

Use of School Resources, Crazy Political Times, and The First Amendment



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Plan for Today



- Religious Expression and the First Amendment
- Use of School Resources and the First Amendment

Religious Expression and the First Amendment



"Not to be argumentative, but go to hell, Ernie."

Kennedy v. Bremerton Sch. Dist.

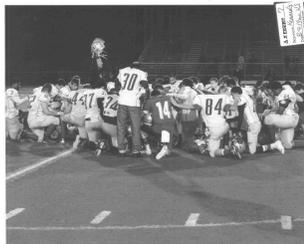
(U.S. June 27, 2022)



- A Tale of Two Coaches
 - What you've seen in the news: "Coach can pray on field."
 - What's real: very limited facts used by the Court
- Prior to October 2015
 - Locker room prayers
 - Team prayers led by Kennedy

Kennedy v. Bremerton Sch. Dist.

(U.S. June 27, 2022)



Kennedy v. Bremerton Sch. Dist.

(U.S. June 27, 2022)



Photograph of J. Kennedy in prayer circle (Oct. 16, 2015).

Jesus take the kneel: when 15 feet makes all the difference...



Kennedy v. Bremerton Sch. Dist.

(U.S. June 27, 2022)



- October 2015
 - Private, solo prayers
 - About 30 seconds

Kennedy v. Bremerton Sch. Dist.

(U.S. June 27, 2022)



- Court applied *Pickering-Garcetti* test
- Kennedy was speaking as a private citizen, outside of his official duties:
 - “Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters.”
- Kennedy’s conduct was therefore entitled to protection under the First Amendment.

Kluge v. Brownsburg Cmty. Sch. Corp.,

548 F. Supp. 3d 814 (S.D. Ind. 2021)



- “What’s in a name? William Shakespeare suggested maybe not much, for “that which we call a rose, by any other name would smell as sweet.” But a transgender individual may answer that question very differently, as being referred to by a name matching one’s identity can provide a great deal of support and affirmation. This case involves the legal ramifications of a public-school corporation’s practical response to that philosophical question.”

Kluge v. Brownsburg Cmty. Sch. Corp.,

548 F. Supp. 3d 814 (S.D. Ind. 2021)



- John Kluge was ordered to refer to transgender students by their preferred names and pronouns
- Kluge was forced to resign after not complying; sued
- 7th Cir previously: no free speech claim; no free exercise claim, but Title VII religious accom. claim survived
- Second round in district court
 - Failure to accommodate his religious beliefs
 - Retaliation

Kluge v. Brownsburg Cmty. Sch.

Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021)



- Dist. Court: no failure to accommodate or retaliation
 - Schools not required to grant accommodates that place them "on the razor's edge of liability"
 - "[C]ontinuing to allow Mr. Kluge an accommodation that resulted in complaints that transgender students felt targeted and dehumanized could potentially have subjected BCSC to a Title IX discrimination lawsuit brought by a transgender student."

Kluge v. Brownsburg Cmty. Sch.

Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021)



- Kluge: but what about academic freedom and the fact college professors get away with so much more?!
- Court: "courts have continually emphasized the distinction between public K-12 schools and universities in addressing speech and other constitutional issues"
 - This is important for other areas

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



- Middle school teacher had two students who were born female but identified with male pronouns
- Teacher was suspended for not using preferred pronouns for one of the students
 - District utilized general non-discrimination policy
 - Board *subsequently* enacted policy
 - Teacher sued because she believed compliance would require her to violate her religious beliefs

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



- Preferred Pronoun Policy
 - "Students will be called by their preferred name and pronouns."
- Communication with Parents Policy
 - Forbid disclosure of preferred pronouns/name usage to parents w/o student consent
 - No distinction between intentional and not
- Teacher requested court to prevent district from enforcement with an injunction

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



- Injunction required:
 - Likely to Succeed
 - Irreparable Harm
- Court: No irreparable harm on pronoun policy
 - Agreement between parties to use first names
- However: Plaintiff is likely to succeed on the merits re: parent communication policy
 - Regular communication with parents would put plaintiff in impossible position
 - "Plaintiff would face the Hobbesian choice of complying with the District's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline."

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



- Because the policy burdened religious rights, it must be "neutral and generally applicable" to survive challenge
- Court held it was not generally applicable as other teachers were not disciplined for accidental disclosures
- School also admitted it would produce records to comply with FERPA request
 - "Thus, the District is willing to make an exception for the secular purpose of complying with federal law, but not religious reasons."

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



- Court: District cannot discipline teacher for violating Communication with Parents policy during the rest of the case
- Injunction lasted for remainder of contract—which ended in May

Ricard v. USD 475 Geary Cty.

2022 U.S. Dist. LEXIS 83742



Kansas public school pays \$95K after suspending teacher for refusing to deceive parents
APL attorney representing middle school teacher secure favorable settlement in First Amendment case
 Wichita, Aug 11, 2022

Vlaming v. West Point School Board (VA)



- Vlaming, a ten-year teacher, refused to use the preferred pronouns for a transgender student
- Several meetings with Supt., PAL, and Board Members
- Placed on administrative leave, later fired for insubordination
- Lots of community support
 - 150 student walkout
 - Go Fund Me for \$75,000

Blaming v. West Point School Board (VA)



- Teacher sued for \$1M under state constitution
 - Free speech and free exercise of religion
- Using male pronouns violates his conscience and goes against his religious beliefs
- Trial court dismissed all claims
- Appealed to the VA Supreme Court
- VA Supreme Court agreed to hear the case March 3rd
- Still waiting to be heard, amicus briefs filed in August 2022

Policy and Contract Solutions to Implement re Religious Expression



- Make clear what is allowed while on duty ("the pizza test")
 - Certificated teachers
 - Classified staff
 - Community coaches
- KSB recommends against a policy on transgender students (case by case)
 - But check your policy for "gender"
 - But be wary of making teachers lie

Use of School Resources and the First Amendment



"I love reading. I read about 3 hours a day. My favorite book is Facebook."

Workplace Privacy Act



- Neb. Rev. Stat. 48-3501 *et seq.*
- Restricts employers from
 - Requesting username and password for "personal internet account"
 - Requiring employee to "add" anyone, including the employer
 - Taking adverse action or discriminating if an employee refused to disclose account information

Workplace Privacy Act



- Personal Internet Account
 - An individual's online account that requires login information in order to access or control the account
- Does not include
 - An online account that an...educational institution supplies or pays for, except when the employer or educational institution pays only for additional features or enhancements to the online account
 - An online account that is used exclusively for a business purpose of the employer

Political Activities, Generally



20-160. Employees of state or political subdivisions; prohibited from political activities during office hours, while performing official duties, or while wearing a uniform.

Unless specifically restricted by a federal law or any other state law, no employee of the state or any political subdivision thereof, as defined in subdivision (2) of section 13-702, shall be prohibited from participating in political activities except during office hours or when otherwise engaged in the performance of his or her official duties. No such employee shall engage in any political activity while wearing a uniform required by the state or any political subdivision thereof.

"Use of Public Resources or Funds"



49-14,101.02. Public official or public employee; use of public resources or funds; prohibited acts; exceptions.

(1) For purposes of this section, public resources means personnel, property, resources, or funds under the official care and control of a public official or public employee.

(2) Except as otherwise provided in this section, a public official or public employee shall not use or authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

(3) This section does not prohibit a public official or public employee from making government facilities available to a person for campaign purposes if the identity of the candidate or the support for or opposition to the ballot question is not a factor in making the government facility available or a factor in determining the cost or conditions of use.

"Use of Public Resources or Funds"



(8) Nothing in this section prohibits a public official from campaigning for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate when no public resources are used.

(9) Nothing in this section prohibits a public employee from campaigning for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate when no public resources are used. Except as otherwise provided in this section, a public employee shall not engage in campaign activity for or against the qualification, passage, or defeat of a ballot question or the nomination or election of a candidate while on government work time or when otherwise engaged in his or her official duties.

School E-mail & Politics



- Nebraska Political Accountability and Disclosure Act
- In the Matter of Michael Nolan, Case No. 07-03:
 - Norfolk City Manager used city's e-mail to send message opposing referendum
 - Used his own computer; outside work time
 - Used city's e-mail system, using the city's e-mail server and the city's internet service provider

“De Minimis”



49-14,101.03. Public official or public employee; incidental or de minimis use of public resources; permissible activities and uses.

(1) Any use of public resources by a public official or public employee which is incidental or de minimis shall not constitute a violation of section 49-14,101.01 or 49-14,101.02.

(2) For purposes of sections 49-14,101.01 and 49-14,101.02, a resource of government, including a vehicle, shall not be considered a public resource and personal use shall not be prohibited if (a) the use of the resource for personal purposes is part of the public official's or public employee's compensation provided in an employment contract or a written policy approved by a government body and (b) the personal use of the resource as compensation is reported in accordance with the Internal Revenue Code of 1986, as amended, and taxes, if any, are paid. If authorized by the contract or policy, the resource may be used whether or not the public official or public employee is engaged in the duties of his or her public office or public employment.

“De Minimis”



(3) Use of a government vehicle by a public official or public employee to travel to a designated location or the home of the public official or public employee is permissible when the primary purpose of the travel serves a government purpose and the use is pursuant to a written policy approved by a government body.

(4) Pursuant to a collective-bargaining agreement, a public facility may be used by a bargaining unit to meet regarding activities of the union or bargaining unit. This section shall not authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

(5) Nothing in the Nebraska Political Accountability and Disclosure Act prohibits a public official or public employee from using his or her personal cellular telephone, electronic handheld device, or computer to access a wireless network to which access is provided to the public by a government body.

A quick note on “de minimis” use of public resources...



WIRECUT EDITOR'S PICK

Ricketts calls for resignation amid allegations Sen. Kintner had explicit video on state computer

SACH FLUHACKER and JOANNE YOUNG Lincoln Journal Star Updated 3 hrs ago (12)



Gov. Pete Ricketts has urged state Sen. Bill Kintner of Papillion to resign if allegations are proven true that Kintner exchanged sexually explicit video of himself using his state computer.

A source familiar with the situation said Kintner told investigators about the video when he asked the Nebraska State Patrol for help with computer problems in July 2015.



State Sen. Bill Kintner courtesy photo

Policy and Contract Solutions to Implement re Use of Property



- Collect a list of school social media accounts with usernames and passwords
- Be sure "de minimis" use of school resources is allowed somewhere in policy or contract
 - But you'll have to take the bitter with the sweet
- Be sure to train board members on First Amendment issues
 - School cannot delete allow comments on the school pages and delete only negative ones
 - The board members cannot block patrons from personal accounts if accounts are used for public purposes

Questions?



"Quack quack quack! That's your answer to everything!"
