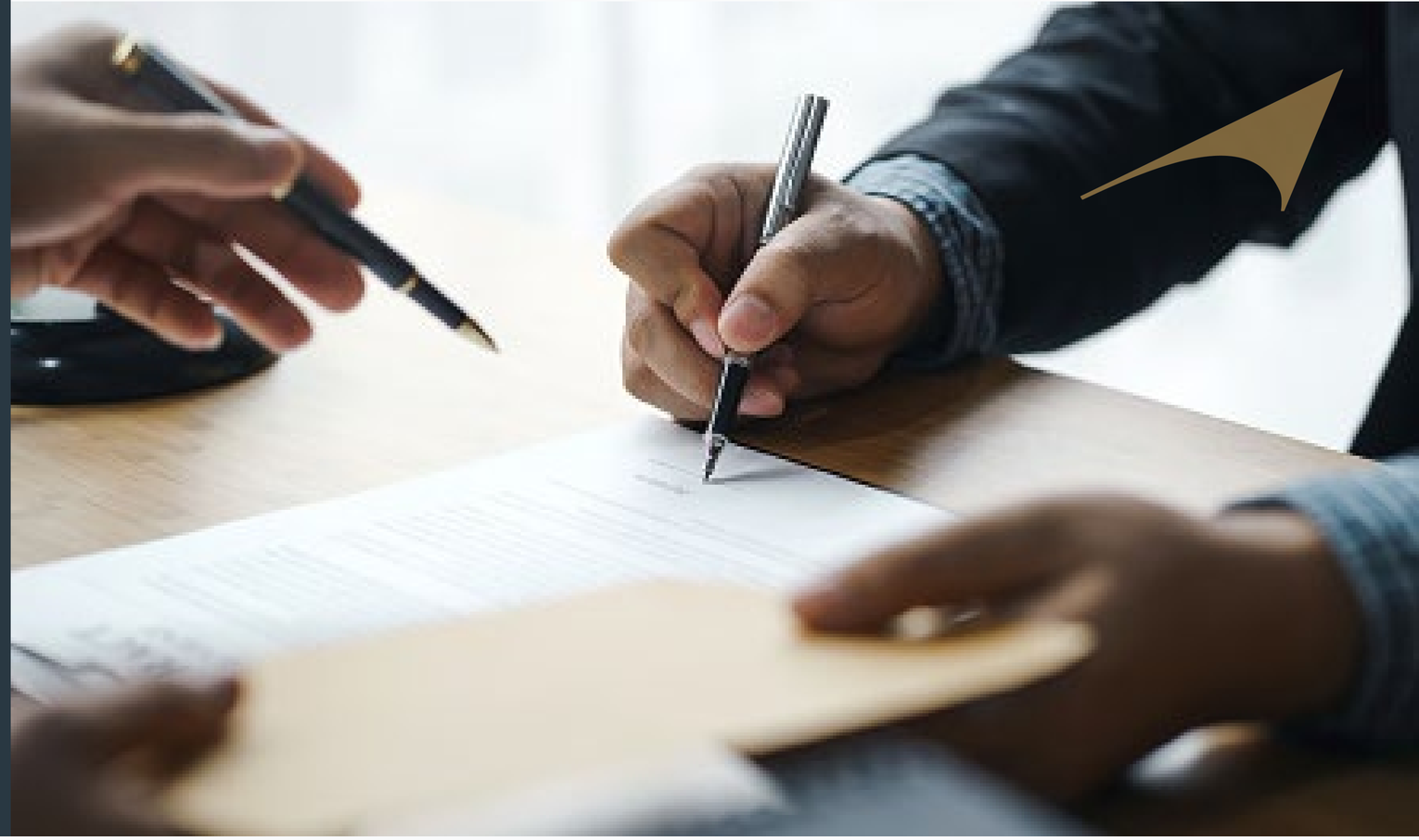
Free Speech: Where Employees' and Community Voices Meet Constitutional Guardrails

40th Annual School Client Conference



January 17, 2025

Andrew J. Freedman, Esq.

Asia R. Evans, Esq.

Hodgson Russ LLP ATTORNEYS

HODGSON RUSS

Disclaimer

This presentation is intended for general informational purposes only and does not constitute legal advice or legal opinion on any specific facts or circumstances. Information contained in this presentation may not be appropriate to your particular facts or situation. You should not act upon the information in this presentation without consulting Hodgson Russ LLP or other professional advisors about your particular situation. No attorney-client relationship with Hodgson Russ LLP is established by viewing this presentation. Hodgson Russ LLP makes no representations as to the accuracy or completeness of any information in this presentation, and the opinions expressed in this presentation are the opinions of the individual authors and may not reflect the opinions of the firm or any individual attorney.

Hodgson Russ LLP
ATTORNEYS

Agenda

- Introduction
- Employee Speech
  - Matters of Public Concern
  - Speech as a Private Citizen
  - “Other” Speech
  - Disciplining Employee Speech
- Community Speech
  - School Board Meetings
- Case Studies
- Questions

Hodgson Russ LLP ATTORNEYS

“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.”

- First Amendment of the U.S. Constitution

Hodgson Russ LLP ATTORNEYS

Schools are a Limited Forum

- Three kinds of forum:
  - Public “open”
  - Limited
  - Nonpublic or “closed”
- The extent that speech is protected depends largely on where the speech is made.

Employee Speech

Hodgson Russ LLP
ATTORNEYS

Employee Speech

- "The First Amendment's protections extend to teachers and students, neither of whom shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969).
- Public employees enjoy constitutional protection when they:
  - Speak on matters of public concern, **and**
  - When they are <u>not</u> acting pursuant to their official duties.

Matters of Public Concern

- Any matter of political, social, or other concern to the community.
  - For example, it is a subject of legitimate news interest; a subject of general interest and of value and concern to the public at the time of publication. *City of San Diego v. Roe*, 543 U.S. 77 (2004).

Hodgson Russ LLP ATTORNEYS

Matters That are NOT of Public Concern

- Speech that focuses on an issue that is related to an employee's own situation or that is intended to redress personal grievances is not a matter of public concern, even if it touches upon matters of general importance.
  - Personal grievances
  - Complaints
  - Reporting certain workplace conduct

- Whistleblowers are generally protected under New York's Civil Service Law and Education Law. *See* N.Y. Civ. Serv. § 75-b; N.Y. Educ. § 3028-d.

Speech Pursuant to Official Duties

- Whether an employee's speech is deemed to be pursuant to their official duties depends on whether the speech at issue is ordinarily within the scope of an employee's duties.
- Examples of unprotected speech pursuant to official duties under First Amendment:
  - Internal reports about classroom sanitary conditions. *See Massaro v. N.Y. City Dep't of Educ.*, 481 Fed. Appx. 653 (2d Cir. 2012).
  - Reports to Principal regarding over-enrollment of physical education classes. *See Smith v. City of N.Y.*, 130 F.Supp.3d 819 (S.D.N.Y. 2015) aff'd, 664 Fed. Appx. 45 (2d Cir. 2016).
  - Statements about special education staffing needs, provisions of special education related services and other advocacy on behalf of special education students. *See Jerram v. Cornwall CSD*, 464 Fed. Appx. 66 (2d Cir. 2008).

Speech Pursuant to Official Duties

- Reporting potential grading irregularities on state exams to school administrators and state education officials. *See Cohn v. Dep't of Educ. of the City of N.Y.*, 697 Fed. Appx. 98 (2d Cir. 2017).
- Reporting a co-teacher's aggressive and frightening behavior towards students. *See Anglisano v. N.Y. City Dep't of Educ.*, 2015 U.S. Dist. LEXIS 39596 (E.D.N.Y. Sept. 30, 2015).
- Reporting security concerns to administrators and the police. *See Alvarez v. Staple*, 345 F.Supp.3d 320 (S.D.N.Y. 2018).
- Reports to the Principal regarding alleged physical and verbal abuse of students. *See Fierro v. City of N.Y. Dep't of Educ.*, 2022 U.S. Dist. LEXIS 24549 (S.D.N.Y. Feb. 10, 2022).

Reports to Outside Agencies

- In certain situations, reports to outside agencies have been found to fall within an employee's responsibilities and thus not considered protected private speech.
- Examples of unprotected speech to outside agencies:
  - Reports to the NYS Education Department ("NYSED") regarding falsification of student population and graduation rates. *See McDonald v. Hempstead UFSD*, 2022 U.S. Dist. LEXIS 23272 (E.D.N.Y. Feb. 9, 2022).
  - Reports to NYSED regarding a school district's negligence in ensuring special education students received required testing accommodations. *See Agyeman v. Roosevelt UFSD*, 254 F.Supp.3d 524 (E.D.N.Y. 2017).
  - Filing an OSHA Complaint regarding building safety. *See Ross v. N.Y. City Dep't of Educ.*, 935 F.Supp.2d 508 (E.D.N.Y. 2013).

Reports to Outside Agencies

- Examples of unprotected speech to outside agencies, cont.:
  - Reports to NYSED regarding improprieties within the district's homeless program. *See Kilduff v. Rochester City Sch. Dist.*, 53 F.Supp.3d 610 (W.D.N.Y. 2014).
  - Reports to the U.S. Department of Education Office of Civil Rights regarding failure to provide students with aids and services. *See Freud v. N.Y. City Dep't of Educ.*, 2022 U.S. Dist. LEXIS 54353 (S.D.N.Y. Mar. 25, 2022).

Private Speech

- Whether speech is spoken as a private citizen, and possibly entitled to protection under the First Amendment depends largely on whether it is expressed outside the scope of an employee's employment. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- Courts also apply a balancing test to determine the public importance of the matter being addressed by the employee and the degree to which the same would be disruptive in the workplace. *See Pickering v. Bd. of Township High Sch. Dist.* 205, 391 U.S. 563 (1968).

Protected Speech Outside the Scope of an Employee's Duties

- Examples of protected private speech include:
  - When an employee is called to provide truthful sworn testimony pursuant to a subpoena. *See Lane v. Franks*, 573 U.S. 228 (2014).
  - Voluntarily providing sworn testimony as part of an investigation of harassment and discrimination in the workplace. *See Bianchi v. Green*, 2019 U.S. Dist. LEXIS 55128 (N.D.N.Y. Mar. 29, 2019).
  - Advocacy by officers or representatives of an employee union in their union role. *See Montero v. City of Yonkers*, 890 F.3d 389 (2d. Cir. 2018).

“Other” Speech

- Political Paraphernalia
  - Buttons (e.g., BLM)
  - Pins
  - Hats (e.g., MAGA)
  - Flags
- Recitation of the Pledge of Allegiance
- Social media posts
  - Facebook “rants” and commentary
  - Photos on Instagram
  - Tik Tok Challenges

“Other” Speech – Political Paraphernalia

- Generally, a school District may restrict school staff from wearing political paraphernalia (e.g., buttons, pins). *See Weingarten v. Bd. Of Educ. Of City Sch. Dist. Of City of New York*, 591 F.Supp.2d 511 (S.D.N.Y. 2008).
  - “School districts have a legitimate pedagogical concern with the maintenance of neutrality … prohibiting teachers from wearing political buttons is constitutional so long as the school acted in good faith and reasonably could have regarded the button ban as furthering their legitimate pedagogical concerns.” *Weingarten v. Bd. of Educ. of City Sch. Dist. of New York*, 680 F.Supp.2d 595 (S.D.N.Y. 2010).

“Other” Speech – Social Media

- Employee speech on social media, outside of working hours, is not automatically protected if it is disruptive.
- Unprotected Social Media Speech:
  - Teacher’s Facebook post of a protective style (e.g., braid or loc) being compared to a black snake was found racially insensitive and undermined a teacher’s status as a role model in the class. *See* SED Case No. 39,182 (2023).
  - A teacher’s Facebook post complaining about her class and students. Specifically, that one of her classes was “suicide inducing,” that “students had potential but do nothing but cheat on everything,” that “one class was the weirdest in the history of classes,” that a student was “unteachable and the worst human being ever,” and that “all immigrants are potential gun carriers, and [she] use [her] gun to board the elevator in lieu of a swipe card.” *See* SED Case No. 18,152 (2012).

Employee Discipline

- District employees may be subject to discipline and dismissal for:
  - Speech that is not a matter of public concern
  - Speech that addresses a matter of public concern but is made pursuant to the discharge of official responsibilities rather than as a private citizen.
  - Speech as a private citizen that is disruptive. *See Melzer v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, 336 F.3d 185 (2d. Cir. 2003).
  - "Other speech" that violates District policy (e.g., dress code policy).

Hodgson Russ LLP ATTORNEYS

Community Speech

Hodgson Russ LLP
ATTORNEYS

“There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, *social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech.* The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry..”

- Lindke v. Freed, 601 U.S. 187 (2024)

Hodgson Russ LLP ATTORNEYS

Community Speech – Board Members

- Board members, as state actors, enjoy First Amendment protections.
- "A public official who prevents someone from commenting on the official's social-media page engages in state action … only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts"
- - *Lindke v. Freed*, 601 U.S. 187 (2024).

Hodgson Russ LLP ATTORNEYS

Community Speech – Lindke v. Freed

- *Lindke v. Freed*, 601 U.S. 187 (2024).
  - A City Manager blocked a constituent from his public Facebook page after the constituent commented that he was displeased with how the City was handling the COVID-19 pandemic. When the constituent's comments persisted the City Manager blocked him.
  - The Supreme Court held that the City Manager did not violate the First Amendment when blocking the constituent because, despite the use of his "mixed use page" he was not acting as a state actor when he did so. Rather, he was exercising his own First Amendment right.

Community Speech – *Lindke v. Freed*

- *"A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. The former is state action taken in his official capacity as school board president; the latter is private action taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president."*

Hodgson Russ LLP ATTORNEYS

Community Speech – *O'Connor-Ratcliff v. Garnier*

- *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).
  - Two Board Trustees had personal Facebook and Twitter pages which they used publicly to promote their campaigns for a seat on the board and to discuss issues related to the school district they worked for. After they won the election, the also posted school district related content (e.g., board meeting recaps, soliciting for board positions, budget plans, surveys, etc.), to communicate with constituents, and receive feedback from the community. Two parents often criticized the Trustees and began posting lengthy and repetitive comments on the Trustees' social media posts. The Trustees initially deleted the posts and ultimately blocked the parents. The parents filed suit.

Community Speech – *O'Connor-Ratcliff v. Garnier*

- *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).
  - The Ninth Circuit held that "§ 1983's state-action requirement was satisfied because there was a "close nexus between the Trustees' use of their social media pages and their official positions. The court cited its own state-action precedent, which holds that an off-duty state employee acts under color of law if she (1) "purports to or pretends to act under color of law"; (2) her "pretense of acting in the performance of [her] duties had the purpose and effect of influencing the behavior of others"; and (3) the "harm inflicted on plaintiff related in some meaningful way either to the officer's governmental status or to the performance of [her] duties." Applying that framework, the court found state action based largely on the official "appearance and content" of the Trustees' pages.

Community Speech – *O'Connor-Ratcliff v. Garnier*

- *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).
  - In a memorandum order, the Supreme Court vacated and remanded the O'Connor decision back to the Ninth Circuit to be decided consistent with its decision in *Lindke*.

School Board Meetings

- Generally, board meetings are considered open forums and community speech (e.g., speech from the public such as parents, community members) is regulated by a District's published rules.
- Although school board meetings must be open to the public, there is no requirement that school boards allow members of the public to speak at school board meetings. *See Appeal of Byrne*, 61 Educ. Dept. Rep., Dec. No. 18,089 (2022).
- Public Comment
  - Lewd, vulgar, and indecent speech is prohibited.
  - Personal attacks against Board Members and Staff can only be regulated to the extent compliments and other praiseworthy statements are regulated.
  - Social media

Hodgson Russ LLP ATTORNEYS

School Board Meetings

- Minimizing Disruptions
  - If a Board has opted to allow for public comment and participation, Boards can adopt policies that limit the time for a person to speak.
  - Boards can also limit the types of topics they allow public comment on.
  - Restrictions must be reasonable and viewpoint neutral.

School Board Meetings

- School districts may adopt rules to ensure the orderly conduct of meetings, consistent with recommendations of the Committee on Open Government.
  - These rules should govern, for example, community speech and video and/or audio recording of school board meetings.
- If a district adopts rules, the rules must be conspicuously posted during board meetings and written copies made available upon request to the community members attending.

Case Studies

Hodgson Russ LLP
ATTORNEYS

The “Jerk, rat-like, dunderhead” students

- A teacher maintained a personal blog outside of work hours to which she regularly shared posts and other content. After a rough day with her students, she posted on her blog that her students were “jerks,” “rat-like,” “dunderhead,” “whiny, simpering grade-grubbers” who had an “unrealistically high perception of [their] own ability [levels] and [were] frightfully dim.” In addition to calling her students these names, she also wrote that the parents were “breeding a disgusting brood of insolent, unappreciative, selfish brats.” The District was notified of the teacher’s blog post.

- Is the teacher’s blog post protected speech?

Hodgson Russ LLP ATTORNEYS

The “Jerk, rat-like, dunderhead” students

- No. The Third Circuit court found that the blog posts were an issue of public concern but were sufficiently disruptive to diminish any legitimate interest in the teacher’s right to speech. Accordingly, the speech was deemed unprotected. *See Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015).

“My students are the all the devil’s spawns!”

- Limited Resources Central School District West took the students to the beach as a year end celebration. One student tragically drowned during the field trip. Later that day, Tammy the Teacher wrote on her Facebook page “After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils spawn!” One of her Facebook friends then posted, “oh you would let little Kwame float away!” Tammy the Teacher responded, “Yes, I would not throw a life jacket in for a million!!” Another teacher told the Principal and Tammy was terminated.

- Is Tammy the Teacher’s Facebook post protected?

Hodgson Russ LLP ATTORNEYS

“My students are the all the devil’s spawns!”

- Yes. The Hearing Officer held that even though the story of the student drowning was in the newspaper and a matter of public concern, “When an employee’s expression cannot be fairly considered as relating to any pattern of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices without the intrusive oversight by the judiciary.” Both the lower court and Second Circuit affirmed the recission of termination as the teacher’s penalty. *See Rubino v. City of New York*, 106 A.D.3d149 (2nd Dept. 2013).

Hodgson Russ LLP ATTORNEYS

“Heck No, I won’t Go!”

- Mr. Henderson was required to attend and participate in Equity Training as a condition of his employment with Limited Resources Public School District. He complained that the District compelled him to speak at times and “chilled” his speech at times. Mr. Henderson refused to go, stating that the equity training was an unconstitutional condition of employment. Mr. Henderson filed suit against Limited Resources Public School for violating his First Amendment and Fourteenth Amendment rights.

- Were Mr. Henderson’s First Amendment Rights violated?

Hodgson Russ LLP ATTORNEYS

“Heck No, I won’t Go!”

- No. The 8th Circuit affirmed the lower court’s ruling that Mr. Henderson had no standing as he lacked an injury and added that Mr. Henderson’s purported “fear of punishment” was too speculative to support a cognizable injury.

Hodgson Russ LLP ATTORNEYS

Questions?

Hodgson Russ LLP
ATTORNEYS

HODGSON RUSS

Contact Us

ANDREW J. FREEDMAN

Partner

716.848.1322

afreedma@hodgsonruss.com

ASIA R. EVANS

Associate

716. 848.1543

aevans@hodgsonruss.com

Hodgson Russ LLP ATTORNEYS