Academic Freedom in the Classroom

To avoid courtroom disputes, inform teachers of their rights and responsibilities.

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In May 1980, 18-year veteran English teacher Cyril Lang was suspended by the Montgomery County, Maryland, school board for teaching unauthorized classics by Machiavelli and Aristotle to his tenth-grade students. His principal had repeatedly warned him that the county's curriculum developers believed the texts he used were too difficult for high school sophomores. Lang persisted, claiming that it was his right to teach such works as "Poetics" and "The Prince." Deemed guilty of insubordination and misconduct, Lang spent the 1980-81 school year working in the school system's research department. This September—having appealed his suspension to the Maryland State Board of Education where it is pending—Lang returned to teaching, but not to the ancient classics.

Academic freedom in the classroom is itself an ancient concept, as the death of Socrates attests. In its modern form, the concept can be traced to 19th century Germany, where it implied both the teacher's freedom to teach and the student's freedom to learn. Professional organizations in the United States, including the American Association of University Professors, the National Education Association, and the National Council for the Social Studies, have long supported the professional right of their members to academic freedom. Much of the controversy over the nature and extent of academic freedom in this country stems from the fact that it is not specifically mentioned in the Constitution.

In landmark cases, the United States Supreme Court has recognized the First Amendment rights of public school teachers to freedom of association outside the school and to freedom of expression outside the classroom. However, while the high court has recognized the college professor's claim to academic freedom in the classroom, the justices have left the public school teacher's claim to the same right to the determination of the lower courts. Since the 11 federal courts of appeals have not been consistent in their rulings, the legal status of academic freedom in the classroom varies geographically.

In early 1979, a school board in Texas refused to renew the contract of a high school history teacher. Members of the board were upset because the teacher had used a simulation game to introduce her students to the characteristics of rural life during the post-Civil War Reconstruction era. The role-playing triggered considerable controversy in the school and community. The teacher sued the school board in federal court, claiming the district had retaliated against her for exercising a protected constitutional right. The case led to the strongest statement of support yet issued from a federal court of appeals for a public school teacher's right to academic freedom in the classroom. The ruling departs significantly from state and federal courts' more common deference to school board authority.

"Liberal" Circuits

The Texas case was ultimately decided by the U.S. Court of Appeals for the Fifth Circuit with jurisdiction for Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida. The decision clearly placed the Fifth Circuit on the side favoring classroom academic freedom for the public school teacher. Judge Godbold flatly stated, "We thus join the First and Sixth Circuits in holding that classroom discussion is protected activity."[1] He went on to declare that the proper test to determine if a teacher has abused the right is not whether substantial disruption occurred, but whether such disruption overbalanced the teacher's usefulness as an instructor. Since there was no evidence that the teacher's usefulness had been impaired, the school erred in not renewing her contract. She was ordered reinstated.

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Of the three judicial circuits supporting classroom academic freedom, the Fifth is the most supportive. The U.S. Court of Appeals for the First Circuit affirmed its recognition of teacher classroom academic freedom in *Mailloux v. Kiley*, a 1971 ruling.[2] The case involved an eleventh grade English teacher who was dismissed for using the word "fuck" in class as an illustration of a taboo word in American society. Although the appeals court ruled in favor of the teacher, it was unwilling to issue blanket academic freedom rights to teachers and opted for a case-by-case inquiry.

The Sixth Circuit, with jurisdiction over Michigan, Ohio, Kentucky, and Tennessee, indirectly recognized teacher classroom rights in *Minarcini v. Strongsville School District*, a 1976 case involving library censorship. Commenting that "If one of the English teachers considered Joseph Heller's *Catch 22* to be one of the more important modern American novels," the court observed that "we would assume that no one would dispute that the First Amendment's protection of academic freedom would protect both his right to say so in class and his students' right to hear him and to find and read the book."[3]

More Conservative Circuits

The courts in the remaining eight circuits generally have upheld the power of the administration to control teacher classroom behavior. The primary rationale in their decisions is that as an employee, the teacher is justifiably held responsible to the employer. Should the teacher deviate from the prescribed lesson plan, the long recognized right of the state and local school board to determine the curriculum would be thwarted. Justice Black stated the proposition in its bluntest form in his dissent in the landmark student rights case, *Tinker v. Des Moines School District*: "Teachers in state controlled public schools are hired to teach there. . . . Certainly a teacher is not paid to go into school and teach subjects the state does not hire him to teach as part of its selected curriculum."[4]

The positions of those circuits currently upholding school board authority should not be overgeneralized, however. For example, in a 1979 Tenth Circuit (Wyoming, Utah, Colorado, New Mexico, Kansas, and Oklahoma) decision, the court recognized some degree of classroom academic freedom even though ruling for the state. Judge Logan noted that "We think teachers do have some rights of freedom of expression in the classroom, teaching high school juniors and seniors. They cannot be made simply to read from a script prepared or approved by the board."[5] A few courts have recognized that teachers of older students are entitled to more leeway in the classroom than teachers of young children. In effect, a sliding scale emerges where the teacher's right to teach varies directly with the age of the student.

The most recent decision in the academic freedom arena concerns the novel argument of the student's right to hear and/or know. The students in *Zykan v. Warsaw Comm. Sch. Corp.*, a 1980 case, were protesting the termination of an experimental English curriculum and the nonrenewal of its teacher. Two students sued, alleging that their "right to know" and "right to read" had been infringed, that the decisions were based on the personal tastes of the school board and not on pedagogy, and that the entire episode had had a chilling effect on the academic freedom of students and teachers alike.

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The U.S. Court of Appeals for the Seventh Circuit, with jurisdiction over Wisconsin, Illinois, and Indiana, agreed that students do have some entitlement to a "right to hear" in the classroom but held that the school board has "a vital and compelling interest" in selecting a suitable curriculum. The court noted that students lack the necessary skills to respond to a marketplace of ideas and noted further the interest of the school board in seeing that the intellectual development of students includes the assurance that the student will take an appropriate place in society. The court gave strong endorsement to school board authority, asserting that "The Constitution neither disparages the application of social, political, and moral tastes to secondary school educational decisions, nor specifies that such criteria are irrelevant or alien to the legitimate exercise of educational choice."[6]

Implications for Administrators and Teachers

The pattern of federal court rulings in the last decade suggests that while substantial recognition continues to be accorded administrative control over classroom activity, the claim of upper level public school teachers to some degree of academic freedom in the classroom has received growing judicial approval. Given the variations among the circuits, it is important for school boards, administrators, teachers, professional educational organizations, and those involved in teacher education to understand the law as it applies to them in their circuit. The law in this area does indeed depend upon where one lives. Until the U.S. Supreme Court rules on the issue, there will be no uniformity.

Because the law in this area is considerably unsettled, teachers should use caution in asserting a claim to engage in classroom discussion or to choose teaching methodology. In addition to knowing what the law is in their area, teachers should endeavor to ascertain what school policy is with respect to the role of the teacher in curriculum development and classroom control. In addition, since the quality of the employer-employee relationship has recently caught the attention of the Supreme Court,[7] teachers should be careful not to exercise recognized rights of expression in such a way as to seriously erode their ability to work with school administrators and colleagues.

In circuits recognizing at least some classroom academic freedom as a protected right, school authorities should devote more attention to developing legally sound school curriculum policies. Such policies should track the law in mapping out what rights teachers have to lead classroom discussions and to select teaching methodologies. If teachers are made aware of their classroom rights and responsibilities in advance, many potential disputes could be avoided. The case law in this area demonstrates that courts are reluctant to legitimize punitive actions against teachers in the absence of clearly developed and promulgated policies.

Teachers who abuse their classroom rights can, of course, be transferred, nonrenewed, or dismissed, but the burden of proof will be on administrators in circuits recognizing academic freedom for classroom teachers. This means that administrators must pay particular attention to documenting policy infractions. Managers in the industrial sector have developed the concept of "progressive

discipline'' to ensure fairness to the employee while at the same time building a record to guarantee that negative personnel decisions will not be overturned by the courts. Progressive discipline refers to an escalating pattern of sanctions against employees beginning with a counseling memorandum and ending with dismissal. Infractions are duly recorded, as are periodic conferences.

For progressive discipline to work in education, teacher classroom activities must be closely monitored and periodically assessed. Despite assertions to the contrary, teacher evaluation has not been done very well in most school districts. Building a record to convince the court of the appropriateness of a teacher transfer, nonrenewal, or dismissal will require a much more consistent and effective effort. Even though transfers and nonrenewals need not be accompanied by a recitation of reasons in many jurisdictions, administrators should be prepared to reveal them in case a disgruntled employee pursues the matter in court, alleging the transfer or nonrenewal was a retaliation for exercising protected rights.

The matter of teacher classroom rights raises complex problems for judges. The lack of consistency in judicial rulings suggests that judges are on unfamiliar ground and would probably much prefer that educators resolve these problems themselves. Developing policies that reflect the professional prerogatives of teachers, the interests of students, and the traditional right of school boards and administrators to set curriculum standards would be a step in this direction. Whether educators are up to such a task, however, remains to be seen. ■

[1] *Kingsville I.S.D. v. Cooper*, 611 F.2d 1109 at 1113 (5th Cir. 1980).

[2] 323 F. Supp. 1387 (D. Mass. 1970); *aff'd* 448 F.2d 1242 (1st Cir. 1971) (per curiam).

[3] 383 F. Supp. 698 (N.D. Ohio E.D. 1974); *aff'd in part*, 541 F.2d 577 at 582 (6th Cir. 1976).

[4] 393 U.S. 503 at 522 (1969).

[5] *Cary v. Brd. of Ed. of Adams-Arapahoe Sch. Dist.*, 698 F.2d 533 at 543 (10th Cir. 1979).

[6] 631 F.2d 1300 at 1306 (7th Cir. 1980).

[7] See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). A federal district court used the deteriorating employer-employee relationship approach in upholding the nonrenewal of a teacher in *Barbre v. Garland I.S.D.*, 474 F. Supp. 687 (N.D. Tx. 1979).