

# **Teachers' Rights: The American Experience**

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## **Abstract**

In recent years teachers in the United States of America have seen their First Amendment academic free speech rights questioned by the courts. The need for teachers and school administrators to be aware of their possible personal liability in dealing with students' due process rights has been clarified in judicial decisions. At the same time, teachers' own civil rights including due process, equal protection, no harassment, no discrimination, the right to join teachers' unions and other job rights have been supported legally. Only public school teachers in America must be concerned with constitutional rights, such as due process and First Amendment freedom of speech in the classroom, since public school teachers are seen as state officers. Both public and private school teachers are covered by the appropriate non-discrimination laws.

This article explores the rights of teachers in the face of the need to provide the required student rights and consider possible limits of a teacher's free speech in the classroom. This is followed by a discussion of the rights of American teachers that reflect personal rights against any discrimination, and job protection rights.

## **The Need for Awareness by Teachers of Students' Rights**

All students in American public schools and colleges have due process and equal protection rights, granted by the Fourteenth Amendment. Due process means what is fair and applies to individuals. Equal protection applies to groups, or classes of people, to prevent discrimination by groups, such as the race or gender of similarly situated people. If a private school's contract with the parents or student includes terms that call for the use of due process, even though it did not have to do so, the private school must grant the student due process. This is by contract, and not by constitutional law, as in public schools. The teacher who violates a student's constitutional due process and equal protection rights may be found to have personal liability.

The Fourteenth Amendment calls for due process and equal protection to be applied to state government actions. The public school is part of state government, and its teachers and administrators may face possible liability for violations because they are considered state officers. The statute used for due process and equal protection is 42 U.S. Code § 1983. The Fifth Amendment calls for due process to be applied to federal government actions.

Due process is similar to the concept of natural law. Two kinds of due process must be known and observed by teachers: (a) substantive due process means the rules themselves and overall results must be fair; (b) procedural due process means the way one implements the rules must be fair, so that notice, hearing, and explanation are provided to students before disciplinary action is taken against the students. Public school students, from kindergarten through graduate school, have a right to due process in the areas of grading, attendance, cheating, suspension, and expulsion.

Any student with a disability who is accused of violating the student code, must be given a manifestation determination hearing before she/he is subjected to regular due process procedures. The manifestation determination hearing, conducted by the group which placed the student, determines if the student's misconduct was a manifestation of the student's disability. If it is determined to have been a manifestation of a student's disability, then the student with a disability will not be referred to regular due process procedures, but will be considered for appropriate placement by his individual education placement committee.

Students with disabilities are placed in either the special education program, Individuals With Disabilities Education Act Amendments of 1997, or Section 504 of the Rehabilitation Act (1973), where students are in regular classrooms with reasonable accommodations. These students are entitled to either an impartial due process hearing, or negotiations, to challenge the school's decisions on identification, evaluation, placement, free appropriate public education, re-evaluation and manifestation determination hearings. Regular teachers must take part in the Individual Education Placement meetings for special education students when their classroom is affected.

The courts have 'historically been reluctant to find Section 1983 liability for private educational institutions' (Mawdsley, 1997).

If the public school administrator or teacher reasonably should have known the due process rights of students, as set forth in clearly established law, then he/she can be held to be personally liable (to pay from one's personal funds) for all attorney fees, court costs, and other costs which spring from his/her violating the student's due process rights. These costs can be substantial.

A defense to a charge of violating a student's due process rights is qualified immunity. Qualified immunity shields officials performing discretionary functions from damage liability as long as their conduct did not violate clearly established statutory or constitutional rights of which a person should reasonably have known. Qualified immunity is an affirmative defense, thus the burden of proof is on the defendant. Good faith alone is not sufficient, and ignorance of the law is no excuse. A public school teacher charged in court with a violation of a student's due process rights has a right to show his or her knowledge and observance of settled and clear laws, of which she or he should have reasonably known, by using the defense of qualified immunity. If such a defense is shown to be acceptable by the court, no damages may be assessed to the teacher who is the defendant.

*Jackson v. Katy Independent School District* (1996) held that the doctrine of qualified immunity applies to officials sued in their official capacities.

In Alabama and certain other states, if the defendant is sued in federal court, money damages are possible. If, however, the defendant is sued in state court, only mandamus and injunctive actions against individuals found to have violated a student's due process rights may be ordered.

A teacher has a right to purchase liability insurance, if desired. Some insurance policies may not cover costs in a due process case, since for a public school or college educator not to know what due process is and how to utilize it may be 'outside the scope of duty'. Thus, after reviewing one's insurance policies, and considering one's situation, one may be able to decide if extra liability insurance is desired. Here is a liability checklist:

1. Know the state and federal laws governing liability;
2. Learn potential liability risks;
3. Guard against risks on the job;
4. Determine what your insurance coverage provides; and
5. Investigate the possibility of obtaining supplemental individual coverage, if desired or needed.

Due process also applies to search and seizure. Students frequently initiate violent acts as a result of gang or peer related pressures. When such tips are received the prudent actions to take are those that will ensure the safety and well being of students, personnel, and other clientele served by the schools. The U.S. Supreme Court, in *New Jersey v. T.L.O.* (1985), held that public school students have a Fourth Amendment privacy right. School administrators and teachers must have reasonable cause to search students. Police must have probable cause to search students.

In *Konop v. Northwestern School District* (1998), eighth grade students who were subject to a strip search by a teacher sought a declaration that strip searches are unconstitutional and asserted intentional infliction of emotional distress and battery claims. The court concluded that a student's Fourth Amendment right to be free from unreasonable searches in a school setting was clearly established at the time of the searches at issue. Also, it held that the principal's and teacher's strip search of eighth grade students for the allegedly stolen \$200 was without reasonable basis to believe a particular student had committed the crime.

Students are protected from the different forms of discrimination. Sexual harassment of a student by a teacher was considered by the U.S. Supreme Court in *Franklin v. Gwinnett County Public Schools* (1992). It allowed for the teacher to be required to pay monetary damages for intentional violations of Title IX. Title IX is a federal civil rights statute that provides for equal gender rights in education. A teacher has no right to discriminate against a student by sexual harassment or harassment based on race, religion, national origin, disability, age, or gender.

Thus, a public school teacher should know a student's rights including due process and equal protection in attendance, cheating, grading, expulsion, suspension, search, and seizure, harassment and any other discrimination. It is a teacher's right to practice preventive law by clearly following the law when around students, and knowing the proper defenses, such as qualified immunity, if charged with a violation. A teacher has a right to purchase liability insurance, if desired. Use of a Student Code of Conduct, a classroom syllabus and a Teacher's Handbook, updated annually, can assist teachers in knowing and making known the applicable laws and rules.

### **The Constraints of the First Amendment Cases**

In academic freedom cases, the courts have ruled against a teacher's exercise of free speech in teaching in public schools, and treated teachers as employees subject to discipline when their speech is considered disruptive and not a matter of public concern (*Connick v. Myers*, 1983). A balancing test of the protection of the employee's free speech against the employer's need to operate an efficient public organisation is often used (*Waters v. Churchill*, 1994).

In *Boring v. Buncombe County Board of Education* (1998), the court upheld a school board's decision for an involuntary transfer of a teacher from the high school to a middle school because of her choice of a play for drama students, and the language used in the play.

State laws give school boards the responsibility for the selection of curriculum in schools, and teachers may not be able to insert their own ideas into what they teach.

In *Peolza v. Capistrano Unified School District* (1992), the court held that a biology teacher who inserted his own theories into the curriculum has 'no constitutional right to conduct himself as a loose cannon in his classroom ... and teach scientific theories of his own choosing'.

The government as employer has much more power to restrict its employee's speech than does the government as sovereign. And 'the concept of academic freedom is more clearly defined in academic literature than in the courts' (*Cohen v. San Bernadino Valley College*, 1995). Cohen cites only two U.S. Supreme Court cases which protect the teacher's classroom speech conduct, and these cases are based on the establishment clause of the First Amendment (there shall be no established religion) not on freedom of expression (*Cohen v. San Bernadino Valley College*, 1995).

The right of teachers to participate in decision-making on policy, budgets, and curricula without administrative consent is legally non-existent in America. The court's holding that public college faculty do not have a First Amendment right to participate in these decisions is made more severe by the fact that many faculty may be unaware that their legal rights to participate in decision-making, or criticise their administrators, may be non-existent in many instances (Miles, Miller, & Anderson, 1996).

In *Minnesota State Board for Community Colleges v. Knight* (1984), the court held that faculty do not have the right to alter or amend any curricular item, such as a syllabus or lesson plan, without the permission of the supervisory administrator.

Teachers and administrators have real First Amendment freedom of association. They may join unions and bargain against their employing school boards without threat of retaliation. Teachers and administrators may also join private clubs of their choosing and engage in political activities, although they may be asked to take a leave of absence when they run for office.

State law on collective bargaining and the right of teachers to strike varies among the different states. In *Lehnert v. Ferris Faculty Association* (1991), the U.S. Supreme Court ruled in a Michigan case that a university bargaining unit could extract financial support from the entire faculty for the national activities of a union, whether all the faculty members had joined the local bargaining unit or not (Russo, Gordon, & Miles, 1993).

### **Teachers Rights to other Laws**

Other laws give rights to teachers. Teachers have clear rights in contracts, torts, due process for themselves, and non-discrimination and civil rights laws.

1. Contracts do not provide tenured employment. Oral contracts can be binding in teacher's issues, even when the statement was made without witnesses. A teacher has a right to enforce existing contracts, including oral ones. An oral promise by an administrator to a

teacher or coach can be binding, using agency and contract law, as in *University of Arizona v. County of Pima* (1986).

- a. In *Tuomala v. Regent University* (1996), university professors filed declaratory judgment suits seeking determination of rights under their faculty contracts. The court ruled that contracts did not provide permanent tenured employment.
2. Negligent and intentional torts may be brought by the teacher in the case of personal injury. In *St. Francis College v. Al-Khazraji* (1987), a professor who alleged discrimination based on national origin was allowed by the court to sue the individual members of the tenure committee using the tort of intentional infliction of emotional distress.
3. Due process can protect teachers' job rights. Only teachers in public schools who can show that they have a property or liberty interest may gain the constitutional rights of due process and equal protection. For faculty, *Board of Regents v. Roth* (1972) held that property interests stem from state law. In *Roth*, the U. S. Supreme Court held that Wisconsin laws did not grant property rights to non-tenured professors. Since *Roth*, the property right of a tenured professor or teacher is upheld in all states.
  - a. The liberty interest, however, flows from the U.S. Constitution, and is interpreted, usually, by deciding whether one's reputation has been severely injured in a termination so that 'the state inflicts damage to an employee's reputation, good name, or integrity' (*Bishop v. Wood*, 1976).
  - b. A teacher or administrator in public schools who has tenure through a property right such as state law is entitled to due process before suspension, termination, or transfer. In *Cleveland Board of Education v. Loudermill* (1985), the U.S. Supreme Court ruled that when a public employee with a property right is terminated for cause, a pre-termination opportunity to respond should be provided.
  - c. A teacher or administrator in a public school does not have a right to due process if he or she does not have a property or liberty interest. If, however, a teacher or administrator is on contract to a school and the school wants to terminate him or her before the life of the contract is over, then that person is usually entitled to a due process hearing.
4. Title VII of the Civil Rights Act of 1964 is the most litigated of the federal employment discrimination laws. It was extended in 1972 to cover both public and private educational institutions. Title VII states, at 42 U.S.C. Section 2000(e)(2), that an employer cannot 'refuse to hire or to discharge any individual or otherwise to discriminate...because of such individual's race, color, religion, sex or national origin'. The Equal Employment Opportunity Commission (EEOC) administers Title VII, and may investigate claims of discrimination in employment, sue violators or issue right-to-sue letters to possible victims of discrimination.
5. Teachers are protected from discrimination based on sex by Title IX. Title IX of the Education Amendments of 1972, states, 'No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving federal financial assistance'. Title IX was extended to cover employment, school sports and sexual harassment. In *Meritor Saving Bank v. Vinson* (1986), the U.S. Supreme Court held that a claim of 'hostile environment' sexual harassment is a form of sex discrimination under the Title VII employment discrimination statute. The Meritor decision held that the test of sexual harassment is whether the alleged sexual advances were unwelcome, not that the sex-related conduct was voluntary on the part of the person being harassed.

- a. There are two kinds of harassment: *quid pro quo*, which means an attempt to exchange a favor of power such as a promotion or salary raise for a sexual favor, and hostile environment. Both kinds of harassment may be addressed by teachers in Title VII and Title IX as an employment issue for teachers. Title IX can be for any kind of gender discrimination.
6. The American With Disabilities Act of 1990 provides broad-based protection for disabled persons in the areas of employment, facilities and auxiliary aids and services. Schools must observe the ADA guidelines on essential functions in job descriptions and the interviews and make certain that all job interviewers know and follow the correct timing of questions in job interviews. The ADA is perhaps the most sweeping anti-discrimination legislation since the Civil Rights Act of 1964 (Miles, Russo, & Gordon, 1991).
  - a. In *Meling v. St. Francis College* (1998), a terminated physical education professor sued the college, alleging that her termination violated the Americans with Disabilities Act and various state employment statutes. Following a jury trial, the trial court awarded the professor \$225,000 in compensatory damages and \$150,000 in punitive damages, and ordered her reinstatement. The court held that the evidence clearly established that the college acted with reckless indifference to the professor's rights under the ADA.
7. The Pregnancy Discrimination Act of 1978 explicitly incorporated pregnancy and related conditions into Title VII's prohibition against sex discrimination and employment. Educational employers cannot discriminate against or treat differently, employees or prospective employees because of pregnancy related conditions if such decisions can be shown to be based upon pregnancy-related factors and not poor job performance (Sharp, 1998).
8. The Family and Medical Leave Act of 1993 provides for twelve weeks unpaid leave for eligible employee to take care of themselves, their parents, their children, or their spouse. The FMLA applies to both public and private schools. There are special provisions applicable to instructional personnel (Miles, Russo, & Steinhelber, 1994).

## **Conclusion**

An awareness of one's legal rights and responsibilities is of increasing importance to the teacher in the United States of America. The American public school teacher especially must know and observe the students' clearly established constitutional and statutory rights. The defense of qualified immunity and the purchase of liability insurance are teachers' rights. A public school

teacher should be aware of the limits of academic free speech in the judgement of the teacher's supervisory administrator. Teachers have freedom of association rights and may join unions. A teacher has strong rights in job rights and non-discrimination laws.

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