

First Amendment Does Not Protect Speech Occurring During Official Duties and Aimed at Students

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The United States Court of Appeals for the Ninth Circuit recently upheld that a public school employee's speech falls outside First Amendment protection when it occurs within the course of performing their official duties and is directed at students. *Theis v. InterMountain Education Service District - Board of Directors* (9th Cir. 2026) 182 F.4th 1091 serves as a reminder of the line between public employees' private expression, and speech attributable to the governmental employer.

Factual Background

Roderick E. Theis II (Theis) served as an Education Specialist for the InterMountain Education Service District (District). Theis had offices at two different school sites, where he would meet with students to conduct evaluations and standardized testing under his supervision. Theis decorated his offices with personal items, including displaying two books in one office which shared themes that gender is binary and unchangeable, and one in the other office which "allegorically" commented on transgender issues.

The District had a policy to address "bias incidents," which it defined as a hostile expression of animus based on a protected characteristic, including gender identity, and established procedures to investigate such incidents.

After receiving a complaint that Theis's book displays were transphobic, the District investigated, determined the displays constituted a prohibited bias incident, issued a directive instructing Theis to stop displaying the books, and warned that noncompliance could lead to termination.

District Court Decision

Theis sued the District, seeking a preliminary injunction—a temporary order to halt the enforcement of the directive—and claiming the removal directive violated his right to free speech. The U.S. District Court for the District of Oregon granted his motion in part and denied it in part, drawing a careful distinction between student-facing settings and those outside the presence of students. The District Court concluded that when Theis displayed the books while performing his official duties he spoke as a public employee, meaning the District could prohibit him from displaying the books when students were present. However, when students were absent, his display was a form of protected private expression that the District could not prohibit.

Theis appealed the partial denial to the Ninth Circuit and resumed displaying the books even when students were present. In response, the District initiated a second investigation, which concluded that Theis violated its internal policies and the District Court's order, and it began disciplinary proceedings. Theis asked the District Court to block the District's discipline by filing a motion to enforce the partial injunction, arguing that discipline violated the District Court's initial ruling. The District Court denied the motion, clarifying that its order did not protect book displays in the presence of students and did not bar discipline. The District subsequently terminated Theis's employment. Theis filed a second appeal to challenge this decision, sending both of his appeals to the Ninth Circuit Court of Appeals.

Ninth Circuit Decision

The Ninth Circuit ruled that the District did not violate the First Amendment when it directed Theis to stop displaying the books in the presence of students and instituted discipline for his failure to comply with that directive. The Ninth Circuit relied upon what it described as a "robust body of precedent" that First Amendment rights do not extend to a public employee's speech directed at students when performing their official duties.

Since Theis displayed the books within his assigned school offices while he was interacting with students and did not dispute that the displays were aimed at the students, the Ninth Circuit concluded that the speech fell within the scope of his professional role. The Ninth Circuit distinguished this from cases where school employees speak off school grounds, perform tasks unrelated to a school's ordinary operations, and do not direct their speech toward students. This included distinguishing *Kennedy v. Bremerton School District* (2022) 597 U.S. 507, 509, where the Supreme Court found that a football coach's postgame prayer on the field constituted protected private expression when the prayer occurred when the coach was not engaged in his official duties, not supervising students, and not speaking in a manner that could reasonably be attributed to the school.

Unlike *Kennedy*, Theis displayed the books in a student-facing setting while performing his assigned duties, meaning his speech remained subject to the District's control. Theis was only in a position to speak to students as an authority figure because the school hired him to do so. As a result, the District retained authority over the messages Theis conveyed because his speech owed its existence entirely to his position. The Ninth Circuit affirmed the District Court's rulings.

Takeaways

In its *Theis* opinion, the Ninth Circuit upheld that public education employees speak for the government when they convey messages to students while carrying out their assigned duties. Under those circumstances, school districts can regulate their employees' speech.

However, school districts should be cautious about enforcing blanket bans on speech if the messages (such as an office display) are only visible when students are absent or when an employee is engaged in a moment of private expression detached from their role.

If you have any questions about this decision or need guidance related to First Amendment issues, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#) and [LinkedIn](#), or download our [mobile app](#).

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