

What Trustees Need to Know About Speech and Expression Issues on Campus: Legal Boundaries Explained

San Bernardino Community College District | June 22, 2026

Presented By: *Pilar Morin*

LIEBERT CASSIDY WHITMORE

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Agenda

- Free Speech – Basic Principles
- Student Speech
- Employee Speech
- Trustee Speech
- Social Media
 - Brown Act and Social Media
- Public Records Act

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Free Speech – Basic Principles

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Constitutional Free Speech

“Congress shall make no law . . . abridging the freedom of speech, or of the press”
U.S. Constitution, First Amendment

“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”
California Constitution, art. 1, section 2.

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Student Speech

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Broad Student First Amendment Rights Recognized

- Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”
- Can only be disciplined if speech “materially and substantially interferes” with discipline and operation of school, or
- “Collid[es] with the rights of others”

Tinker v. Des Moines Independent Community School District,
(1969) 393 U.S. 503.

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Education Code and Student Free Speech

- Governing boards and administrators cannot make or enforce any rule subjecting any student to disciplinary action based solely on:
 - The student's speech or
 - Other communication that would otherwise be constitutionally protected speech when engaged in outside of campus
- Districts cannot place prior restraints on student speech

Ed. Code, § 66301

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Education Code and Student Free Speech

- District policies and procedures cannot interfere with the right of students to exercise free expression including
 - Distributing printed materials or petitions
 - Wearing of buttons, badges, or other insignia
 - Speaking or protesting

Ed. Code, § 76120

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Education Code and Student Free Speech

- Exceptions - where that expression is:
 - Obscene, libelous or slanderous according to current legal standards, or
 - Which so incites students as to create a clear and present danger of the commission of unlawful acts on community college premises, or
 - The violation of lawful community college regulations
 - The substantial disruption of the orderly operation of the community college

Ed. Code, § 76120

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Student Speech

Remember that even offensive speech can be protected speech.

Ed. Code, § 66301

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Student Speech – *Layshock and J.S.*

- *Layshock v. Hermitage Sch. Dist.* 2011 WL 2305970 (3d Cir. 2011) (en banc)
 - High School Student when off-campus created fake MySpace profile of his principal, in which principal stated he was drunk and promiscuous
- *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 2011 WL 2305973 (3d Cir. 2011) (en banc)
 - Middle School Student did the same, arguing her principal sought sexual relations with students, and insulting principal's family

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Student Speech – *Layshock and J.S. (cont.'d)*

- In both cases, First Amendment precluded discipline, because insufficient disruption on campus
- College students thought to have substantially greater free speech rights than high school students, so reasoning probably applies to colleges

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Student Speech – Compare Defamation

- Social media speech by high school student suggesting that her fellow student had Herpes was not protected by First Amendment
- “Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created ‘actual or nascent’ substantial disorder and disruption in the school.”

Kowalski v. Berkeley County Schools,
(4th Cir. 2011) 652 F.3d 565

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Employee Speech

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Employee Speech: Is It Protected Speech?

The Two-Part Test:

Is the District Employee Speaking:

1. As a private citizen?
2. On a matter of public concern?

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**Employee Speech:
The *Pickering* Balance**

Interest of employee, as a citizen, in commenting on matters of public concern
vs.
Interest of public employer in promoting efficiency of the public services

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Free Speech: Speech Must Be Made in the Role of a Private Citizen

- To be protected by the First Amendment, speech must be made in the employee's role as a **private** citizen; not as part of the employee's **official** capacity
- If the speech is made in an official capacity, such as comments as part of official duties, the speech is not protected by the First Amendment

Garcetti v. Ceballos (2006) 126 S.Ct. 1951.

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Case Study – Public Concern

Faculty member Dr. Sams posts comments on Facebook and Instagram stating, among other things, that he disagrees with California's protections for transgender individuals and undocumented immigrants.

Dr. Sams argues that this speech is protected because he is speaking about a matter of public concern. Is he correct?

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The Constitution and Employee Speech

- Speech by public employees at work is afforded greater protection than that of private sector employees
- Employees do not give up free speech rights when working for government
 - BUT: CCDs must still run an efficient, safe, and inclusive workplace

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“Hate Speech”

- “Hate speech” includes protected classifications, including ancestry, national origin religion, race, gender, sexual orientation, etc.
- No “hate speech” exception to First Amendment
 - *RAV v. St Paul*, 505 U.S. 377 (1992) (Scalia, J.).
- Potential exception if targets individual, actually violates rights to employment or education
- Many institutions punish and take First Amendment risk
- But institution can refrain from punishing, and use First Amendment to protect from liability
 - *Rodriguez v. Maricopa CCD*, 605 F.3d 703 (9th Cir. 2010).

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Employee Speech: Academic Freedom

- Academic Freedom
 - Freedom to investigate, teach, and publish without undue interference
 - Protects faculty participation in governance
 - Extends to speaking as private citizens
- Faculty have academic freedom rights
 - Through policies and collective bargaining agreements
 - Through First Amendment - academic freedom in “scholarship and teaching”

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Academic Freedom

Courts must grant a “degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” *Grutter v. Bollinger* (2003) 539 U.S. 306

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Academic Freedom

- *Demers v. Austin* (9th Cir. 2014) 746 F.3d 402 -Public university professor circulated written critique of departmental governance
 - Garcetti inapplicable to speech related to scholarship or teaching; Pickering applies
- *Heim v. Daniel* (2d Cir. 2023) 81 F.4th 212 Public university adjunct professor challenged adverse decisions based on academic methodology
 - Garcetti inapplicable, but university’s hiring and academic-governance interests outweighed professor’s speech under Pickering
- *Kilborn v. Amiridis* (7th Cir. 2025) 131 F.4th 550 - Public university professor disciplined for exam question and in- and out-of-class remarks on public issues
 - Speech involved matters of public concern; reverse dismissal of First Amendment retaliation

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**Employee Speech Recap:
Is It Protected Speech?**

- Is the District Employee Speaking (1) As a private citizen (2) on a matter of public concern?
- Political, social, or community issues (protected)
- Personal grievances/internal disputes (not protected)
- Courts consider content, form, and context
- *Garcetti v. Ceballos* (2006): No First Amendment protection for speech made pursuant to official duties
 - Colleges can discipline job-duty speech (e.g., reports, advising, assigned teaching)
 - **Exception:** *Demers v. Austin* (2014, 9th Cir.) → Garcetti does not apply to academic speech, but must still apply balancing test

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Free Speech – Protected or Unprotected?

Unprotected Speech and Conduct:

- Speech not protected by the First Amendment
 - Defamation
 - "Fighting words"
 - True threats
 - Unlawful harassment/discrimination.
 - Obscenity

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Overlapping Statutes & Laws Affecting Speech & Behavior

- Laws Affecting Rights and Obligations
- California
 - FEHA & Federal Anti Discrimination Statutes
 - Labor Code
 - Education Code
 - Election Code
 - Union Activity
 - District's Electronic Communications/Resources Use Policy
 - SB 2 re Peace Officers

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Trustee Speech

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Trustee Speech

- Trustees are elected officials, not employees of the District: employee speech rules (*Pickering / Garcetti*) do not apply
- Trustees retain First Amendment rights as private citizens, i.e., when:
 - Expressing personal views on public or political issues
 - Speaking outside official Board meetings or actions
 - Using personal platforms (e.g., social media [but note there are Brown Act restrictions])
 - Not claiming to speak on behalf of the District
- The Board may still censure a Trustee for speech

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Unprotected Trustee Speech

- Trustee speech is not protected when acting in an official capacity
 - Voting or participating in Board decisions
 - Use of official authority or position
 - Conduct as part of the legislative process
- Trustees may not disclose confidential information obtained through their role (e.g., closed session, student records, legal advice)

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Case Study – Social Media

Sara Smith is a member of the Presidential Community College District’s Board of Trustees. She maintains two Instagram accounts, an official account and a personal account. Trustee Smith’s personal account also served as her official campaign account when she ran for a seat on the Board. Both of her accounts are “public,” meaning that Instagram users do not need to “follow” to Trustee Smith’s Instagram page to view her tweets.

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Case Study – Social Media

While Board seats are non-partisan, Trustee Smith is generally considered to be in the “minority” on the Board. Trustee Smith and Trustee Garcia recently voted in the minority against a Board resolution that would have allowed homeless students to use campus parking lots for overnight parking. Leading up to the vote, Trustee Smith took to her personal Instagram account to criticize the resolution. After receiving pushback in the comments section of her posts, she “blocked” several constituents who criticized her viewpoints.

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Case Study – Social Media

Was Trustee Smith’s act of blocking constituents from her personal Instagram account unconstitutional?

What if Trustee Smith’s personal account was not public?

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Trustees and Social Media

- A Trustee’s account may be considered official if:
 - It discusses Board business or District matters
 - The Trustee appears to speak in their official role
 - It is used to communicate with the public about District issues
- If so:
 - The account may be treated as a public forum
 - The Trustee may not restrict speech based on viewpoint (e.g., blocking critics, deleting comments)

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CCD-Hosted Social Media

- How can a CCD abide by the First Amendment on its social media page?
 - Specify that obscene, defamatory, and other similar comments are not permitted
 - Any restrictions must be viewpoint neutral
 - Government Speech Doctrine
 - The doctrine allows the CCD to control the content of its own posts and messages

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Case Study

A District hosts a social media page to notify students, faculty, and the community about important dates and events. A community member posts a comment on the District's social media page that makes allegations of misconduct against a District administrator. The District wants to remove the comment from its page.

May the District do so?

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Social Media

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Free Speech vs. Social Media

- Social Media is:
 - The “modern public square”
 - Represents a space for public discourse
 - Provides “the principal sources for... Current events... and otherwise exploring the vast realms of human thought and knowledge.”

Packingham v. North Carolina (2017) 137 S. Ct. 1730.

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CCD-Hosted Social Media

- Best Practices:
 - Specify that obscene, defamatory, and other similar comments are not permitted
 - Any restrictions must be viewpoint neutral
 - Government Speech Doctrine
 - allows the CCD to control its own messages and posts

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Case Study

A District hosts a social media page to notify students, faculty, and the community about important dates and events. A community member posts a comment on the District’s social media page that makes allegations of misconduct against a District administrator. The District wants to remove the comment from its page.

May the District do so?

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The Brown Act & Social Media Issues

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What is a Meeting Covered by the Brown Act?

- Congregation of a majority of members of a legislative body
 - Same time and place
 - To “hear, discuss, or deliberate”
 - On any item within its subject matter jurisdiction
 - Regardless of reaching collective concurrence

Government Code section 54952.2

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Be Careful – Serial Meetings Prohibited!

- No communication between majority
 - Through email, telephone, intermediaries, etc.
 - To hear, discuss, or deliberate on any item within the subject matter jurisdiction of the district
- Cannot use individual contacts to bypass Brown Act

Government Code section 54952.2, subd. (b)

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Social Media and the Brown Act

- Trustees may discuss matters within jurisdiction
 - With members of the public
 - On social media
- But cannot:
 - Discuss agency business with majority of Board
 - Respond directly to another Trustee
 - Including emojis, liking, etc.

Gov. Code, § 54952.2

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Trustee Best Practices

- Participate in training on the Brown Act, ethics, conflicts of interest, and First Amendment issues
- Know and follow the District's Board Policies and Administrative Procedures
- Seek guidance when you are unsure about a legal or governance issue
- Protect confidential information, including closed-session discussions and privileged communications
- Use caution when communicating through email, text messages, and social media
- Maintain public trust by acting with transparency, accountability, and respect for Board governance processes

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Public Records Act

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Public Records Act

- Allows members of the public to access public records
- Public records includes any writing relating to the conduct of the public's business prepared, owned, used, or retained by the district

Gov. Code, § 6252.

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Public Records Act

- Writings includes emails and text messages sent by public officials or public employees on their **personal** accounts
 - Must involve "official business"
- PRA Exceptions Apply
 - e.g., personnel files, balancing test, privilege, etc.

City of San Jose v. Superior Court of Santa Clara County (2017) 2 Cal.5th 608.


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Public Records Act

Writings concerning public business are public records even if they are sent, received, or stored on an employee's personal email, phone or computer.

City of San Jose v. Superior Court (2017) 2 Cal.5th 608.



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Questions?

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Thank You!
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