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School Speech: Whose Speech Is It Anyway and Why Does the First Amendment Care?*

by
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A key feature of First Amendment speech analysis in the public schools focuses on speaker identity. Speaker identity can play a crucial role in designing the First Amendment landscape on a variety of issues including the right of speakers to gain access to public school forums for expression,1 the right of student editors to control the content of school-sponsored publications,2 and the right of school administrators to permit religious speech in the public school setting.3

In all of these situations, the issue of speaker identity focuses on the distinction between the government’s own speech and the speech of private speakers. For example, when a private speaker seeks access to a potential public forum, the identities of the other speakers who are allowed access to the putative forum are critical to the success of the claim. If the only voice permitted in the forum is the government’s own voice, no access rights are created. This follows from the fact that the government is allowed to offer its own viewpoint without triggering any First Amendment obligation to provide equal access to opposing viewpoints.4 An opposite dynamic operates when the speech is religious speech. In that case, if the speech is attributed to school officials rather than private speakers, it will be forbidden by the First Amendment’s Establishment Clause.5

The government is very different from an individual when it comes to using its voice. When the government speaks, it must do so by allowing individuals to speak for it. The issue of speaker identity is relatively easy when the government speaks through its official representatives. In the school setting, this can mean an official policy adopted by

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4 E.g., Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 792 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005) (“when the government speaks for itself and is not regulating the speech of others, it may discriminate based on viewpoint”).

5 E.g., Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990) (“there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect”).
a school board, a statement by a school principal in her official capacity, or the speech of other school administrators.  

The distinction between government speech and private speech, however, is made more difficult by the fact that many speakers can speak in dual capacities, sometimes as individuals and sometimes as government spokespersons. For example, a teacher may be speaking as a government employee or may be speaking in her capacity as an individual citizen, a right that is not foreclosed by agreeing to work for the government. Even students can sometimes serve as the official voice of the government, not to mention outside speakers who the government can ask to express its official positions.

One example of this phenomenon occurred in *Downs v. Los Angeles Unified School District*.[8] In that case, the school district, to support its “Educating for Diversity” resolution, created a Gay and Lesbian Awareness Month and provided materials such as posters to support that theme. At Leichman High School, staff members created a bulletin board to celebrate Gay and Lesbian Awareness Month. The materials provided by the school district were posted on the board and, in addition, faculty and staff members could post other material related to the theme. While no permission was needed prior to posting material, the content of the board was under the supervision of the school principal.

The controversy arose when Robert Downs, a teacher at the high school who objected to the viewpoints expressed on the bulletin board, created his own bulletin board to post various items objecting to homosexuality. After he was told to remove the items because they were inconsistent with the school’s diversity theme, he sued the school district. His lawsuit claimed that the school district was engaging in viewpoint discrimination because it was only permitting pro-gay messages and excluding anti-gay messages. The Ninth Circuit rejected his First Amendment argument, finding that the high school’s Gay and Lesbian Awareness bulletin board was a place for the official views of the school and not for the views of private speakers.[9] While some of the material on the board was placed there by faculty and staff, in doing so they were acting as the school’s representatives and not in their private capacity.[10] Since the government is permitted to speak, and express its viewpoint, without creating a public forum and triggering rights of access for opposing viewpoints, the court dismissed Downs’ suit.[11]

A similar case arose more recently in South Carolina. In *Page v. Lexington County School District One*,[12] a parent sought access to the school’s information distribution

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6 But see *Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (school board member speaking at graduation spoke in private not official capacity).


8 228 F.3d 1003 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001).

9 *Id.* at 1012.

10 *Id.*

11 *Id.* at 1016-17.

system to distribute material supporting proposed school voucher legislation, legislation opposed by the school. The school district refused to grant the requested access. It defended its actions in court on the ground that it had not created a public forum because the only speech disseminated through the distribution system was the government’s own speech. The parent responded by arguing that some private speakers had been granted access as well. In analyzing a situation “where both government and a private entity are claimed to be speaking,” the federal district court relied on Fourth Circuit precedent to distinguish between government and private speech. The court’s analysis focused on a number of critical facts:

1. the central “purpose” of the program in which the speech in question occurs;
2. the degree of “editorial control” exercised by the government or private entities over the content of the speech;
3. the identity of the “literal speaker”; and
4. whether the government or the private entity bears the “ultimate responsibility” for the content of the speech.

While singling out these facts, the court acknowledged the difficulty of discerning speaker identity when it admitted that “the listed factors were neither ‘exhaustive [n]or always applicable.”

A related issue of speaker identity concerns the issue of whether speech that occurs in the context of a school-sponsored activity will be perceived as the public school’s own speech or that of a private speaker. Even if the speech is not an official pronouncement by a school administrator, the speech of teachers and even students will sometimes be attributed to the school. When speech “bears the imprimatur of the school,” the school can exercise greater content control over the speech. By contrast, if the views expressed by teachers or students will not be perceived as school-sponsored content, the school’s right to censor the speech is greatly reduced.

The issue of how to characterize the in-class speech of a teacher arose in Lee v. York County School Division. In that case, William Lee, a high school Spanish teacher in York County, Virginia, posted material on a bulletin board in his classroom. After receiving a complaint from a parent that the content of the bulletin board was religious, the principal removed 5 items from the board. In its decision in Lee, the Fourth Circuit considered which of two lines of precedent controlled, decisions that examined the rights of teachers as citizens to speak on matters of public concern or decisions that gave public school administrators considerable control over speech related to its curriculum. The court first concluded that Lee’s speech was not protected as speech engaged in by a

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13 Id. at *21 (quoting Sons of Confederate Veterans, Inc. v. Comm’r of Va. Dep’t of Motor Vehicles, 288 F.3d 610, 617 (4th Cir.), reh’g en banc denied, 305 F.3d 241 (4th Cir. 2002)).
14 Id.
15 Id.
17 484 F.3d 687 (4th Cir. 2007).
private citizen speaking on a matter of public concern since he was speaking as a teacher in a classroom setting and was engaging in curriculum-related speech.18

After concluding that Lee’s speech was curriculum-related, “school sponsored speech bearing the imprimatur of the school,”19 the court, relying on Hazelwood School District v. Kuhlmeier,20 deferred to the principal’s decision to remove the five items. According to the court, under the circumstances the teacher’s speech was not protected by the First Amendment and the dispute became an ordinary employment dispute.21

School prayer is another area where speaker identity is important. If the prayer is an official school prayer, a school-sponsored prayer, or even a school-encouraged prayer, it will be attributed to the school even if the prayer is delivered by a student or outside speaker. Under this circumstance, the prayer will violate the First Amendment’s Establishment Clause. On the other hand, if the delivery of the prayer is an independent utterance, and not encouraged by the school, the prayer will be private speech and permitted by the Establishment Clause.

In Santa Fe Independent School District v. Doe,22 the United States Supreme Court struck down a school district practice of allowing an invocation at home football games even though the invocation was recited by a student speaker. The Court rejected the argument that the prayers were permitted private speech due to the fact that the school district had sponsored an election in which students could decide whether to include prayer at the games as well as permitted the elected student to have access to the school’s public address system. In addition, the atmosphere at the “regularly scheduled, school-sponsored”23 games, with the school’s name displayed on uniforms, banners, and flags, communicated that all of the events at the game were school sponsored. “In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.”24

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18 Id. at 697 (“In these circumstances, however, applying the pertinent legal principles, Lee’s speech nevertheless was curricular in nature, because his postings of the Removed Items constituted school-sponsored speech bearing the imprimatur of Tabb High School, and they were designed to impart particular knowledge to the students.”).

19 Id. at 699.

20 Id. at 695 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)) (“We thus recognize that the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts.” (internal quotation marks and citation omitted)).

21 Id. at 700.


23 Id. at 307.

24 Id. at 308.
In contrast to Supreme Court’s decision in *Doe*, the Eighth Circuit upheld the recitation of the Lord’s Prayer at a high school graduation. Prayers had originally been part of the official graduation program, but the threat of a lawsuit had caused those prayers to be cancelled. A prayer was nevertheless inserted in the graduation when a member of the school board whose daughter was graduating was permitted to speak as part of a general practice of allowing board members to speak in this circumstance. As part of his speech, the board member, after referring to the change in the official graduation program, recited the Lord’s Prayer. A legal challenge to the inclusion of the prayer was dismissed. The court found that the school board member was not speaking in his official capacity as a member of the board, but was instead speaking as a private citizen. The private character of the prayer was reinforced by earlier statements at the graduation by the School Board President who informed those in attendance that the scheduled prayers had been cancelled, the fact that the school district had no advance knowledge the school board member intended to include a prayer in his remarks, and the entirety of the board member’s remarks which made it appear that he was speaking for himself and not in his representative capacity. Under these circumstances, the prayer was private speech and could not be attributed to the school district.

Another area where speaker identity is central is where the “speech” at issue is not the expression of a viewpoint, but is a decision to censor speech. Most of the time when censorship decisions are challenged in the school content, there is no doubt that the government has acted and the rejected speaker can sue based on the existence of “state action” that arguably violates the First Amendment. However, this is not always the case where a public school has put students in charge of a school activity, such as when they serve as editors for a school-sponsored publication. In that circumstance, the publication the students edit is certainly school-sponsored. However, the editorial decisions made by the students may not be the actions of the government. This can occur if the students are not acting to carry out any school policy and have not received any directive from a school official. When student editors exercise their own independent editorial judgment, a rejected speaker, such as an advertiser or someone submitting an article for publication, may encounter a barrier to suit because the challenged decision is not that of the government.

Courts faced with decisions about whether speech in the public school setting is private or government speech must consider the context in which the speech occurs to make this crucial characterization. This fact specific inquiry often turns on subtle distinctions in who initiates the speech and the relationship of the speech to school-approved content or school-sponsored activities.

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25 *Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003).
26 *Id.* at 613.
27 *Id.* at 612-13.
28 *Douglass v. Londonderry Sch. Bd.*, 372 F. Supp. 2d 203, 2007 (D.N.H. 2005) (“In other words, the First Amendment protects individuals against governmental action; it does not restrict the conduct of private citizens, nor is it violated when one private actor “suppresses” the speech of another.”).