

Denise Specht
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Bernie Burnham
Vice President

Rodney Rowe
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Sara Gjerdrum
Executive Director

Educator Speech in Support of Black Lives Matter: Legal Protections and Limitations in 2020

While the primary purpose of this document is to provide legal information to Education Minnesota members based on existing law, as a matter of general policy, Education Minnesota recognizes the need for all schools in the state to take bold action to eliminate long-standing racial opportunity gaps that permeate our education system. See our recent [EPIC paper](#) for a detailed discussion of racial equity concerns and our proposed policy solutions. Education Minnesota has [condemned](#) the death of George Floyd while in police custody, and supports all educators who take steps to make their classrooms and schools more equitable for students of color and LGBTQ+ students.

Education Minnesota also understands that educators cannot do this work alone. Education Minnesota calls on school administrators, school boards, parents and other community organizations to do the work necessary to show that our schools are open to and inclusive of all students, and that our schools can be part of the solution to solving the many problems created by systemic racism in the United States.

What constitutes “speech” in this context?

Speech includes oral speaking, posters, T-shirts, Bitmojis, arm bands, masks, etc.

What laws apply to this analysis?

We have a backdrop of Minnesota’s public sector labor law (PELRA) and federal law (the First Amendment) with consideration of individual district policies as well:

PELRA protects employees who express their views about their jobs (as long as they are not interrupting their own work performance and not disrupting the work/worksite).

The “Expression of Views” Protection:


Conversations and other communications regarding employee working conditions are protected under PELRA. Employees and employee representatives are permitted to **“express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment,** so long as this is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative.” Minn. Stat. § 179A.06, subd. 1 (2018).

The First Amendment provides very limited protections for public employees who are expressing concerns about their work or speech made at work, but does protect speech made on a matter of public concern that does not disrupt the workplace. Under current case law, a public employer may not discipline an employee for engaging in constitutionally protected speech, but not all speech is constitutionally protected.

Speech that is made pursuant to an employee’s official duties is not constitutionally protected. The U.S. Supreme Court held in *Garcetti* that **“when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from discipline.”**

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41 Sherburne Ave., St. Paul, MN 55103
651-227-9541 800-652-9073 Fax 651-292-4802
www.educationminnesota.org

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If the speech was not pursuant to the employee's official duties, the courts will analyze whether the speech touches on a matter of **public concern** (which is protected under the Constitution) or private concern (which is not). Courts will weigh:

- Whether the speech was made primarily in the employee's role as citizen, or primarily in the role as employee.
- Whether the speech relates to a matter of political, social or other concern to the community.
- Whether the speech addresses only internal practices that are relevant only to the people involved. If so, the employee speaks as an employee and such speech is not protected. Accordingly, the airing of personal grievances by an upset employee does not raise a free speech issue.

If the speech is regarding a matter of public concern, the courts will balance the employee's right to free speech against the school district's interest in the effective functioning of its organization. A school district may only prohibit an employee from speaking about issues of public concern if the school district can show that the speech would create disruption--disharmony in the workplace, impeding the speaker's ability to perform his or her job duties, or significantly impairing the working relationship with other employees who work closely with the speaker. Courts have routinely held that educator speech in the classroom regarding personal religious or political beliefs is not protected by the First Amendment, but we are not aware of case law specifically addressing Black Lives Matter signs, buttons or posters.

District policy: Most districts have retained sole authority for setting the curriculum (which includes materials used and content discussed). It is lawful for a district to restrict the posting of political and other non-curricular items in classroom spaces. You are generally considered to speak for the district when you are in a classroom setting, and typically, the district will require that because students are a captive audience, teachers and other educators not try to persuade them to adopt their personal views.

Frequently Asked Questions:

1. What can I do to visibly support Black Lives Matter in my work area in the school setting?

To the extent you can frame your message of support for Black students as being related to your working conditions (my classroom is a safe space for Black and Brown students; at this school/in this department, we are fighting for the rights of our BIPOC students to have educational justice and equality, etc.), this is more likely to be speech protected by PELRA, although this is untested. In addition, most district policies allow speech/displays that promote tolerance and acceptance of students and beliefs.

Staff are also able to engage in visible support in areas unregulated by the district, like putting stickers on cars that are parked in the school parking lot, putting frames around Facebook profile pictures, etc.

2. Can the union visibly support Black Lives Matter in the school setting?

The union also has rights under PELRA as the employee representative to engage in speech about working conditions provided it does not interfere with employees' duties (including instruction).

Moving from individual to collective action within your building or local can be a powerful way to mitigate risk while also bringing people together to address racism and support BIPOC students. The Mounds View Education Association recently ordered T-shirts with the image to the right and their local's logo to express solidarity with BLM and students and families of color.



3. Can I wear a Black Lives Matter T-shirt, mask or button when I'm working as an educator?

In most settings this is permissible provided it does not interfere with the educational environment. If this demonstration of support for students does lead to disruption or controversy by those opposed to this message of support, this is an issue that should be addressed system-wide.

4. If my district requires me to remove a mask or take down a poster, what should I do?

We often advise members to “obey now and grieve later” to avoid an additional charge of insubordination. The practical reality is that some educators may be willing to accept the possible disciplinary consequences of refusing to remove pro-BLM signage as a way to make a statement and potentially change existing policies. In the case of posters, you could also indicate that you prefer the district remove them (which they most likely have the authority to do). In the event you are subjected to discipline for making these choices, Education Minnesota's legal department will provide representation to your local if requested. However, because of the district's rights in this area, these will likely be difficult cases to win. Probationary teachers will be especially vulnerable if they are failing to follow lawful directives.

The best way for a guaranteed result is to organize the community to help the district see that these are messages of support, not disruptive political statements. Here is an [article](#) explaining that BLM is not a hate group, and several resources from the NEA on [BLM in Schools](#).

As a local [example](#), educators' actions in Delano to support inclusion were ultimately permitted when the district received community pressure to counteract the original wave of intolerant complaints.

5. Can I be disciplined for discussing Black Lives Matter with students?

What you say or communicate inside the classroom is considered speech on behalf of the school district, and therefore, will not be entitled to much protection if the district is unsupportive. Districts set the curriculum and may need to be convinced how this issue ties into your curriculum or supports the students' social/emotional learning (SEL). Many districts are permitting staff to facilitate important discussions about Black Lives Matter and to pledge that students (and particularly Black students) are safe in their school space. Other districts, however, are framing such messages as unsanctioned political speech, or reacting to students or families who oppose the messages. Although these districts do have the right to restrict speech/messaging in their buildings generally, this may be an issue for the broader community to address. Students and families will likely have strong opinions about allowing messages of support to be conveyed and issues of educational inequity to be addressed.

6. Can I talk to students about my personal activities in attending a Black Lives Matter demonstration?

If you have not specifically been instructed not to share your personal beliefs, you are in a better position to defend this discussion. If, however, you have been instructed not to discuss with students your personal opinions or to attempt to influence them to share particular beliefs, this speech may not be protected. Courts have found that teachers can be disciplined for departing from the curriculum adopted by the school district, and inserting your personal experience as a protester could be considered such a departure.

7. Can I rally support of students and families?

Although you cannot do so on work time, you can absolutely do so in your personal time through personal (non-work related) channels. For example, you can work with the union to organize parents, PTAs/PTOs and other community organizations. You can also speak publicly on issues of public concern (how will our district demonstrate that our Black and brown students are safe and treated with respect in the educational setting?) and your views related to your conditions of employment (I, as a public employee of ____ district am not permitted to post support for my BIPOC students and this feels like I am then not allowed to attempt to address the educational inequities that they have experienced on a systemic basis). You can do this at school board meetings and other public events that you attend in your personal capacity.

While this document is focused on educator support for Black Lives Matter, the above analysis applies to other student-centered social justice issues as well. Additionally, Education Minnesota has a Social Justice Rapid Response team that can help educators organize and coordinate thoughtful and strategic responses to insensitive or offensive incidents pertaining to race, gender, sexual orientation, nationality, and class. Please contact your field staff for more information or advice.