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TEACHER METHODS AND CLASSROOM DISCUSSIONS: POLICY ISSUES**Overview**

Recent stories in the popular media have once again raised lingering issues involving public school teachers and the inclusion of controversial subjects, teaching methods, course materials, student research, and discussions in the classroom. Here in Virginia, for example, controversy arose in a county public school system when a teacher showed a film in which Muslims present their opinions regarding the attack on The Trade Towers in New York City ("9/11"). Most recently, the Associated Press published a story involving a suburban Denver, Colorado, public school system where there have been protests and heated debate in school board meetings over the content and course materials found in an Advanced Placement history class.

This past month The American Library Association (ALA) celebrated *Banned Books Week* (September 21 to 27, 2014). The ALA released a list of the *Top Ten* frequently challenged books of 2013, as a part of the *State of America's Library Report*. Reading the list I harkened back to such past court decisions as *Mozert v. Hawkins County Board of Education* (6th Cir. 1987), where parents challenged a public school system requirement that all students in grades one through eight use a prescribed set of basic reading textbooks; *Virgil v. School Board* (8th Cir. 1989), where parents objected to what they said were "vulgarity and sexual explicitness" in an approved textbook in a high school elective humanities course; and the United States Supreme Court's seminal decision in *Board of Education v. Pico* (1982), involving a local school board removing library books from its junior and senior high schools after parents characterized the books as "objectionable" and "improper fare for school students."

At the college and university level some schools have requested that professors include statements in their course syllabus forewarning students that some course readings and discussions might be offensive or upsetting. Also on campuses invited speakers are sometimes objected to by students and faculty because of their political or philosophical reputations and/or the possible content of their remarks.

Not long ago I came across a student First Amendment case involving a California public high school system where, after learning of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, and because of a skirmish the previous year, school officials feared there would be hostilities between white students and students of Mexican descent during this year's celebration. Thus, school officials asked students to remove clothing bearing images of the American flag, turn their shirts inside out, or leave school for the day. Darriano v. Morgan Hill Unified School District (9th Cir. 2014)

While such happenings are not new, they once again are garnering national attention. Is there a common thread in the diverse array of situations described above? What are the policy implications?

School Boards, Teachers, and the Curriculum

It is a basic tenet of public school law that local school boards make curricular decisions. (Vacca and Boshier, 2012) As the United States Court of Appeals for the Fourth Circuit has held "school officials and not classroom teachers should make curricular decisions." Boring v. Buncombe County (4th Cir. 1998) However, local school boards and administrators do not possess unlimited discretion regarding the school curriculum (*e.g.*, state law may require that certain subjects be taught). Teachers as professionals have considerable discretion in organizing and conducting their classes, incorporating subject matter into the syllabus, selecting class materials, and planning lessons. This is especially important at a time when the impact of technology has opened up a vast highway of information available to teachers and their students, and has taken the notion of "instructional materials" far beyond traditional paper sources such as textbooks, newspapers, and magazines. In fact, today's teachers are able to develop and use their personally prepared course materials and not depend on traditional publishing houses. Thus, the traditional meanings of such age worn classroom terms as "textbooks," "blackboards," "discussions," and "research" have radically changed.

Classroom Instruction. As a general rule teacher discretion is constrained by: (1) what "good practice" dictates, (2) research based methods and procedures, (3) state law and state board of education mandates, and (4) local school board policy. It also is expected that classroom teachers will take into consideration such matters as age, maturity, and grade level of students, and the relevance of all materials, student research, and class discussions to the subject matter being taught. Moreover, community standards likely will have an impact on a teacher's freedom (*i.e.*, academic freedom) to conduct his/her courses. However, the problem is one of balance between the legal prerogatives of the school board, the discretion of teachers as professionals, and local community standards—all with the goal of providing what is in best interests of students. (Vacca and Boshier, 2012)

Employee Comments. In 1968, the United States Supreme Court decided Pickering v. Board of Education, a case in which a teacher had been dismissed for making critical statements about his local school board in a letter to the newspaper. The Court held that because Pickering was speaking out on public issues that particularly affect his own profession, his comments were protected by the First Amendment. Subsequent lower court opinions began to recognize a difference between public employees speaking out on matters of "public concern" from employee comments of a "personal concern." (Vacca and Boshier, 2012) In 2006, the Supreme Court added

another standard to the analysis when in Garcetti v. Ceballos (2006), a non-school case, the Court stated that a determination must be made as to whether an employee has spoken “as a citizen on a matter of public concern or as an employee pursuant to his official duties.”

Judicial Restraint. Almost forty years ago, in one of this nation’s first educational malpractice cases, a California appellate court reminded us that “[t]he science of pedagogy itself is fraught with different and conflicting theories of how and what a child should be taught and any layman might—and commonly does—have his own views on the subject.” Peter W. v. San Francisco Unified School District (Cal. App. 1976) The line of cases that followed demonstrated a reluctance of judges to recognize *improper instruction* and *poor academic performance of students* as actionable claims. In this era of accountability and transparency, with the advent of linking student scores on statewide academic tests to individual teacher classroom performance, this judicial attitude is likely to change.

Controversial Subjects in the Classroom

As the United States Supreme Court has expressed, “classroom methodologies and techniques are matters best left to teachers and not the courts.” Owasso v. Falvo (2002) This point is subsequently emphasized in a Virginia case involving a teacher’s posting materials on his classroom bulletin boards. In affirming the lower court’s award of summary judgment to the school board the Fourth Circuit Court offered the following observation: “Although school teachers provide more than academic knowledge to their students, it is not a court’s obligation to determine which messages of social or moral values are appropriate in a classroom.” It is the school board’s responsibility. Lee v. York County (4th Cir. 2007)

In the Eighth Edition of our text, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (Lexis/Nexis, 2012), Professor Boshier and I devote an extensive discussion, with numerous case citations, to the school curriculum, academic freedom, and the inclusion of controversial subjects in the classroom. Beginning with Tinker v. Des Moines (1969) and the Supreme Court’s declaration that teachers do not shed their freedom of expression “at the schoolhouse gate,” the case law covers such issue producers as using R-rated films in class, requiring students to research and read materials dealing with sex education, and bringing outside speakers into classes, among others. One issue producer that has caused conflict has involved class discussions and teacher extemporaneous comments and remarks during class discussions. What follows is a brief look back at a court decision included in our text. I selected the case as an example of what a court might say in a situation where a classroom teacher was disciplined not for the materials or methods used, but rather for comments made in giving examples in response to questions asked by students in his ninth grade government classroom.

Miles v. Denver Public Schools (10 Cir. 1991)

Facts: During class Miles stated that the quality of the school had declined since 1967. When a student asked for specific examples he replied that in the past the school did not have so many pop cans lying around school and school discipline was better. He also commented, “I don’t think in 1967 you would have seen two students making out on the tennis court.” His comment referred to an incident that allegedly had occurred the previous day and was the topic of a rumor

throughout the school. Miles had heard the rumor but never got official confirmation before repeating it in class.

Parents of the alleged participants described in the rumor complained to the principal. The principal placed Miles on paid administrative leave for four days. Miles wrote the principal apologizing for exercising “bad judgment.”

After completing an investigation the principal issued Miles a letter of reprimand. In the letter the principal stated that Miles displayed “poor judgment” and that his comment was an “inappropriate topic for comment in a classroom setting.” The principal said that Miles “will need to refrain from commenting on any items which might reflect negatively on individual members of our student body.”

District Court Action. Eight months after his reinstatement Miles filed suit in federal court claiming that the paid administrative leave and reprimand in his file violated his First Amendment free speech rights. He sought damages and injunctive relief pursuant to 42 U.S.C 1983. Subsequently, the court granted summary judgment in favor of school officials. Miles v. Denver Public Schools (D. Colo. 1990) Miles appealed the decision to the United States Court of Appeals for the Tenth Circuit, where the Court granted *de novo* review.

Tenth Circuit Rationale and Decision. Applying the Mt. Healthy v. Doyle (1977) standard to determine whether an adverse employment decision violates a public employee’s First Amendment rights, the Tenth Circuit Court first had to determine whether teacher Miles satisfied the initial burden of showing his classroom expression is constitutionally protected. In its initial analysis the Tenth Circuit relied on Hazelwood v. Kuhlmeier (1988), where the United States Supreme Court stated that the actions of educators do not offend the First Amendment “so long as their actions are reasonably related to legitimate pedagogical concerns,” and on Tinker v. Des Moines (1969) where, among other things, the Supreme Court opined that the school is not a “public forum” and “school officials may impose reasonable restrictions” on students, teachers, and others.

In the Tenth Circuit’s view “[a] podium before a captive audience of public school children is decisively different from the street corner. An ordinary classroom—such as the one in which Miles taught—is not a public forum. There is no evidence that school authorities intended Miles’ government class for public discourse. Therefore, we conclude that the school ‘reserved the forum for its intended purpose’ of teaching government.” Here the Tenth Circuit quoted from Perry Educ. Assoc. v. Perry Local Educators’ Assoc. (1983) Moreover, and once again relying on Hazelwood (1988), the Tenth Circuit concluded that “Miles’ expression during a ninth-grade government class must be treated as school-sponsored expression in a nonpublic forum for first amendment purposes.” The Court also concluded that because of the “special Characteristics of a classroom environment,” Hazelwood (1988) and not Pickering V. Board of Education (1968) applies. Thus, said the Court, a distinction is made “between teachers’ classroom expression and teachers’ expression in other situations that would not be perceived as school-sponsored.” Here the Court quotes Hazelwood (1988), noting the authority of school officials to assure that “students ‘learn whatever lessons the activity is designed to teach’ ...and that students are not ‘exposed to material that may be inappropriate for their level of maturity.’”

The Tenth Circuit next focuses on the notion of a teacher’s “professionalism” and “sound judgment” and the need of their employer to ensure an employee’s “ability and competence to perform his or her job.” They continue, “clearly professionalism and sound judgment contribute to the competent performance of a teacher’s job...Indeed, as Miles himself reminds us.” Referencing the school’s curriculum the Court adds that “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct in and out of class.”

Regarding the placement of Miles on paid administrative leave and the letter of reprimand the Court found that school officials actions were “taken directly related to the school’s legitimate pedagogical concerns.” Likewise, said the Court, we “will not interfere with the authority of the school officials to select among alternative forms of discipline. We should not and will not run the schools.” Citing Board of Education v. Pico (1980) and other cases where the Court differentiates between teacher speech in primary and secondary schools versus teacher speech at the university level in determining the “suitability” of a particular subject (in Mile’s case “his substantiation of a rumor in a classroom setting”), the Tenth Circuit concludes that the “mild restrictions” did not give merit to his academic freedom argument.

Decision. Because Miles did not show that his classroom comments under these circumstances were constitutionally protected, and failed to raise a genuine factual dispute, the Tenth Circuit affirmed the decision of the district court.

Policy Implications

When many of our nation’s public schools are working to maintain state accreditation, close the student achievement gap, maintain discipline, control and prevent violence in schools, and reduce the number of students who drop-out of school, it is more than likely that students (especially technology-oriented secondary school students equipped with laptops and tablets, *et al.*) will be asking their classroom teachers for a host of opinions regarding their school, its student body, their school’s accreditation status, and their school’s reputation in the community. At the same time, with November elections looming in the near future and the constant focus in the media regarding such topics as Ebola, possible terrorist attacks, and violence in the Middle East, it is more than likely that classroom teachers in all subject areas will be asked for their personal opinions. While some topics of discussion may be more appropriate for a health education class, or a biology class, or a government class, there are some discussions relevant across several classes. While it is but one case, and an older case at that, what does Miles v. Denver Public Schools (10th Cir. 1991) teach us about classroom protocols and what can be inferred from the Court’s rationale? What are the policy implications?

School board policies must make it clear that:

- The Board is the final decision maker in matters of the school curriculum—including matters associated with all school sponsored and/or sanctioned activities of an academic and non-academic nature.

- All teachers are expected to plan for and implement the goals and objectives of the official school curriculum as it applies to their particular subject field and in fulfillment of their contractual obligations.
- All classroom teaching methods, materials selected, assignments made, discussions, and testing of students will be (a) based on legitimate pedagogical concerns and (b) related to the subject being taught.
- It is expected that within the special context of the school environment and within the context of their classroom, all teacher comments to and discussions with students are related to the goals and objectives of the subject being taught, as well as to the age and maturity level of students, and that teachers will refrain from making comments or initiating class discussions with students of a solely personal nature.
- Civil discourse and active debate, when and where appropriate, will be encouraged and demonstrated in all classrooms.

Final Note: Recently I came across an excellent and thought provoking article written by Michael Sherrer, in Time Magazine. Titled, *The Paperless Classroom is Coming: A national push to get a computer into each student's hands will upend the way American children are taught*, the author posits, among other things, that if this goal is reached it will "get all 49.8 million American kids live simultaneously by 2017." 184 Time 37 (2014) Needless to say, the concept of teacher and student initiated "class discussions" will radically change and require a total and futuristic audit of contemporary school board policies—a process that already has begun.

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Note: The views expressed in this commentary are those of the author.