



School Board Control of Curricular Speech

By Laurie L. Mesibov and Natalie Russell Dunham

Public schools are built on the belief that all children can learn.¹ Indeed, children can learn from everyone they encounter and everything going on around them. Although this makes controlling what children *learn* impossible, controlling what students *are taught* is not. A school's curriculum is designed for that very purpose and is the principal means for offering an education that prepares students for higher education, employment, and responsible citizenship.² The integrity of the curriculum, from design to presentation, is essential to fulfilling the schools' educational mission.

Educators, students, and parents commonly define a school's curriculum as the courses offered by the school for which students can earn credit. However, the definition of "curriculum" used by the Court of Appeals for the Fourth Circuit is much broader and may apply to activities of school personnel even when they are not teaching in a classroom.³ The court accepted a 1971 dictionary definition of curriculum: "all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program."⁴ The court noted that this definition is consistent with the U.S. Supreme Court's ruling in a case involving speech in "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."⁵

In North Carolina the local school board controls the curriculum as long as the board acts in a manner consistent with federal and state law and within parameters set by the State Board of Education (State Board). Although teachers, not board members, deliver the curriculum, teach-

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1. "The General Assembly believes that all children can learn. It is the intent of the General Assembly that the mission of the public school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential." N.C. GEN. STAT. (hereinafter G.S.) § 115C-81(a).

2. Students in North Carolina have a state constitutional right to a sound basic education. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997).

3. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 367-68 (4th Cir. 1998) (en banc). This view is consistent with the assessment of local boards of education that extracurricular activities are an important means through which students learn skills and habits that prepare them for their future responsibilities.

4. *Id.* at 367-68 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 557 (1971)).

5. *Id.* at 368 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). The Supreme Court said that these activities "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

ers do not have a right to select content or instructional materials or methods unless they have been specifically assigned that authority by the state or local board of education.⁶ Court decisions have established that a teacher in North Carolina has no right under the First Amendment to challenge or fail to follow a school board's decisions related to the curriculum, whether or not the teacher is convinced that he or she knows how best to help students learn and achieve.

This situation allows school boards a wide range of policy options. A board may narrowly define the role of teachers in the curriculum or delegate significant authority to them or develop processes that formally involve teachers or even explicitly support a teacher's right to make curriculum choices.

Under North Carolina law, local boards of education are charged with providing for the efficient teaching of the course content required by the state's Standard Course of Study.⁷ It is the duty of all teachers "to teach as thoroughly as they are able all branches which they are required to teach."⁸ This means that teachers are responsible for teaching the curriculum adopted by the local board.

School boards have a strong interest in and an obligation to maintain control over instructional content, and the law protects that interest. This protection has its benefits. A curriculum controlled by the board helps students to have access to a sound basic education, to transfer easily between schools, and to be adequately prepared for annual standardized tests and admission to institutions of higher education. It also may make information about the curriculum easily available to parents and others in the community.

Tight board regulation may place serious limitations on a teacher's expression in the classroom, which some will see as an additional benefit and others as an unfortunate result. Teachers may believe their inability to respond creatively to the needs of a particular student or class both limits learning and removes a significant source of job satisfaction. This article will discuss the lack of First Amendment protection for teachers' curricular speech and the options school boards have as a result of that lack of protection. After reviewing the law, this article will suggest questions a local board may want to consider in adopting a policy with regard to the curriculum (appendix A) and present excerpts from policies that have been adopted by local boards (appendix B).

6. A 2007 incident at Enloe High School in Raleigh brought renewed attention to issues related to teachers' rights to make decisions about the curriculum. On February 15, 2007, Robert Escamilla, a social studies teacher, invited a guest speaker, Kamil Solomon, a Christian evangelist and the head of Kamil International Ministries Organization, to his class. Solomon was born in Egypt, and the purpose of his talk was ostensibly to tell students about his past as a Christian living in Egypt. However, during his speech, Solomon made derogatory statements about Muslims and described Islam as a religion of violence. After school officials received complaints from parents and from various organizations, the school system investigated the incident. At its conclusion, the board formally reprimanded Escamilla and transferred him to a different high school. Escamilla sued. The case was resolved through a settlement. Yonat Shimron and Kinea White Epps, "Students Told to Shun Muslims," *Raleigh News & Observer*, Feb. 22, 2007, www.newsobserver.com/146/story/545851.html; Yonat Shimron, "Teacher Fights on in Flap over Anti-Islam Speaker," *Raleigh News & Observer*, June 13, 2007, www.newsobserver.com/news/story/602017.html; T. Keung Hui, "Escamilla Settlement Released," *Raleigh News & Observer*, Apr. 8, 2008, www.newsobserver.com/news/story/1029891.html.

7. G.S. 115C-81(c).

8. G.S. 115C-307(d).

Curriculum Development

The U.S. Constitution has a role in placing limitations on a curriculum. To take an obvious example, the Establishment Clause of the First Amendment prohibits any public school from teaching that the beliefs of any particular religion are true and that students must accept them as truth. This allows the curriculum to include teaching about religion itself and different religions but prohibits teaching that one religion is “true” or superior to any other or to no religion at all.⁹

Congress has only limited direct authority over curriculum because the power to regulate education is not granted to Congress in Article I of the Constitution and thus is reserved for the states under the Tenth Amendment.¹⁰ Nonetheless, in recent decades the federal government has become increasingly involved in school operations, primarily through Congress’s use of the spending power in Article I, Section 8 of the U.S. Constitution, which allows not mandatory control, but a sort of bargain—school boards agree to do certain things in order to get federal moneys. Four examples that illustrate this point are the Individuals with Disabilities Education Act, the No Child Left Behind Act, Title IX (prohibiting sex discrimination), and the Family Educational Rights and Privacy Act (regulating the disclosure of student records). Although any meaningful analysis of the role of the federal government is beyond the scope of this article, school board members and educators must respect the limits federal law places on their authority over the curriculum.

State law plays a much greater role in public education in general and in the curriculum in particular. The North Carolina Supreme Court has determined that “Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.”¹¹ It has defined this right in a manner that directly affects the curriculum:

For purposes of our Constitution, a “sound basic education” is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.¹²

Providing a sound basic education is a state responsibility.¹³

9. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968).

10. U.S. CONST. art. I; U.S. CONST. amend. X.

11. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997). Article I, Section 15 of the North Carolina Constitution provides that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” Article IX, Section 2 of the North Carolina Constitution states that “[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students.”

12. *Leandro*, 346 N.C. at 347, 488 S.E.2d at 255.

13. *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 635, 599 S.E.2d 365, 389 (2004).

State Board of Education

The General Assembly has by statute delegated the power and responsibility to develop the Basic Education Program¹⁴ and the Standard Course of Study to the State Board. The Basic Education Program must include instruction in “arts, communication skills, physical education and personal health and safety, mathematics, media and computer skills, science, second languages, social studies, and vocational and technical education.”¹⁵

The state Department of Public Instruction, which implements the public school laws and State Board policies,¹⁶ develops the North Carolina Standard Course of Study, which establishes content standards for required subjects and educational goals for the different grade levels.¹⁷ The Standard Course of Study includes the curriculum that the state mandates be made available to all public school students as well as suggested elective courses.

The State Board also sets minimum high school graduation requirements.¹⁸ Local boards may add additional requirements.¹⁹

Local Boards of Education

Local boards of education must provide for the effective teaching of all materials set forth in the Standard Course of Study²⁰ and follow other state directives regarding curriculum. These boards are also subject to the same constitutional restraints as the state. However, within those parameters, local boards may add to the state-mandated curricular minimum and select teaching materials and methods. Local boards have sole authority to select supplementary instructional materials,²¹ and they are not required to use the textbooks adopted by the State Board.²² Local boards also have “sole authority and discretion to determine whether a challenge [to instructional materials] has merit and whether challenged material should be retained or removed.”²³ Local board control may provide uniformity across grade levels and schools within a school administrative unit, although boards may also create special-interest schools. For example, the Durham Public Schools Board of Education has created nine such schools, “from which families can choose to match their student’s interests and aptitudes.”²⁴ Local control theoretically prevents teachers from using their classrooms as a forum for teaching personal views.²⁵

14. G.S. 115C-81(a).

15. G.S. 115C-81(a1).

16. G.S. 115C-21.

17. For more information about the Department of Public Instruction and the N.C. Standard Course of Study, see www.dpi.state.nc.us.

18. G.S. 115C-81(a), (b)(4).

19. For example, the Chapel Hill–Carrboro City Schools board requires participation in service learning activities (teaching methods that link community service with academics, personal growth, and civic responsibility). See Chapel Hill–Carrboro City Board of Education, Policy Code: 3460 (C)(2) (2007), www2.chccs.k12.nc.us/education/dept/dept.php?sectionid=4389 (follow “Policies” hyperlink under “Board of Education”).

20. G.S. 115C-81(c).

21. G.S. 115C-47(33).

22. G.S. 115C-47(33a).

23. G.S. 115C-98(b1).

24. Durham Public Schools Magnet Programs, www.dpsnc.net/programs-services/choice-programs/magnet-programs.

25. See *Boring*, 136 F.3d at 373 (Luttig, J., concurring).

Courts traditionally have been reluctant to infringe on the authority of local boards in the absence of a clear misuse of their authority.²⁶ As the Fourth Circuit has explained, “it is far better public policy . . . that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the teachers, who would be responsible only to the judges.”²⁷

However, local board control of the curriculum may come at some cost. A board may choose to essentially eliminate any right for teachers to have a protected or meaningful role in curriculum design or method of delivery. As the cases discussed below demonstrate, teachers who challenge local board decisions have little chance for success.

Boring v. Buncombe County Board of Education

Margaret Boring, a high school drama teacher in Buncombe County, N.C., sued the school board and other school officials, challenging the decision to transfer her to another school and assign her to teach different classes.²⁸ Boring claimed that her transfer was a violation of her First Amendment right to free speech because, she alleged, the transfer was an act of retaliation for her selection of a controversial play for students in her advanced acting class to perform in an annual statewide competition.

The play, *Independence*, portrays a divorced mother dealing with three daughters, one a lesbian and another unmarried and pregnant. Boring notified the principal of the play’s title, as she had routinely done in the past. She also sent copies of the script home with the student-actors for their parents to read. No one expressed any objection. Controversy about the play erupted only after a scene was performed in school for an English class. One student in that class described the scene to his parents, who then complained to the principal. The principal initially told Boring that the students could not perform the play but later allowed its performance with several scenes deleted. The production won second place in the state competition.

Although Boring was evaluated as “superior” and “well above standard” in all function areas, she was transferred to a middle school and assigned to teach introductory drama. The principal requested that Boring be transferred because of “personal conflicts resulting from actions she initiated during the course of this school year.”²⁹ The superintendent approved the transfer request based on Boring’s failure to follow the school system’s controversial materials policy in selecting the play. Boring appealed the transfer, but it was upheld by the local board of education. She then sued the board and others, claiming she was punished with a retaliatory transfer in violation of the First Amendment because of the ideas expressed in the play she chose. Boring also claimed that at the time she produced *Independence*, the controversial materials policy did not cover dramatic presentations.

The district court dismissed Boring’s free speech claim, ruling that Boring’s selection of a play was not speech protected by the First Amendment and that even if it were, the board would

26. See, e.g., *Lee v. York County Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007), cert. denied, 128 S. Ct. 387, 169 L. Ed. 2d 263 (2007); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 369 (4th Cir. 1998) (en banc); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989).

27. *Boring*, 136 F.3d at 371.

28. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc), aff’g No. 93-CV-230, 1995 WL 17001368 (W.D.N.C. June 1, 1995).

29. *Id.* at 366–67.

have a legitimate pedagogical interest in controlling it. A panel of the Fourth Circuit Court of Appeals reversed, ruling that Boring's claim should not have been dismissed.³⁰ The panel ruled that the selection of a play is protected speech and that at the time Boring's claim was dismissed there was no evidence in the record of any legitimate pedagogical concern that would justify restricting this speech. The full court then vacated the reinstatement of Boring's complaint and granted the school board's motion for a rehearing. In its final ruling, the court affirmed the dismissal of Boring's claims.³¹

The appeals court first considered whether Boring's selection of the play was a part of the curriculum. The court looked at the two definitions of curriculum described above: the dictionary definition of "all planned school activities including besides courses of study, organized play, athletics, dramatics, clubs, and homeroom program"³² and the *Hazelwood v. Kuhlmeier* definition of any activities that "bear the imprimatur of the school . . . , so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants."³³ The court concluded that the two definitions were essentially the same.

Applying these definitions, the court found that the selection and production of *Independence* was part of the curriculum. The play was performed by students representing the school at an interscholastic competition, and a teacher supervised the production and used the play for the purpose of imparting acting skills to students, all of which would lead a reasonable observer to believe that the selection of *Independence* bore the imprimatur of the school.

Curricular speech, the court said, is not protected by the U.S. Constitution.³⁴ The court explained that a public employee has no First Amendment protection when speaking "as an employee upon matters of personal interest," a standard from *Connick v. Myers*, a U.S. Supreme Court decision concerning employee speech in a nonschool context.³⁵ Because school boards, not teachers, have control over the curriculum, the court found that Boring's curricular speech led to an ordinary employment dispute and was not a matter of public concern that might have been entitled to First Amendment protection.

The Fourth Circuit was closely divided in this case. Dissenting judges argued that *Hazelwood* should be the controlling authority³⁶ because its standard was better tailored to the school

30. 98 F.3d 1474 (4th Cir. 1996) (the court was not reaching a decision on the merits).

31. The last step in this litigation was the U.S. Supreme Court's refusal to hear the case as Boring requested. 525 U.S. 813 (1998).

32. 136 F.3d 364, 367–68 (4th Cir. 1998) (en banc) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 557 (1971)). Interestingly, a survey of the definitions of "curriculum" in more recent dictionaries indicates that the term is more often given a meaning limited to a traditional course of study. See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 446 (4th ed. 2006) ("1. All the courses of study offered by an educational institution. 2. A group of related courses, often in a special field of study.").

33. 136 F.3d at 368 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

34. Nor does the N.C. Constitution help the teacher. See, e.g., *In re Spivey*, 345 N.C. 404, 414–15, 480 S.E.2d 693, 698–99 (1997) (holding that an individual's removal from his government job for comments he made that were not an expression of his views on matters of public policy did not violate the North Carolina Constitution). *But cf.* *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 410 S.E.2d 232 (1991) (permitting a teacher to pursue a claim under the North Carolina Constitution based on allegations that he was denied a promotion due to his speech on a matter of public interest).

35. *Boring*, 136 F.3d at 368 (quoting *Connick v. Myers*, 461 U.S. 138, 147 (1983)).

36. The federal courts of appeal are also divided on this issue. The First, Second, Tenth, and Eleventh Circuits agree with Judge Motz's dissenting opinion that the *Hazelwood* standard should be used for analyzing teachers' in-class speech. See *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

setting. In *Hazelwood*, a principal prohibited journalism students from publishing certain articles in the school newspaper, and when his decision was challenged, the Supreme Court ruled in his favor.³⁷ The Court held that administrators may regulate school-sponsored student speech as long as the decision to restrict the speech is “reasonably related to legitimate pedagogical concerns.”³⁸ According to the dissent in *Boring*, school officials had failed to offer any evidence establishing the legitimate pedagogical concern supporting Boring’s transfer. Even if the school board had done so, the dissent said that the *Connick* standard used by the majority was inadequate because it did not account for the “unique character” of classroom speech.³⁹

The majority addressed this issue as well, saying that even if the *Hazelwood* standard applied, Boring’s free speech rights were not violated because the transfer was justified by a legitimate pedagogical interest. The court reasoned that the content of the curriculum is inherently a legitimate pedagogical concern because the board has the right to establish the curriculum, and thus no particular or specific concern need be explicitly identified by the board.

Going beyond legal analysis, the court also gave its view that it is better public policy for elected school officials to make curricular decisions because they are democratically accountable. As explained in a concurring opinion, any recognition of a teacher’s constitutional right to control the curriculum would encourage too much federal court intervention and infringe on state and local governments’ traditional authority over education.⁴⁰

Lee v. York County School Division

In 2007 the Fourth Circuit again considered teachers’ rights with regard to the curriculum in *Lee v. York County School Division*.⁴¹ The decision reinforced the court’s position in *Boring* that curricular speech is not a matter of public concern and is not protected under the First Amendment.⁴²

William Lee, a high school Spanish teacher in Virginia, posted several items on a classroom bulletin board. In response to a private citizen’s complaint that the materials were overly religious for this setting, the principal looked at (but did not completely read) the materials and, as part of his responsibility to monitor classroom displays,⁴³ immediately removed some of them. The principal explained to Lee that the removed items⁴⁴ were inappropriate for the classroom because

37. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

38. *Id.* at 273.

39. *Boring*, 136 F.3d at 378 (Motz, J., dissenting) (“[A teacher’s] speech is neither ordinary employee workplace speech nor common public debate.”).

40. *Id.* at 371 (Wilkinson, C.J., concurring).

41. 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 387, 169 L. Ed. 2d 263 (2007).

42. After *Boring* but before *Lee*, in May 2006, the United States Supreme Court decided a new public employee speech case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court held 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 employer discipline.” *Id.* at 421. This holding appears to narrow even further the types of public employee speech that are protected; however, the Court expressly refrained from deciding whether the new analysis would apply to a case “involving speech related to scholarship or teaching.” *Id.* at 425; *see also Lee*, 484 F.3d at 695 n.11 (finding *Garcetti* inapplicable to present case).

43. The principal testified that this was the first time he had removed materials from a classroom bulletin board. 484 F.3d at 691 n.5.

44. The five removed items were (1) a 2001 National Day of Prayer poster featuring George Washington kneeling in prayer, (2) a news article listing the differences in the philosophical and religious beliefs

they appeared to violate the Establishment Clause of the First Amendment by endorsing religion. The county school superintendent denied Lee's request for permission to repost the items.

At that time, the high school and the school board had no written policies about acceptable content for bulletin board postings. Teachers apparently were aware of an unwritten policy prohibiting postings that were offensive, profane, in violation of the First Amendment, or otherwise unrelated to the curriculum. Lee sued the school board, individual board members, and the superintendent, claiming that the removal of the items violated his First Amendment right to free speech.

The district court ruled in favor of the school board before trial, and the Fourth Circuit affirmed, following its conclusion in *Boring* that curricular speech is, in effect, merely the carrying out of a teacher's job duties. The Fourth Circuit noted the general recognition by courts that public schools have "the right to regulate speech that occurs within a compulsory classroom setting"⁴⁵ and cited *Boring's* explanation that any conflict over the selection of curricular speech is nothing more than an ordinary employment dispute, not a free speech issue.⁴⁶

An essential step in the court's analysis was its determination that the items Lee posted on the bulletin board were curricular in nature and satisfied all elements of the *Hazelwood* definition of curriculum. They bore the imprimatur of the school because (1) they were posted in a compulsory classroom setting on a school-owned bulletin board that was subject to school regulations and was constantly on view during class, (2) they were supervised by a faculty member because only Lee was authorized to post items, and (3) Lee acknowledged that the items were designed to impart particular knowledge to students.

The court explained that curricular speech can be aimed at instructing and imparting knowledge not related to the particular subject matter of the class (here, Spanish). Lee himself said he posted the items because he felt responsible for his student's moral welfare, not because they were related to his Spanish curriculum. The articles were intended to uplift students and to encourage them not to be ashamed of their faith and to inform students of potential role models and their personal values.

The court referred to the district court's opinion discussion of teaching methodology and noted that the state must retain the ability to control the manner as well as the content in which its employees discharge their duties.⁴⁷

In addition to its discussion of the controlling law, the court opined that the result also was good public policy because "it is not a court's obligation to determine which messages of social or moral values are appropriate in a classroom. Instead, it is the school board's obligation to make such determinations."⁴⁸

of two presidential candidates, (3) a news article describing how then-Attorney General John Ashcroft held voluntary Bible study sessions with staff members, (4) a news article detailing the missionary activities of a former Virginia high school student whose plane had been shot down in South America, and (5) a Peninsula Rescue Mission newsletter highlighting the missionary work of the dead student with an envelope asking for donations for the group's missionary work attached. 484 F.3d at 690. Interestingly, the principal chose not to remove other posted items with religious themes, such as a picture of Boy Scouts praying in memory of September 11 and a picture of a military pilot with a helmet displaying the message "Pray for America." The principal explained that he left these items on the board because many students and families had been personally affected by the terrorist attacks and because Lee had previously served in the military. *Id.* at 691 n.6.

45. *Id.* at 695.

46. *Id.* at 697.

47. *Id.* at 693.

48. *Id.* at 700.

Current State of the Law

Boring and *Lee* make it plain that public school teachers⁴⁹ in North Carolina have no right under the First Amendment to participate in controlling the content of the curriculum, as it has been broadly defined.

The definition of curriculum used by the Fourth Circuit is the *Hazelwood* definition,⁵⁰ and the elements of that definition are interrelated. Deciding whether speech bears the imprimatur of the school depends on the conclusion that a reasonable observer would reach. An obvious factor in identifying speech as part of the curriculum is whether the speech occurs on school property, particularly in the classroom. The Fourth Circuit has said that “[a]s a general proposition, students and parents are likely to regard a teacher’s in-class speech as approved and supported by the school.”⁵¹ Speech that occurs outside of a classroom setting also may reasonably appear to bear the imprimatur of the school.⁵²

The speaker’s identity and motivation also are part of the definition. In *Lee*, the fact that only teachers were allowed to post materials on classroom bulletin boards helped create an appearance of school sponsorship. To fit within the definition of curricular speech, a faculty member must supervise the speech⁵³ with the goal of imparting particular knowledge to students.⁵⁴ In *Lee*, the court rejected the idea that the substantive content of a class is an automatic boundary for curricular speech, saying that “[w]hether classroom speech is designed to impart particular knowledge has a broader meaning than the name of a traditional course of study, or the designation of materials used to achieve specific curricular objectives. Classroom speech can impart particular knowledge if its purpose is to convey a specific message or information to students.”⁵⁵ Under this interpretation, only the narrowest slice of a teacher’s in-class speech might not convey “a specific message or information.”⁵⁶

49. The Fourth Circuit has upheld restrictions on university faculty as well. A Virginia statute restricting state employees from accessing sexually explicit material on computers owned or leased by the state did not violate the right to free speech of all state employees. The law regulates only employees’ speech in their status as public employees, not in their capacity as private citizens addressing matters of public concern. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc).

50. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

51. *Lee*, 484 F.3d at 698.

52. In *Boring*, students were representing the school in an interscholastic competition. 136 F.3d at 366. In *Hazelwood*, the articles were written by students for the school newspaper and had the imprimatur of the school because the paper was produced in connection with a for-credit journalism class. 484 U.S. at 268.

53. Cases from other jurisdictions involved issues where the teacher’s supervisory role was less clear. These cases indicate that student activities are supervised by a faculty member when there is a faculty advisor assigned to oversee the activity. In *Bannon v. School District*, 387 F.3d 1208 (11th Cir. 2004), the court ruled that a school beautification project involving murals painted independently by students was supervised by a faculty member because a teacher was assigned to monitor mural contents. In *Henerey ex rel. Henerey v. City of St. Charles, School District*, 200 F.3d 1128 (8th Cir. 1999), the court found that student government elections were supervised by a faculty member because a school administrator was serving as the student council advisor. These cases suggest that it is not always necessary to have a formal teacher–student relationship between the faculty supervisor and the student participants for an activity to be part of the curriculum.

54. It is not a significant stretch to conclude that a coach’s speech, whether a debate coach or an athletic coach, will be viewed as school-sponsored.

55. 484 F.3d at 699 (citation omitted).

56. *Lee* did not address the possibility of First Amendment protection when a teacher engages in speech outside of the classroom on topics unrelated to the subject matter of the course, but a logical

Because the First Amendment does not protect curricular speech, any protection for teachers must come from other sources, the most significant of which is local board policy. Every board will want to be sure that its policy reflects its intent and that all personnel affected by the policy understand its provisions.

Policy Options for Boards of Education

Local boards in North Carolina have adopted a range of policies and procedures related to curricular speech. Some policies simply require teachers to follow curriculum guides provided by the board. Guides may reflect only the Standard Course of Study, or they may include additional subjects or materials identified by the board. Policies may provide for the use of curriculum guides as a framework within which teachers may select their own teaching methods.⁵⁷ Curriculum guides help establish clear standards for course content and may be useful in evaluating a teacher's delivery of the material to students, even though some teachers may believe a strict adherence to the guide results in a loss of useful instructional flexibility and creativity. Guides also may give teachers a sort of safe harbor for their classroom speech because they are not likely to run afoul of the board's expectations when they follow a prescribed guide.

Advisory committees are a common element in local curriculum policies. State law authorizes the establishment of community media advisory committees to investigate and evaluate challenges to "instructional materials on the grounds that they are educationally unsuitable, pervasively vulgar, or inappropriate to the age, maturity, or grade level of the students."⁵⁸ Although local policies may vary in the membership and responsibilities of advisory committees, policies often provide for teacher representation on the committee. Policies may give committees a role in the initial selection of instructional materials as well as in responding to a challenge to materials. A broad role for the committee may provide an opportunity for teachers to contribute their expertise to the curriculum without subjecting themselves to potential problems for a controversial choice.

Local boards are required to adopt written policies establishing the procedures to be followed in selecting supplementary instructional materials.⁵⁹ Some school boards identify the need to choose resources that discuss controversial issues so that students may develop critical analysis skills.⁶⁰ At the same time, policies often require individuals or committees selecting materials to consider the purpose, reliability, and objectivity of a resource as part of the selection criteria. Such statements promote selection of materials for their educational value and appropriateness.

extension of the holding might well leave teachers without such protection if all elements of the court's test are present.

57. *See, e.g.*, Winston-Salem/Forsyth County Board of Education, Policy 6143 (IV) (1980), <http://wsfcs.k12.nc.us/education/components/scrapbook/default.php?sectiondetailid=14730> (follow "School Board Policies" hyperlink) ("[W]ithin the framework of the curriculum guides, teachers are permitted and encouraged to use initiative and creativity in teaching methods and to adapt the curriculum to the specific needs of their students.").

58. G.S. 115C-98(b1).

59. G.S. 115C-98(b).

60. This idea is adopted from an Interpretation of the American Library Association Bill of Rights. *See, e.g.*, Johnston County Board of Education, Policy Code: 3310 (2006), www.johnston.k12.nc.us/education/components/scrapbook/default.php?sectiondetailid=9132 (follow "Board Policy Manual" hyperlink).

An advisory committee is usually the first body to consider challenges to instructional materials. Although local boards have the statutory authority to determine the merits of such challenges,⁶¹ the prevailing practice appears to be to institute policies that call for advisory committees to investigate and make a recommendation about challenged material. This process can provide useful information if a teacher faces any adverse consequences for curricular speech.

Adopting procedures for principals or other school administrators to approve materials selected by teachers is another policy option. These policies allow teachers to participate in curriculum choices while providing oversight and review to prevent the use of inappropriate materials. However, it may be difficult to define the particular subset of materials that must be reviewed, and administrators have practical limitations on their ability to meaningfully review materials and make informed decisions. For example, a policy requiring that “all potentially controversial materials” be submitted for review requires teachers to make difficult predictions about how certain materials will be received.

In addition to following school board policies, administrators and teachers can take steps to avoid controversies over curricular material. Principals may want to discuss the topic with the faculty, perhaps addressing the potential tension between teachers’ innovation and creativity and the lack of First Amendment protection for their choices. If prior approval for materials or methods is required, administrators will want to notify teachers about what must be approved and what information the teacher must supply when seeking approval. Any review process should aim to be both efficient and meaningful,⁶² and decisions about curricular speech should be principled, not arbitrary.⁶³

Teachers must exercise care when engaging in curricular speech. Their primary responsibility is to teach students, and the decision of what students are to be taught does not rest with teachers. Professional judgment is essential, and teachers must be able to explain their choices on the basis of a sound educational rationale, not their own values and opinions.

To the extent a tension exists between a school board’s interest in controlling the content of the curriculum and teachers’ interest in free expression through curricular speech, the law protects the board’s authority over the curriculum. A board’s use of its authority to craft policies that suit local needs can prevent disputes while also resulting in a strong educational program for all students, a goal shared by school boards, educators, students, and the larger community.

61. G.S. 115C-98(b1).

62. For example, Boring informed the principal only of the title of the play, and the principal initially gave tacit approval to the selection without receiving or requesting additional information.

63. The principal in *Lee*, for example, chose not to remove certain items from the bulletin board even though they contained religious themes similar to the removed items. Although he explained that decision, it appears inconsistent with his rationale for removing other items.

Appendix A

Questions about Policies for Boards of Education

Before Adoption

1. Does the board have the authority to adopt a policy on this subject?
2. Does the policy comply with federal and state law and State Board of Education regulations?
3. What is the catalyst for the policy? If it changes a current policy, what is unsatisfactory about that policy? Why does the board expect the new policy to be better?
4. What are the board's objectives? Does the policy support them?
5. What will students learn from the policy? Parents? Others in the school community? The larger community?
6. Are these lessons consistent with other lessons the board wants students and others to learn?
7. How will the community react to the policy when it is reported in the media?
8. What are the possible unintended consequences of the policy?
9. Is the policy written so that employees, students, and parents can easily understand it?
10. Can the policy be administered?
11. Will the policy be administered fairly and consistently?
12. What exceptions to the policy, if any, is the board willing to make?
13. Is the policy likely to be challenged in court? Is the board prepared to defend it?
14. What will the policy cost, if anything? How will the board pay for it?

After Adoption

1. Is the policy properly publicized and the reasons for its adoption explained?
2. Is the policy being implemented? As intended? Consistently? Fairly?
3. Is the policy accomplishing what the board wants it to accomplish? How does the board know? How is the policy being evaluated?
4. What else does the board need to do?

Appendix B

Excerpts from Local Board Policies

- Students must learn the techniques and skills of democratic dissent. They must have the opportunity to hear, discuss, and study issues that are controversial. Teachers must be free to conduct such discussions without fear of reprisal as long as they maintain a high level of professional impartiality.
- Teachers shall be protected from censorship or restraint which unreasonably interferes with their obligation to expose students to controversial issues and to help students express their own views on such issues.
- Statements made or materials used in the classroom must be relevant to the topic being taught in order for them to serve a valid educational purpose.
- When correctly handled, the use of controversial speakers becomes an invaluable component in accomplishing the goals of citizenship education. However, this places a serious responsibility on the professional staff members to structure correctly the learning situation involving the speaker. All speakers must be approved, in advance, in writing, by the school principal.
- The basic responsibility for curriculum development rests with the superintendent, who may delegate portions of this responsibility to the administrative and supervisory staff of the system.
- All subjects (sensitive issues) shall have prior approval of the principal and assistant superintendent for instructional services.
- It is the right of a responsible teacher to encourage freedom of discussion of controversial questions in the classroom and to develop in students a love of knowledge and a desire to search for truth. Academic freedom is a necessary condition for the successful practice of the academic profession in a free society.
- All materials that may be of a controversial or sensitive nature must be approved prior to classroom use by the principal and/or the assistant superintendent for instructional services.
- Teachers are responsible for seeking clarification whenever unsure about any of the requirements of this (lesson-planning) policy.
- Job description of teacher: to teach the required curriculum as adopted by the board.
- The superintendent shall be responsible for the development of curriculum for the school system and shall establish a procedure that ensures broad-based input from the professional staff, the community, and other groups.
- The board expects the involvement of teachers in making curriculum-related decisions.
- Proposals for additions to or modifications of the Standard Course of Study should be made in writing to the superintendent for prior approval. Such proposals should document need, course objectives, means of evaluation, and personnel required.
- The board delegates to the superintendent and school principals the authority and responsibility for selection of all print and nonprint materials. Selection procedures shall involve representatives of the professional staff directly affected by the selections.
- Curriculum development must be an ongoing process in order to address the changing needs and diversity of all students and to fulfill the educational goals of the board. The board further recognizes that while educators must be responsible for developing the curriculum, parents, other governmental agencies, businesses, and members of the public have valuable insights into the type of curriculum needed.

- Academic freedom allows and encourages licensed employees and students the opportunity to study, investigate, present, interpret, and discuss facts and ideas relevant to the classroom subject matter. Nonetheless, the facts and ideas must be in accordance with the maturity and intellectual and emotional capacities of the students. Academic freedom does not allow teachers to deviate from the required curriculum or from the use of required curriculum and instructional guides. The principal is responsible for encouraging academic freedom and for ensuring that academic freedom is not abused.
- If a school wishes to modify the curriculum it may submit its proposal to the central curriculum review committee.
- The superintendent will ensure that the methods for meeting curriculum objectives are regularly evaluated for their effectiveness.
- The curriculum guides shall constitute the program of instruction for a particular course or grade and shall be followed by teachers in providing classroom instruction. However, within the framework of the curriculum guides, teachers are permitted and encouraged to use initiative and creativity in teaching methods and to adapt the curriculum to the specific needs of their students.
- Prior approval by a school administrator is required for all videos/DVDs not included in a school's media collection, listed in the curriculum guide or listed on the approved list of supplementary materials for a class or course.

Note: The above excerpts are from North Carolina school board policies, all of which are public records.

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