

**PUBLIC SCHOOL TEACHERS WHO REFUSE TO USE
PREFERRED NAMES AND PRONOUNS: A BRIEF
EXPLORATION OF THE FIRST AMENDMENT
LIMITATIONS IN K-12 CLASSROOMS**

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A public school teacher in Kansas filed a lawsuit against her school district after it suspended and disciplined her when she refused to use students' preferred names and pronouns in class in accordance with school policy. The teacher's refusal was based on her sincerely held religious beliefs.¹ The teacher also did not agree with a school policy that instructed her not to share information with students' parents about their gender identities.² Although litigation involving teachers being asked to use students' preferred names and pronouns in class continues to evolve,³ there is some guidance for school districts on this matter.

While examining this latest case from Kansas, this article focuses only on whether a teacher has a First Amendment right under both the free speech and free exercise clauses of the U.S. Constitution when refusing to use a student's preferred name or pronoun in a public school classroom. The article begins by briefly summarizing the most recent case in Kansas and then examines prior precedent involving teachers' classroom speech and teachers' rights to freely exercise their religious rights in public schools. It then briefly highlights how these issues have been addressed in previous pronoun cases and concludes with a discussion of a few other related issues.

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1. Ricard v. USD 475 Geary Cnty, 2022 WL 1471372_(D. Kan. 2022).

2. *Id.* at *2.

3. Suzanne Eckes, *Pronouns and Preferred Names: When Public School Teachers' Religious Beliefs Conflict with School Directives*, 50 AMER. EDUCATIONAL RES. ASSOC 65 (2020), <https://doi.org/10.3102/0013189X20943198>. The current article builds off this earlier piece.

I. *RICARD V. USD 475 GEARY COUNTY SCHOOLS SCHOOL BOARD MEMBERS*

The teacher in Kansas opposed school policies involving preferred names and pronouns because she is a Christian and believes that “God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one’s biological sex is a rejection of the image of God within that person.”⁴ She also thinks that the Bible prohibits her from lying to parents, that referring to children in a way that is inconsistent with their biological sex is untrue, and that parents have a fundamental right to control the upbringing of their children. She sought a preliminary injunction based on her free speech, free exercise, and due process rights.⁵

After the teacher refused to follow the policy, she was suspended and disciplined. The court denied her motion for a preliminary injunction related to the preferred name and pronoun policy; the court found it unlikely that the teacher would experience irreparable harm from enforcement of the pronoun policy.⁶ Specifically, the court noted that the school district did not require this teacher to use preferred pronouns and allowed her to refer to students only by their first name, provided the teacher elects not to use pronouns for any student.⁷ The court also found that the teacher would not automatically trigger a policy violation if she inadvertently used pronouns with other students. In denying her request for a preliminary injunction, the court stated that it would resolve this free speech question related to the pronoun/preferred issue at a later stage of the litigation.⁸

However, the court granted the teacher’s motion for a preliminary injunction on the free exercise claim as it related to the communication plans with parents and stated that it would resolve the free speech and due process claims related to the parent policy during the ordinary course of the litigation.⁹ Unfortunately, there will not be a full trial on the merits of this case; the case eventually settled with the district paying the teacher

4. Complaint at 3, Ricard v. USD 475 Geary Cnty, No. 5:22-cv-04015 (Mar. 7, 2022), <https://sunflowerstatejournal.com/wp-content/uploads/2022/03/geartsuit.pdf>.

5. *Id.* The due process claim is beyond the scope of this article. Also, the article only addresses the teacher’s claim as it relates to the pronoun and preferred name matter under the free speech and free exercise clauses.

6. *Ricard*, at *3.

7. *Id.*

8. *Id.* at *9-10.

9. *Id.*

\$95,000.¹⁰ If the case had not settled, it seems that the school district would have had a plausible argument at least with regard to the First Amendment free speech and free exercise clause claims. Each of these areas are examined below.

II. FIRST AMENDMENT: TEACHER SPEECH IN THE K-12 CLASSROOM

Teachers' First Amendment speech rights in the public school classroom are not absolute.¹¹ In *Garcetti v. Ceballos* in 2006, the Supreme Court distinguished between a public employee speaking pursuant to his official duties and a public employee speaking as a citizen. The case concerned a disagreement between a deputy district attorney and his superiors over the handling of a criminal prosecution.¹² The employee in this decision voiced concerns about irregularities in a case with his supervisors and testified for the defense that a police affidavit included some inaccuracies. The employee was subsequently reassigned and denied a promotion; he sued alleging a First Amendment violation.¹³ The Supreme Court held that expression directly related to the official job duties of a public employee is not protected under the First Amendment.¹⁴ The *Garcetti* decision has subsequently been applied several times in cases involving teacher classroom speech.¹⁵ Under *Garcetti*, when a public school teacher is speaking about a matter that is directly related to an official job duty, the speech is not protected under the First Amendment. A few illustrative examples demonstrate how this legal standard has played out within the K-12 public school classroom context.

To illustrate, in *Mayer v. Monroe County Community School Corporation*, a public school teacher's contract was not renewed after she told her class that she honked for peace in support of demonstrators protesting the war in Iraq.¹⁶ The teacher was responding to a student's question related to political activism taking place in the community at that

10. Andrea Salcedo, *Teacher Punished For Not Using Student's Pronouns Gets \$95K Settlement*, WASH. POST, Sept. 1, 2022.

11. Suzanne Eckes & Janet Decker, *Academic Freedom in K-12 Schools*, 1 SUPREMA 1-20 (2021); Suzanne Eckes & Charles Russo, *Teacher Speech Inside and Outside the Classroom: Understanding the First Amendment*, 10 LAWS 4:1-13 (2021); Suzanne Eckes & Charles Russo, *Teaching and Teacher Education* in LEGAL FOUNDATIONS OF EDUCATION 1 (J.C. Blokhuis ed. forthcoming).

12. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

13. *Id.*

14. Eckes & Russo, *supra* note 11.

15. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010); *Mayer v. Monroe Cnty Community Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

16. *Mayer v. Monroe Cnty. Community Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

time. Relying on *Garcetti*, the Seventh Circuit Court of Appeals concluded that “the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”¹⁷ Likewise, in *Evans-Marshall v. Tipp City Exempted Village School District*, a public high school teacher claimed a First Amendment right to select books for use in her classroom without interference from her employer.¹⁸ The Sixth Circuit Court of Appeals disagreed, finding that “the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made ‘pursuant to’ their official duties.”¹⁹ Several other cases suggest that school officials have a lot of leeway in regulating teachers’ classroom speech.²⁰ Thus, it would seem that referring to students by the gender with which they identify would be part of a teacher’s job duties and that school officials can require teachers to use preferred names and pronouns. Indeed, using students’ preferred names in class is arguably an essential function of the job.

Assuming the issue does fall under the First Amendment, in addition to *Garcetti*, the U.S. Supreme Court’s *Hazelwood v. Kuhlmeier* decision in 1988 has sometimes been relied upon to regulate teachers’ speech in the public school classroom.²¹ The standard set forth in *Hazelwood* allows school officials to regulate “school-sponsored expressive activities” (such as a school-sponsored student newspaper or a school theater production) as long as their actions are “reasonably related to legitimate pedagogical concerns.”²² In *Boring v. Buncombe County Board of Education*, a teacher was disciplined for allowing students to perform a play featuring a same-sex couple with an unplanned pregnancy.²³ Other federal courts have referenced *Hazelwood* to limit teachers’ First Amendment speech rights in the public school classroom.²⁴ As such, it appears that under *Garcetti* and *Hazelwood*, teachers’ speech rights under the First Amendment are indeed very limited in the public school classroom. Based on the above

17. *Id.* at 480.

18. *Evans-Marshall*, 624 F.3d 332.

19. *Id.* at 334.

20. *See, e.g.*, *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 9654 (9th Cir. 2011); *Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335 (E.D.N.Y. 2010); *Lee v. York Cnty. Sch. Division*, 484 F.3d 687 (4th Cir. 2007).

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

22. *Id.* at 273.

23. *Boring v. Buncombe Cnty Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998).

24. *Kramer v. New York City Bd. of Edu.*, 715 F. Supp. 2d 335 (E.D.N.Y. 2010); *Lee v. York Cnty Sch. Division*, 484 F.3d 687 (4th Cir. 2007).

discussion, it is unclear why the school district in Kansas did not further contest the public school teacher's First Amendment free speech claim.

III. FIRST AMENDMENT: TEACHERS' RIGHTS UNDER THE FREE EXERCISE CLAUSE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." ²⁵ Some public school educators have argued that it violates their right to freely exercise their religion when they are required to use students' preferred names and pronouns in class that do not align with their sex assigned at birth. ²⁶

Personal religious expression is protected in public schools. ²⁷ Under the Free Exercise Clause, school officials generally need to have a compelling reason to place a substantial burden on a teacher's sincerely-held religious beliefs and practices. ²⁸ It is also important to note, though, that laws or policies that burden religious exercise are presumptively unconstitutional unless they are both neutral and generally applicable. ²⁹ Specifically, there is no free exercise violation when the burden on religious exercise is the incidental effect of a neutral, generally applicable policy. ³⁰ It should be mentioned, however, that the Supreme Court has also distinguished laws that are neutral and generally applicable from laws that single out or target a specific religion for unfavorable treatment. ³¹ With regard to the Kansas case, it appears that the school district's policy is neutral and generally applicable. Thus, there should be no free exercise violation because the burden on religious exercise is the incidental effect of this neutral and generally applicable policy. Also, referring to students by the name and gender listed on a school record is really a purely administrative duty, which does not require the teacher to express approval for the reasons that might underlie any particular name change. ³²

However, even if it was found that the school district needed to demonstrate a compelling interest for its policy, it could possibly do so by

25. U.S. CONST. amend. I.

26. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814 (S.D. Ind. 2020); *Vlaming v. West Point Sch. Bd.*, 480 F. Supp. 3d 711 (E.D. 2020).

27. See Martha McCarthy, *Religion and Education: Whither the Establishment Clause*, INDIANA L. J. 75, 123 (2000).

28. See *id.* See also Suzanne Eckes & Preston Green, *Carson v. Makin: Implications for Students' Civil Rights in Taxpayer Funded Religious Schools*, CANOPY FORUM (Sept. 2022).

29. *Emp. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

30. Eckes, *supra* note 3.

31. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017).

32. See, e.g., *Kluge*, 548 F. Supp. 3d 814.

demonstrating that the policy is in the best interest of students. To illustrate, there is a wide body of research that supports the need to better support transgender and gender non-conforming students in schools—a population of students who has often been marginalized.³³ For example, one recent study demonstrated that when students could use their chosen names at school and elsewhere, they experienced 71% fewer symptoms of severe depression and 56% fewer suicidal attempts than students who could not use their chosen names in these contexts.³⁴

Further, requiring school districts to accommodate every teacher's religious beliefs could lead to a slippery slope. In other words, school districts might be forced to allow teachers to object to teaching about evolution in a science classroom, teaching about interracial relationships in a lesson about families, or mentoring a female student teacher if such classroom exercises offended teachers' sincerely held religious beliefs. In sum, there are some occasions within a public school setting that create appropriate limitations related to a teacher's sincerely held religious beliefs.³⁵ Moreover, these limitations do not prohibit teachers from practicing their religion outside the scope of their work duties, and at the same, recognize a student's identity in the classroom.³⁶ Finally, these pronoun/preferred name school policies are not motivated by an animus toward any religion but instead are focused on the best interest and the overall well-being of the student.

IV. OTHER PRONOUN CASES

There is no U.S. Supreme Court case that has analyzed a matter involving preferred names or pronouns in K-12 public schools, but there have been a few federal courts that have done so.³⁷ In one illustrative case, a federal district court in Indiana found no free expression or free exercise violation when a school district dismissed a teacher for refusing to use

33. Jack Day, Salvatore Iovemo, & Stephen Russell, *Safe and Supportive Schools for LGBT Youth: Addressing Educational Inequities through Inclusive Policies and Practices*, J. SCHOOL PSYCH. 29-43 (2019); Mark L. Hatzenbuehler, Michelle Birkett, Aimee Van Wagenen & Ilan Meyer, *Protective School Climates and Reduced Risk for Suicide Ideation in Sexual Minority Youths*, 104 AMER. J. PUB. HEALTH, 279-86 (2014); Joseph Kosciw, Emily Greytak, Adrian Zongrone, Caitlin Clark, & Nahn Truong, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN (2018).

34. Meg Bishop, Salvatore Iovemo, James, Victoria Saba, & Stephen Russell, *Promoting School Safety for LGBTQ and All Students. Austin, TX: The Stories and Numbers Project, STORIESANDNUMBERS.ORG* (2021).

35. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 9654 (9th Cir. 2011).

36. Eckes, *supra* note 3.

37. *Id.*

preferred names and pronouns.³⁸ Similar to the teacher in Kanas, the teacher in Indiana argued that school officials violated his First Amendment rights to free speech when he was terminated from his position. He stressed that he was expressing himself about a matter of public concern by refusing to speak about the mental disorder of gender dysphoria. The court found, however, that the way this teacher addressed students was part of his official job duties as a public school teacher. Importantly, the court observed that although when a teacher addresses students by name it might not be part of the course curriculum, it is still difficult to imagine how a teacher could perform their duties in class without a way to address students. In sum, the teacher's speech was related to his official duties, which precluded his free speech argument under the First Amendment. According to the federal district court, teachers do not surrender all of their free speech rights in public schools, but there are times when they must accept certain limitations in the workplace.³⁹

The teacher in Indiana had also alleged that school officials offended his sincerely-held religious beliefs when he was asked to refer to students by their preferred names or pronouns.⁴⁰ The school district argued that there was no free exercise violation when the burden on religious exercise is the incidental effect of a neutral, generally applicable policy. The court agreed. The federal district court reasoned that the school board's policy was neutral and generally applicable to every teacher in the district, regardless of religious belief. Moreover, the teacher did not produce any evidence to suggest that this policy was developed to target any specific religious belief. As such, the school district's motion to dismiss the teacher's claim was granted.⁴¹

Similar claims involving K-12 schools have been filed in Virginia, West Virginia, and elsewhere.⁴² Also, in 2021, the Sixth Circuit Court of Appeals found in favor of a college professor involving a similar issue.⁴³ The professor in this case contended that his sincerely held religious

38. *Kluge*, 548 F. Supp. 3d 814.

39. *Eckes*, *supra* note 3.

40. *See Kluge*, 548 F. Supp. 3d 814.

41. The teacher also lost his religious discrimination claim under Title VII in a subsequent proceeding, *see Kluge*, 548 F. Supp. 3d 814.

42. *Loudoun County Sch. Bd. v. Cross*, 2021 Va. LEXIS 141 (Va. 2021) (finding teacher may have First Amendment speech right to not follow school's policy related to transgender students; case subsequently settled); *Vlaming v. West Point Sch. Bd.*, 10 F. 4th 300 (4th Cir. 2021) (finding no federal question jurisdiction). These cases have either settled or are ongoing and are therefore not discussed in detail.

43. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

beliefs conflicted with a university policy that required him to address transgender students by their preferred names and pronouns in class. He also alleged a violation of his free speech rights.

In examining the Free Exercise Clause claim, the Sixth Circuit Court of Appeals found that there was evidence that administrators reacted to the professor's arguments in a non-neutral way.⁴⁴ Likewise, the court reasoned that the university's investigation into the matter did not exhibit neutrality. Thus, his free exercise claim was allowed to proceed. The professor also prevailed on the free speech claim; the court ruled that the academic speech of university professors is protected. It is important to highlight that the First Amendment free speech clause is applied very differently within the context of higher education than it would be in a K-12 setting. Thus, this Sixth Circuit case may not be very applicable to the current K-12 cases. In fact, the court was explicit that its holding did not "extend to the in-class curricular speech of teachers in primary and secondary schools."⁴⁵

To be certain, there are occasions within a school setting that create appropriate limitations related to an employee's speech rights and religious beliefs.⁴⁶ This argument seems especially plausible when the speech or religious belief negatively impacts the well-being of students. As noted, a significant body of research exists that demonstrates when school officials treat LGBTQ students with respect, including the use of preferred pronouns and names, it has a positive impact on their overall well-being.⁴⁷ As such, it is not surprising that school districts across the country have adopted politics that focus on treating students with dignity and respect when it comes to using preferred pronouns and names in a classroom.

V. OTHER RELATED ISSUES

In the Kansas teacher's complaint, her attorneys argued that requiring a teacher to use a student's name and preferred pronouns is impermissible compelled speech.⁴⁸ The federal district never really addressed the doctrine of compelled speech during its examination of the request for a preliminary injunction. Nevertheless, the complaint raises

44. *Id.*

45. *Id.* at 505.

46. Eckes, *supra* note 3, at 67.

47. Stephen Russell, Amanda Pollitt, Gu Li & Arnold Grossman, *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 JOURNAL OF ADOLESCENT HEALTH 4, 503-05 (2018).

48. *Kluge*, 548 F. Supp.3d. 814.

some interesting legal questions related to this topic. For example, in *West Virginia State Board of Education v. Barnette* in 1943, the Court examined whether a compulsory salute to the American flag violated the First Amendment rights of public school students. Students who were Jehovah's Witnesses challenged the state board of education policy related to reciting the Pledge of Allegiance after they were sent home from school for non-compliance.⁴⁹ The students argued that Jehovah's Witnesses believe that saluting the flag violates their Ten Commandments. The Court ruled in favor of the students, finding that a flag salute and reciting the Pledge of Allegiance required an "affirmation of a belief and an attitude of mind."⁵⁰ The Court also stressed that patriotism does not increase because it is compulsory.

It appears that the pronoun issue can be distinguished from the compelled speech doctrine that arose in *Barnette*. To begin, the *Barnette* case was about compelled *student speech* and was not focused on teacher speech. As discussed, K-12 teacher speech (under the First Amendment) is very limited in the classroom and the focus of a much different analysis than teacher's speech rights in the classroom. For example, K-12 teachers are required to teach the established curriculum, which is why, for example, courts have held that a science teacher can be required to teach evolution even if it violates the teacher's sincerely held religious belief.⁵¹ Second, even if the *Barnette* case could be applied to teacher speech, there is a difference of degree here—asking a K-12 teacher to call a student by a preferred pronoun is far different from forcing a student to declare their allegiance to the United States. Moreover, the compelled speech doctrine has never been clearly defined and these cases involving preferred pronouns are often linked to anti-discrimination provisions. It will be interesting to watch how courts address this claim of compelled speech within the context of using pronouns and preferred names in a classroom.

Another related issue concerns Virginia Governor Glenn Youngkin's administration that has proposed new policies for the state's schools that restrict which pronouns students may use during school.⁵² The 2022 Model Policies were released in September 2022 and provide that the

49. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

50. *Id.* at 633.

51. *Freshwater v. Mt. Vernon Cty. Sch. Dist.*, 1 N.E.3d 335 (Ohio 2013).

52. Virginia Department of Education, *2022 Model Policies on the Privacy, Dignity, and Respect for all Students and Parents in Virginia's Public Schools* (2022), <https://doe.virginia.gov/support/gender-diversity/2022-model-policies-on-the-privacy-dignity-and-respect-for-all-students-town-hall.pdf>

legal name and sex of a student may not be changed “even upon written instruction of a parent or eligible student” without an official legal document or court order.⁵³ Teachers and other school officials can only refer to a student by their pronouns associated with their sex at birth. They also do not need to refer to a student by their preferred names regardless of paperwork if they feel doing so “would violate their constitutionally protected rights.”⁵⁴ In the cases discussed above, the school district and the university were attempting to do the right thing by presumably basing their pronoun and preferred name policies on what is in the best interest of the student. Virginia, is of course, taking the opposite approach. From a legal perspective, states and local school districts have a great amount of control over a public school’s practices and policies.⁵⁵ Thus, what Governor Youngkin proposes, even though it does not follow best practice, might be legally permissible. On the other hand, the Virginia policy (and similar policies in other states) may be open to a viable legal challenge from a student alleging a Title IX claim or other violation. This will also be another interesting area to watch evolve.

V. CONCLUSION

Given the current legal landscape around teachers’ speech rights and free exercise rights in a public school classroom setting, it is unclear why the school district in Kansas chose to settle this case with the teacher. As the discussion of the court decisions highlighted, K-12 school boards have a lot of discretion to oversee teachers’ classroom speech. Courts have consistently recognized that the K-12 classroom is a unique context. In this environment, teachers have a captive audience of impressionable minds. As a result, teachers may not use their public positions for their own platforms. Likewise, there are times when a teacher’s right to freely exercise religion in a public school can be curtailed.

At the same time, due to costs associated with litigation and other factors, some school districts settle with families even if they have a strong likelihood of prevailing on the merits of a case.⁵⁶ Also, to be fair, this particular topic has not been addressed by many courts and the issue

53. *Id.* at 16.

54. *Id.*

55. See Charles Russo, *Reflections on Education as a Fundamental Human Right*, 20 EDUCATION & L. J. 87-110 (2010).

56. J.R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV. (1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court>; Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations of the Limits of Legal Change*, 9 LAW & SOCIETY REV. 1 (1974); Joanna Schwartz, *Introspection through Litigation*, 90 NOTRE DAME L. REV. 1 (2015).

remains unsettled. It may have been too risky for the district to pursue litigation. Although this school district in Kansas settled the case, this topic will likely continue to generate new litigation in other school districts around the country.⁵⁷ Future litigation will provide more guidance to school officials on this matter that will hopefully allow them to do what is in the best interests of their clients (e.g., the students).

57. See Konner McIntire & Courtney Rau, *Fact Check Team: Teachers Nationwide Face Suspensions Over Free Speech Issues*, ABC7 (Dec. 22, 2022), <https://katv.com/news/nation-world/teachers-across-the-us-facing-suspensions-over-free-speech-first-amendment-kansas-milwaukee-ohio-compelled-speech-doctrine-gender> (discussing similar legal challenges in other parts of the country).