised 11/21*)
- IB - Freedom of Expression (*last revised 10/21*)
- IIBGA/AR - Electronic Communications Systems (*last revised 4/21*)
- JBA/GBN/AR - Sexual Harassment (*last revised 4/24*)
- JFCF - Hazing, Harassment, Intimidation, Bullying, Menacing, Cyberbullying, Teen Dating Violence, or Domestic Violence—Student (*last revised 10/21*)
- JFC - Student Conduct (*last revised 10/21*)
- JFI - Student Demonstrations and Petitions (*last revised 4/17*)

Contact OSBA Director of Policy Services Spencer Lewis at slewis@osba.org if you have questions about OSBA's sample policies.

THIS DOCUMENT PROVIDES GENERAL GUIDANCE AND IS NOT LEGAL ADVICE.

If you have questions, please reach out to your general counsel or contact OSBA/PACE attorneys at pacelegal@osba.org.





EMPLOYEE SPEECH RIGHTS

What is speech?

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Is all speech protected?

No, not all speech is protected. There are several categories of speech that courts have found to be **not protected** such as true threats, defamation, incitement to imminent lawless action, and solicitation to commit crimes, among others.

Can a public school discipline or terminate the employment of a staff member for their speech?

- **Speaking pursuant to official duties** – if the public-school employee speaks pursuant to their official duties (i.e., within the course and scope of performing their job duties), the employer is permitted to control the employee's speech and can discipline or terminate an employee for speech within the course and scope of performing their job duties.
- **Speaking as a citizen on a matter of public concern** – if the public-school employee is not speaking pursuant to their official duties (e.g., during designated breaktime, on social media at home, etc.) and is speaking as a citizen, on a matter of public concern, then whether the employer can discipline or terminate the employee for their speech depends on whether the disruptiveness of the speech outweighs the employee's speech rights. This requires a balancing analysis between the employee's speech rights against the public school's interest, as an employer, in promoting the efficiency of the public services it performs through its employees.
- **Speaking as a citizen on a matter that is not of public concern** - If the public-school employee is not speaking pursuant to their official duties and is speaking as a citizen, on a matter that is not of public concern, the public-school can discipline or terminate an employee for their speech.

Schools are advised to consult with legal counsel in determining whether speech is protected, whether speech is pursuant to official duties, whether speech is as a citizen on a matter of public concern, or not, and whether to discipline or terminate an employee for their speech. This is an extremely fact specific inquiry with potential for significant liability.



Applicable cases: *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Does OSBA have any sample policies that apply to employee speech?

Yes. Please see GCAB Personal Electronic Devices and Social Media last updated in 2019. Contact OSBA Policy Director Spencer Lewis at slewis@osba.org if you would like this sample.

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SCHOOL BOARD MEMBER SPEECH RIGHTS

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Schools are advised to consult with legal counsel in determining whether speech is protected. This is an extremely fact-specific inquiry with potential for significant liability.

What can school board members say publicly in response to controversial political/media-related matters?

School board members do not have authority to speak on behalf of the board or district unless the board votes in a public meeting to authorize that board member to speak on behalf of the board or district. Although school board members have the right to express their own personal opinions, school board members should exercise caution when publicly expressing personal beliefs about controversial issues. When board members speak in their individual capacity, they should make it clear that they are speaking as an individual and not on behalf of the school board or district. If a member's promotion of personal beliefs is reasonably interpreted as an official board communication, this may expose the district to legal liability or undermine public trust.

How can a school board issue public statements on behalf of the board or school?

A school board may authorize their board chair or chief executive officer to make statements on their behalf in between public meetings. This authorization would require the vote of the school board at a public meeting. If authorization has not been previously granted, the school board would need to have a public meeting and craft a statement in a public meeting to make a statement on a particular matter. School boards should rely on their board chair and/or chief executive officer who can consult with legal and communication experts to determine when it is appropriate for a board to meet to discuss issuing a public statement regarding a particular matter.



What can school board members say publicly about district personnel matters?

A school board member should not discuss personnel matters outside of a properly noticed public meeting, open or closed. Talking points school board members can use when community members are asking about personnel matters:

- The school board is responsible for supervising the school's chief executive officer and is not responsible for directly supervising other school staff.
- The school board takes the responsibility of supervising their chief executive officer very seriously.
- Individual school board members do not have the authority to speak on behalf of the board or district unless specifically authorized by the board to do so.
- The district keeps personnel matters confidential and trusts the processes in place to handle complaints.
- Refer people to the chief executive officer for additional handling.

How can a school board address board member speech that is not aligned with the district's educational mission?

A school board can censure one of its members at a public board meeting. A censure is a public statement issued and voted on by the school board at a public meeting conveying a message that the school board does not support or endorse the views expressed by the school board member being censured. A censure typically involves board member action involving a potential or actual violation law, district policy or working agreement. A school board does not have the ability to remove one of its members from the school board. Removal from the school board can only be done by voluntary resignation or petition for recall.

How can a community address board member speech that is not aligned with the district's educational mission?

Community members can submit a complaint about a board member through the district's complaint process. Community members should be aware that school personnel do not have control over school board members, and any complaints filed will be handled by the school board and not school administration. This is typically handled in an open public meeting. School board members are elected officials who can only be removed through voluntary resignation or recall. Recall is a specific process involving signatures, verification, and an election.

Can school board members interrupt attendee speakers at school board meetings?

School boards should have a written procedure in place setting forth expectations regarding attendee speech at school board meetings. Often such procedures provide a time limit for comments or presentations. The school board chair can interrupt speakers who are past their allotted time but should do so in a consistent manner. School boards should not interrupt speakers just because they do not agree with the viewpoint being expressed.

Some school boards have prohibited comments about school staff at board meetings. In those schools, it is permissible to interrupt speakers who begin speaking about school staff and remind them that the meeting rules prohibit comments about staff.



There is risk associated with prohibiting comments about school staff, so a school board is advised to consult with legal counsel about whether to prohibit comments about school staff.

If a speaker is violating district anti-discrimination policies, the board chair will need to make a risk analysis regarding whether the speaker's speech is significantly invading the rights of others to the point where the board chair believes it is necessary to interrupt the speaker. Boards will oftentimes not have time to seek legal counsel before making decisions about whether to interrupt speakers, so boards should be cognizant of potential speech related liability, but also cognizant of their responsibility to run efficient meetings and keep other board meeting attendees, such as staff and students, safe from sustained harassment and discrimination.

Is there liability associated with board member use of social media?

Board member speech on social media, even if it is in the board member's personal capacity, can generate liability for the school and the board member personally. The U.S. Supreme Court has held that board member action to block individuals from social media accounts or action to delete or hide comments can violate the first amendment in some instances. Social media best practices for board members:

- Clearly label social media pages as public or personal using either a label or a disclaimer
- Keep personal and public social media accounts separate
- Avoid posting anything invoking their official capacity as school board member on their personal social media accounts
- Use caution when deleting or hiding comments and blocking individuals from a public or "mixed-use" social media accounts based on viewpoint
- Consider disabling the ability for members of the public to comment on public and "mixed-use" social media pages

Which OSBA sample policies apply to school board member speech and speech at school board meetings?

- BBAA – Individual Board Member's Authority and Responsibilities (*last updated 2021*)
- BBF – Board Member Standards of Conduct (*last updated 2024*)
- BDDH/AR – Public Comment at Board Meetings (*last updated 2021*)

Contact OSBA Director of Policy Services Spencer Lewis at slewis@osba.org if you have questions about OSBA's sample policies.

Applicable cases: *Houston Community College System v. Wilson*, 595 U.S. 468 (2022); *Lindke v. Freed*, 601 U.S. 187 (2024); *Garnier v. O'Connor-Ratcliff*, 601 US 205 (2024); *Garnier v. O'Connor-Ratcliff*, 136 F.4th 1181 (9th Cir. 2025)

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