

July 21, 2020

PreK-12 & PSRP Union Presidents:

Recently there have been public statements made by educators about the safe reopening of schools. This is understandably a very important issue for all educators as well as the students and families they serve.

Educators should know that not all speech is protected by the 1st Amendment to the US Constitution. Some speech may subject the educator to discipline under certain circumstances. While this memo cannot address every situation or scenario, it does attempt to provide some guidance relating to speech that may be protected and speech that may lead to discipline.

The general rule is that speech made by a citizen regarding a matter of public concern is protected by the 1st Amendment of the US Constitution as well and the Connecticut State Constitution. *Garcetti v. Ceballos*, 547 U.S. 410, (2006), *Brown v. Office of CT State Comptroller*, 2020 WL 1955328 (2020) (Appeal Filed).

Conversely, when speech is made pursuant the educator's job duties, it will not be considered a matter of public concern and therefore not protected by the 1st Amendment and subject to potential discipline. *Weintraub v. BOE for the City of New York*, 593 F.3d 196 (2015)

Specifically, *Garcetti* held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

One has to be speaking as a citizen about a matter of public concern and not about a matter that is related to her/his official duties. The Supreme Court has strived to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. BOE*, 391 US 563 (1968)

The COVID-19 pandemic is clearly a matter of public concern. The safe reopening of our public schools is also a matter of public concern. Any **citizen** speaking about these matters would correctly assert that their speech is protected by the 1st Amendment.

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An **educator** in a particular district speaking against her/his district's reopening plan may not be entitled to 1st Amendment protection and could face potential discipline. Of course, the forum and manner of the speech will further instruct a Court in determining whether the speech is protected.

Teacher's "Refuse to Return" campaign.

Acknowledging the unprecedented crisis the world is currently facing, there is an understandable high level of anxiety and stress among educators about returning to work safely. That said, even though the pandemic is clearly a matter of public concern, public speech by individual educators advocating against the reopening of their schools and engaging in a concerted campaign to have teachers refuse to return until health conditions improve is most likely speech that may not be protected by the 1st Amendment. This speech about the safety of the workplace and the classrooms could be categorized as speech made pursuant to an educator's job duties, which includes maintaining a safe working environment.

One area of speech that is almost always considered protected is that made by and through your Union. Union leadership has a concerted right to speak on behalf of its members. Establishing a safe workplace is clearly an area where the Union can advocate on behalf of its members. Getting involved with your Local Union is always an effective way to have your voice heard and amplified!

Any concerned employee should work through their Union to ensure a safe and secure return to work. Public statements independent of the Union, made as an employee as opposed to as a citizen, may subject the employee to discipline.

As stated above, each case is different and facts will dictate how the law is applied. Specific questions should be addressed to your local leadership. Local leadership is encouraged to consult with AFT Connecticut for further guidance.

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