LEGISLATIVE BRIEF

2016 Education Landscape Analysis Part Seven

HB 958
AN ACT TO PROHIBIT POLITICAL ACTIVITY OF EDUCATORS WHILE PERFORMING OFFICIAL DUTIES OR ON SCHOOL GROUNDS OR FACILITIES

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"For if Men are to be precluded from offering their Sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind, reason is of no use to us; the freedom of Speech may be taken away, and, dumb and silent we may be led, like sheep, to the Slaughter. "
George Washington, Address to Officers of the Army, Newburgh, NY (March 15, 1783)

Overview

HB 958 Committee Substitute is on the floor of the House, having passed out of the House Education Committee on a successful motion of Title Sufficient Do Pass.

School administrators and school board members are, in essence, employees of the state under the control of the state through policies adopted by the state legislature. The state, as ultimate employer, has the right to regulate public employee conduct, but does not have the right to ignore or dispose of the constitutional rights of public employees. There are constitutional guidelines!

HB 958 is an unabashed attempt by the Republican Party leadership to terminate the First Amendment rights of school administrators and school board members across the realm, from university to K-12 public school campuses, without any regard for these constitutional guidelines.

HB 958 creates an intimidating new state policy that would suppress, censor, shackle, fetter and render illegal the willingness of our education leaders to freely express opinions on issues of public concern, and to bar their association with others to do so.

This is a shameful and craven attempt by the Republican leadership to nullify three fundamental rights guaranteed and protected by the First Amendment to the US Constitution, which amendment is applied to the states through the 14th Amendment. The First Amendment bars the state from making any laws that abridge the:

- freedom of speech
- right of the people peaceably to assemble
- right of the people to petition the government for a redress of grievances

This Amendment became the *first* amendment in the Bill of Rights, ratified in 1791, because it was understood by the founding fathers to be the keystone in the foundation of our American democracy. It is heartbreaking that the Republican leadership is prepared to hack away at these hallmarks of our democracy to secure short-term political advantages in the resolution of statewide education policy disagreements.

Universities, colleges and junior colleges, elementary and high schools are academic and community institutions where critical thinking and strategic analysis, mutual understanding and appreciation for diversity, can be … ought to be … taught and learned. This requires that education centers function as "marketplaces of ideas" rooted in the patient, mutually respectful exchange of diverse viewpoints. That's the ideal, not a perversion of what schools are supposed to be. HB 958 constitutes a subversion of and credible threat to this ideal.

The back-story:

In 2015 the Republican leadership was publicly fearful that the controversial "Initiative 42", which mandated expanded funding for traditional public school districts and dominated the education policy spotlight for more than a year, might pass in the November 2015 referendum. The leadership was publicly apoplectic that so many teachers and administrators from the universities to K-12 school districts were openly supporting "42".

During the 2015 legislative session an even more wide-reaching bill was introduced to silence and severely punish teachers and administrators who the Republican leaders feared would have the effrontery to organize during the summer and fall for passage of "42". Fortunately, the bill died in the face of the firestorm of public scorn and derision for the transparent effort to shove deeply concerned education stakeholders off the education policy playing field.

There is a *front-story,* too:

Initiative 42 was defeated at the polls, but the Initiative effort was only one matter of public concern about the education policy landscape that has fueled the effort to hush the influential, knowledgeable, and experienced voices of education leaders, school level practitioners and their active constituents.

Here are just a few of the remaining, highly contentious, policy struggles that shed light on why the Republican leadership is in an autocratic frenzy to silence potential opponents:

- Common core or its equivalent by any other name
- Public funding for privately-owned, privately-governed educational enterprises, including but not limited to charter schools, virtual schools, and home schools
- Public funding for vouchers, tax credits and scholarships to pay for private schools
- Transferring administration of parts of state oversight and management of public schools from the State Board of Education to the Governor, State Auditor and PEER, the investigative arm of the Legislature
- Authorization to teach in public schools various religious viewpoints, such as creationism
- Opposition to effective sex education in the public schools

Let's look at how HB 958 is structured to circumscribe and shut down educator participation in the statewide education policy process. There are four parts to our analysis:

I. ***THE PEOPLE*** **WHOSE RIGHTS TO FREE SPEECH, TO FREE ASSOCIATION and TO PETITION FOR REDRESS OF GRIEVANCES ARE CURTAILED UNDER THIS BILL**

II. **THE *SPECIFIC ACTIVITIES* BY EDUCATORS THAT HB 958 SEEKS TO PROHIBIT AND *WHERE* THEY ARE PROHIBITED**

III. **THE *BALANCING TEST* THAT LIMITS THE POWER OF THE STATE TO REGULATE EMPLOYEE SPEECH, ASSOCIATION AND PETITIONS FOR REDRESS OF GRIEVANCES**

IV. **WHY HB 958 IS *UNCONSTITUTIONAL***

HB 958 (Committee Substitute): PROHIBIT POLITICAL ACTIVITY OF EDUCATORS WHILE PERFORMING OFFICIAL DUTIES OR ON SCHOOL GROUNDS OR FACILITIES (Education/Snowden)

HB 958 provides:

I. *THE PEOPLE* WHOSE RIGHTS TO FREE SPEECH, TO FREE ASSOCIATION and TO PETITION FOR REDRESS OF GRIEVANCES ARE CURTAILED UNDER THIS BILL

- In HB 958 each person who falls into one of the categories set forth below is defined as a "college or school administrator" and thereby becomes a target for the curtailment of rights set forth in HB 958(1)(d) [lines 53 – 60]:

  a. Members of the Boards of Trustees at every State Institution of Higher Learning (i.e. all universities and colleges)
  b. Chancellors and Presidents of State Institutions of Higher Learning
  c. Members of the Mississippi Community College Board
  d. Members of the Board of Trustees of each Public Community or Junior College
  e. President of each Public Community or Junior College
  f. Members of the Board of Trustees (i.e. school boards) for every one of the 144 public school districts
  g. Every administrator at the state's universities
  h. Every administrator at the state's colleges
  i. Every administrator at the state's public community or junior colleges
  j. Every school superintendent, administrator, principal and assistant principal at state-funded Pre-K, Kindergarten, Elementary, Middle, High and Agricultural High Schools, and any other public schools

II. THE *SPECIFIC ACTIVITIES* BY EDUCATORS THAT HB 958 SEEKS TO PROHIBIT AND *WHERE* THEY ARE PROHIBITED

HB 958 unfolds its "silence education leaders" strategy in a disingenuous "bait and switch":

The bait:

- Every college and school administrator retains all rights and obligations of citizenship provided in the US and Mississippi constitutions and the laws of Mississippi

  [Note: This statement … the bait … which speaks in the language of protecting rights, is true whether or not HB 958 provides such an acknowledgement. Both the US and MS constitutions are "supreme" … i.e. take precedence … over any state law. The state cannot legislate away fundamental constitutional rights, such as those guaranteed and protected by the First Amendment.]

The switch:

- **Every** "college or school administrator" … (*Reminder: see who they are on the extensive list above!*) … would be absolutely barred from using or allowing the use of the following in support of the "prohibited activities" [HB 958(2)(a) [lines 65-74]:
  a. institutional "time" (defined as the regularly scheduled hours of operation of, or for the performance of official duties for, the position at the institution in which the college or school administrator is employed
  b. institutional equipment
  c. institutional supplies
  d. institutional personnel

- *HB 958 prohibits every college or school administrator from engaging in the following protected First Amendment activities:*

  a. producing
  b. distributing
  c. disseminating
  d. circulating and
  e. communicating

  any material or information in support or opposition of any

  a. political party,
  b. philosophy or
  c. issue

  in an

  a. election or
  b. done to affect the outcome of an election

  or campaigning on

  a. behalf of a specific candidate or
  b. issue and
  c. lobbying the Legislature for policy change

  [Note: This provision reads as if it were a direct attack on educator participation in the furious public debate during 2015 regarding Initiative 42, an *issue of overriding public concern* about how education funding ought to mandated in the state Constitution. At the same time, this provision is so broadly written that it neuters the exercise of protected First Amendment rights by educators, without any reference to a compelling state interest to justify its necessity.]

- In addition to banning the personal conduct described above, HB 958(2)(b) explicitly bans college or school administrators from engaging in the prohibited activities to *"influence or attempt to influence"* any personnel of the institutions covered by this bill concerning any:

  a. political party,
  b. philosophy or
  c. issue

  in an

  a. election or
  b. done to affect the outcome of an election

  or campaigning on

  a. behalf of a specific candidate or
  b. issue and
  c. lobbying the Legislature for policy change

  [Note: There are two separate and independent provisions. One bans expressing any opinion on an issue. The other bans expressing any opinion on an issue in an attempt to influence others. Each is a separate ban. So – the mere expression of any opinion, without intent to influence others, would constitute a violation of the law.]

- These prohibitions "shall include, but not be limited to, any form of advocacy or opposition in a classroom or school setting, faculty or staff meeting, or other higher education or school related employment relationship…"

  [Note: This matrix of prohibitions is incredible! Here they go after the classroom teachers, too! It represents nothing less than demanding that educators leave their brains in the parking lot every morning when they arrive at work and not re-install them until they leave the campus. This would turn the wonderful spectrum of flashing lights that sparkle in the energizing warmth of thoughtful debate and discussion into the gray false calm of fearful neutrality that is the well-established hallmark of a suppressed society ... which is well-remembered by Mississippians who lived through the era of our "closed society".

  This past year there were numerous hotly contested "issues" of great public concern to education stakeholders across the state and in the Legislature. *Every* college and school administrator … and teachers, too … would be barred from tendering an analytical viewpoint or soliciting an opinion about any of these issues, and many more.

  As written, these prohibitions would be operative, for examples:
  a. during a break in a faculty meeting
  b. while shooting the breeze with others in the school parking lot in the morning
  c. in the course of monitoring a school basketball game
  d. while chatting with others during lunch hours
  e. while exhaling an opinion during a stretch and yawn in a planning hour

f. or while musing with others while waiting for access to the photocopier.

Let's focus on "Issues": These are some of the issues that educators, when at school, would be banned from expressing their opinions, or soliciting opinions, about:

a. Whether there is sufficient state revenue to fully fund MAEP
b. Whether there is sufficient state funding for universities and colleges
c. Whether the state should divert public funds from traditional public schools to fund charter schools, school vouchers, virtual schools, and scholarships and tax credits for private schools
d. Whether charter and virtual schools are an effective alternative to traditional public schools
e. Whether Common Core, or its equivalent, as an educational framework, is appropriate for Mississippi schools
f. Whether national experience demonstrates that retention of 3rd grade students who fail the 3rd grade summative assessment is effective or counter-productive
g. Whether Medicaid should be expanded under the Affordable Care Act
h. Whether the Legislature ought to ban educators from speaking out on issues of public concern]

- HB 958 bans any attempt by administrators to use their position to "coerce" any person to support a particular viewpoint regarding issues, philosophies, political parties or elections.

  [Note: This provision actually makes sense. Who can disagree with banning *coercion*? *Coercion* is not protected by the Constitution. Why not pass a bill that is limited to banning *coercion*?]

- When a college or school administrator violates the provisions of this bill, then *any* person can complain to the Secretary of State, who after *verification* of the complaint, shall fine the offender $100 for a first offense and $250 for second and subsequent offenses.

  [Note: Why the Secretary of State? The Secretary is not a judicial officer. The Secretary has no oversight responsibility in the area of public education. Although the Secretary has oversight over the conduct of election procedures, complaints can be brought for expression of opinions having absolutely nothing to do with elections.

  There is no reference in HB 958 regarding due process for the accused. There is no hearing process established. What is the verification process to be used by the Secretary of State? This bill does not even authorize the Secretary of State to create due process mechanisms for the accused, nor require that any verification process be approved consistent with the state's Administrative Procedures Act!

  This provision can be used to stalk and harass educators with whom they disagree on matters of education policy, especially on such hot-button issues as the teaching of evolution, climate change, sex education, marriage, religion, race, and gender diversity, etc. More chilling effect for dedicated educators!]

III. THE *BALANCING TEST* THAT LIMITS THE POWER OF THE STATE TO REGULATE EMPLOYEE SPEECH, ASSOCIATION AND PETITIONS FOR REDRESS OF GRIEVANCES

The US Supreme Court has created a "balancing test" to assess the legitimacy of state efforts to limit or restrict the exercise of First Amendment rights by educators who are public employees. The test involves assessing … weighing … evaluating the following elements:

a. Educators must show their speech and conduct address matters of public concern
b. Educators must show their interest in exercising their First Amendment rights outweigh the state's interest as an employer in efficiency in the delivery of education services

> Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech. *Rankin v. McPherson*, 483 US 378, 384 (1987), opinion for the Court of Supreme Court Justice Thurgood Marshall [citations omitted.]

Whether an educator's speech and conduct address matters of public concern must be determined by evaluating the "content, form and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

Supreme Court Justice Antonin Scalia spelled out that protection for public debate on matters of public concern is at the core of the First Amendment protection of free speech:

> … [W]e have held that the First Amendment's protection against adverse personnel decisions extends only to speech on matters of "public concern," which we have variously described as those matters dealing in some way with 'the essence of self-government,' matters as to which "free and open debate is vital to informed decisionmaking by the electorate," and matters as to which " 'debate … [must] be uninhibited, robust and wide-open,' ". In short, speech on matters of public concern is that speech which lies "at the heart of the First Amendment's protection." *Rankin v. McPherson*, 483 US 378, 395 (1987), dissenting opinion of Justice Antonin Scalia [citations omitted.]

Whether an educator's speech on matters of public concern are outweighed by the state's concern as an employer about the efficiency of the education system must be determined by whether the speech and conduct:

- Impairs discipline or harmony among co-workers
- Has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary
- Interferes with the normal operation of the educational institution

Hudson, Jr., David L., *Balancing Act: Public Employees and Free Speech*, pp. 23-24, First Amendment Center

IV. WHY HB 958 IS *UNCONSTITUTIONAL*

House Education Committee Chair John Moore has expressed concern that administrators may *abuse* their positions of authority by trying to *coerce* other educators to support or oppose an issue of heightened public concern. Fair enough. A bill could be narrowly tailored to address this specific concern.

Another concern that has been stated as a rationale for this bill is that publicly-paid educators should use their work time only for the education work for which they are being paid. Specifically, the bill seeks to ban what it defines as "political activity" [HB 958(2)(c)], but expressly permits political expression during work time so long as it doesn't support or oppose any particular viewpoint: " 'Political activity' " shall not include encouraging awareness and involvement in the political process in a neutral and nonpartisan manner." HB 958(1)(a)

In short, educators can talk politics on matters of public concern *as long as they don't profess to have a viewpoint about it.* This distinction demonstrates that the use of school time is not the gravamen of the prohibition on political activity: the "evil" is expressing a viewpoint! Stated differently, educators can swim in the water as long as they don't make waves.

Do we really want to create an education culture where any person can become a self-appointed "speech police officer" who parses comments by educators to determine whether they have uttered an "illegal" viewpoint, and then files complaints with the Secretary of State? I think not!

The US Supreme Court has fashioned a balancing test to resolve disputes about whether an educator's speech on matters of public concern in a given situation outweighs the state's power to restrict the conduct of its employees.

However, HB 958 fails to acknowledge any balancing test. The bill fails to establish any standard by which to weigh the protected speech of educators about matters of public concern against the state's interest in the efficient delivery of educational services.

Rather, HB 958 takes direct aim specifically and overtly at the expression of opinions on matters of public concern. No balance. No fair and balanced. It simply bans the expression of *all* viewpoints by educators *about matters of public concern* … as if *every* such utterance by an educator on an educational *campus*, or in an educational building or facility, regardless of the context, and by its very nature, undermines the state's interest as an employer and justifies suppression of speech.

HB 958 is designed as a *pre-emptive strike* to silence educators before they can express opinions on matters of public concern. This is also called *prior restraint*, which is anathema in the arena of the First Amendment!

> *Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it he does not hurt or countroul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.* Silence Dogood (pseudonym for Benjamin Franklin),

The New-England Courant, Number 49, July 2-9,1722 [website of the Massachusetts Historical Society]

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