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TO: Barbara Madeloni, MTA President
MTA Board of Directors

FROM: Lee Weissinger, MTA General Counsel SLW
Matt Jones, MTA Staff Counsel M.D.J.
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RE: Analysis of Legal Protections for Public Educators Addressing PARCC Testing and other Educational Policy Issues

In Massachusetts and throughout the country, there is increasing debate over the "Common Core State Standards," standardized testing, and the proper place for standards and tests in public education and in the evaluation and compensation of educators. The Common Core State Standards were incorporated into the Massachusetts English Language Arts and Math Curriculum Frameworks in 2011. Massachusetts has participated in the development of assessments aligned to the Common Core through the PARCC Consortium. PARCC assessments were field tested this past school year, and districts have elected whether to participate in PARCC or MCAS for the spring 2015 testing. The Board of Elementary and Secondary Education (Board of Education or Board) will vote in the fall of 2015 on whether PARCC will replace the MCAS English Language Arts and Math tests in grades 3-8 starting in 2015-2016.

In March 2014, the Legal Division issued a legal memorandum regarding the Board of Education's statutory authority under G.L. c. 69, § 1I which vests the Board with the authority to "adopt a system for evaluating on an annual basis the performance of public school districts and individual public schools." We concluded that the Board has the statutory authority to require school districts to field test and administer PARCC. However, the Board's authority to require school districts to administer PARCC is entirely distinct from the question whether *parents* may "opt out" their children from PARCC testing. Contrary to the position taken by the Board, it is our opinion that various sections of G.L. c. 71 vest local school committees with the authority to implement district policies allowing parents to "opt out" their children from PARCC testing. Also, since local school committees have considerable discretion in regulating student behavior, decisions about whether to impose discipline or academic consequences for student nonparticipation in PARCC testing rests with the local school district. School districts may, or may not, have student conduct rules in place that impose consequences for opting out of PARCC.

There is obvious tension between the Board's authority to implement a testing system to evaluate performance of public schools and the authority of local school districts to officially (or unofficially) allow parents and students to opt out of the testing system. Should sufficient numbers opt out, the testing system will not meet the statutory mandate to "evaluate performance of . . . public schools districts and individual public schools." Thus, school districts may not

implement the opt-out option in a way that would systemically undermine the legal obligation to administer PARCC.

MTA members are at the epicenter of PARCC implementation and other changes that directly affect teaching and learning at the most fundamental level. As educators, their voices are essential to the public debate over these issues. But our members are not only "educators." They are citizens too, and as citizens they have rights under the First Amendment to the United States Constitution and other laws to participate in this debate. Unfortunately, the question of precisely what speech and conduct is legally protected is complex and fact-specific. To help our members participate in the widening public debate over standards and testing, this memorandum outlines the extent to which educator speech and advocacy is protected under the First Amendment and other applicable laws, including the state collective bargaining law, G.L. c. 150E.

I. GUIDING PRINCIPLES FOR PROTECTED SPEECH

A detailed legal analysis of the First Amendment and other laws that protect education employees in speaking out on education issues starts on page 3. Given the complexity of this area of the law, it is useful to first set forth guiding principles by which to judge what speech is legally protected and what is not.

- Government employees are not obliged, simply by virtue of having entered public service, to completely relinquish their First Amendment rights. They are protected *as citizens* in commenting on "matters of public concern."

- Under the First Amendment a government employer (such as a school district) has a significant degree of control over and can restrict otherwise protected speech by public employees that is made pursuant to the employee's official duties. However, the employer cannot restrict employee speech on a matter of public concern simply because the speech deals with facts learned by virtue of public employment.

- Even if an employee speaks outside the scope of employment on a matter of public concern, the public school employer can still discipline or dismiss the employee if the employer has reason to believe the speech would disrupt school operations.

- Education issues such as student testing (including opt-out policies), educational curricula and teacher evaluation systems are, in general, matters of public concern. The public debate relating to the Common Core and PARCC assessments unquestionably raises matters of public concern.

- Educators acting as citizens may speak in opposition to (or in favor of) matters of public concern such as PARCC by such activities as writing letters to public officials, testifying before the Legislature, participating in non-disruptive demonstrations, participating in public forums, and writing letters to newspaper editors and opinion pieces for publication. The educational employee's interest in free expression as a citizen would likely outweigh the school employer's interests.

- Advocating outside one's employment for a change in law or policy clarifying that parents and/or students may opt out of PARCC testing would likely be deemed protected speech.

- Advocating outside one's employment that, as a general matter, parents and/or students "opt out" of, or boycott, PARCC testing is also likely to be deemed protected speech.

- Advocating specifically to students or parents in one's own school in support of opting out of PARCC testing may not be protected, since a school district could reasonably view this as disruptive to the actual administration of PARCC testing.

- The First Amendment will not protect an educator who refuses to administer PARCC testing, refuses to follow district procedures for PARCC testing, tells students not take the PARCC test, or speaks out against PARCC while teaching a class.

- The more an employee's duties require him or her to implement a disputed policy, the less protected the employee will be in voicing opposition to it. For example, a school administrator may have less freedom to oppose PARCC testing than a rank-and-file teacher.

- Speech and advocacy as a union member with other bargaining unit members about the impacts of PARCC (or other educational policy initiatives) on terms and conditions of employment is protected under the Massachusetts Public Sector Labor Law, G.L. c. 150E.

There are many grey areas for teachers in First Amendment jurisprudence. Practically, and to some extent legally, the scope of an employee's free speech rights depends on the employer's perception of its interests. If the policy of a school district is to permit parents to opt out of PARCC testing, then a teacher informing parents of children in the school of this option is less likely to be "disruptive" legally and, as a practical matter, the district is less likely to attempt to squelch anti-PARCC speech. On the other hand, if a district's policy is to support PARCC, anti-PARCC speech by teacher is more likely to be deemed "disruptive" as a legal matter (thereby removing First Amendment protection), and the district is more likely to attempt to impose discipline for anti-PARCC advocacy.

II. PROTECTION FOR PUBLIC EMPLOYEE SPEECH UNDER THE FIRST AMENDMENT

A. Overview

The free speech rights of public employees under the First Amendment to the United States Constitution have been the subject of an extensive body of case law which has developed over the past fifty years. It is clear that "public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). However, in determining what expression is protected under the First Amendment from adverse action by a public employer, the courts have crafted a complex, fact-based analysis that ultimately grants substantial deference to an employer's "discretion and control over the management of its personnel and internal affairs," *Connick v. Myers*, 461 U.S. 138, 151 (1983), and permits "managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Garcetti* at 424.

To determine whether an adverse employment action violates a public employee's free speech rights, courts in Massachusetts apply a four-part analysis. There are two threshold questions which are considered to determine whether an employee's speech implicates First

Amendment concern. First, was the employee "[speaking] as a citizen on a matter of public concern"? *Connick,* 461 U.S. 143. Second, was the employee's statement made "pursuant to his official duties"? *Decotiis v. Whittemore*, 635 F.3d 22, 30 (1st Cir. 2011). "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." *Garcetti* at 421.

If an employee's speech *does* implicate a matter of public concern and was *not* pursuant to official duties, the court then "balance[s] . . . the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The final step in the analysis is to determine whether the employee speech was "a substantial or motivating factor" for the adverse employer action. Even if all four steps of the foregoing analysis are in the employee's favor, the public employer may escape liability if it can show "it would have reached the same decision absent the protected conduct." *Decotiis v. Whittemore*, 635 F.3d 22, 29-30 (1st Cir. 2011) (internal quotations and citations omitted). *Cf. Connick*, *supra* and *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

In summary, the key factors in determining whether public employee speech is protected under the First Amendment are: (1) whether the employee was speaking as a citizen on matters of public concern (the core question in the *Connick* case); (2) if so, whether the speech nevertheless impinged on the interests of the public employer in "promoting the efficiency of the public services it performs through its employees" (the so-called "*Pickering* balancing test"); and (3) whether the speech was "pursuant to . . . official duties" (*Garcetti*).

B. *Matters of Public Concern*

There is a substantial body of law addressing what is and is not a matter of public concern. "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the matter of political, social, or other concern to the community." *Lane v. Franks*, 13-483, 2014 WL 2765285 (U.S. June 19, 2014) citing *Connick* at 147-148. The public-concern test is aimed at ensuring that government operations are not inhibited by speech that holds little value to the public. It seems clear that the issue of PARCC testing satisfies this first inquiry, since the debate goes to the core of the purposes and values of public education. How teaching is conducted in the public schools, the nature of the curriculum, how student and teacher performance are assessed, and what institutions provide public education to children are among the many issues implicated by PARCC. All are classic "political [and] social . . . concern[s] to the community."

C. *The Pickering Balancing Test*

The question of balancing employee speech rights with the employer's management prerogative depends on the nature of the employee's expression and the specific circumstances under which it is made. In the *Pickering* case, a teacher was dismissed by the school board for writing a letter to the editor criticizing the school board's handling of a bond issue and its allocation of resources between educational and athletic programs. The Supreme Court held that Pickering's dismissal violated his First Amendment rights because he was speaking more as a citizen than as an employee and that the statements in the letter did not target any school official that the teacher dealt with on a daily basis (so no issue was created of the employer's ability to maintain discipline or harmony among coworkers). Similarly, an opinion column in a local

newspaper by a firefighter and union officer suggesting that the quality of services provided by firefighters and paramedics was at risk due to insufficient number of emergency workers and "below average annual wages" was found not to impinge on the public employer's legitimate interests so as to override the employee's First Amendment rights. *Abad v. City of Marathon*, 472 F. Supp. 2d 1374 (S.D. Fla. 2007). The speech of a school bus driver, who was president of a union-like organization, expressing her concerns about the safety of children due to bus overcrowding and the lack of time allotted for pre-trip bus inspections, as well as lobbying at the state capitol on behalf of bus drivers, involved matters of public concern for First Amendment purposes. The mere fact that her speech concerning safety issues was made to co-workers or to supervisors, rather than being directed at the general public, did not remove the speech from the category of public concern. *Cook v. Gwinnett County School Dist.*, 414 F.3d 1313 (11th Cir. 2005). In each of these (and similar) cases, the court concluded that, although the employer strongly disfavored the speech at issue, the speech was protected by the First Amendment.

In contrast, even where a corrections officer's statements on a union website touched on questions of public concern (political favoritism by the sheriff's department), the extremity of the officer's expression (among other things, comparing sheriff to Hitler and those who followed sheriff's instructions to Hitler's generals) removed the statements from First Amendment protection because the employer reasonably believed that the speech might be disruptive, impair discipline by superiors, disrupt harmony, and create friction in working relationships. *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007).[1] In *Faghri v. University of Connecticut*, 621 F.3d 92 (2d Cir. 2010), a state university dean was demoted to professor for repeatedly and publicly opposing university policies. While the policies involved public concerns, the dean's interest in free speech was outweighed by the university's interest in effective implementation of its policies by its high-ranking executives. A Federal District Court in Florida denied the First Amendment claim of a teacher who alleged she was suspended and constructively discharged for writing a letter to her congressional representative which was leaked to the Hispanic press. The letter referred to Puerto Ricans as "immigrants" and "foreigners" and expressed her belief that Puerto Ricans are "trashing Orlando daily" and should be kept home in Puerto Rico. The court ruled against the teacher because the letter "caused a community firestorm" and called into question whether she was competent to continue teaching at the school. *Hall v. Orange County School Bd.*, 2007 WL 4181907 (M.D. Fla. 2007) (unreported). Similarly, the dismissal of a Massachusetts state social worker for using a racial epithet at a private, testimonial dinner where political figures were present was not violative of the First Amendment. *Pereira v. Comm'r of Soc. Servs.*, 432 Mass. 51 (2000).

The Supreme Court has noted "the enormous variety of fact situations in which critical statements by… public employees may be thought by their superiors… to furnish grounds for dismissal," which sometimes makes the analysis "difficult." *Garcetti* at 418. Teachers choosing to publicly express opinions about PARCC or other related matters should be mindful that the First Amendment may provide an inadequate shield against a school administrator who reasonably believes the teacher's expression is disruptive to school operations.

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[1] The employer's reasonable belief that the statements were potentially disruptive was sufficient to remove First Amendment protection; the employer was not required to show actual disruption. *Id.* at 49.

D. *Garcetti – Pursuant to Official Duties*

The question before the Supreme Court in the *Garcetti* case was whether an employee's speech made "pursuant to . . . official duties" enjoys constitutional protection. The employee in *Garcetti* was a Los Angeles County Deputy District Attorney who believed that an affidavit prepared by a police officer in order to obtain a critical search warrant was inaccurate. The Deputy wrote an internal memorandum and participated in several meetings where he raised his concerns, but his superiors decided to proceed with the criminal case using the affidavit over his objection. Subsequently, the Deputy was transferred to a lower position at another courthouse and denied a promotion. He contended that these adverse employment actions were the result of his speech in connection with the inaccurate affidavit, which was used to support a key aspect of a criminal prosecution.

While fraud by the government in a criminal prosecution almost certainly meets the test of being a matter of public concern, a majority of the Supreme Court concluded that

> [the Deputy District Attorney's] expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that [he] spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes [his] case from those in which the First Amendment provides protection against discipline. We hold 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.

Garcetti at 421. The Court reasoned that "restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti* at 421-22.

Following *Garcetti*, there has been much litigation grappling with the parameters of the Supreme Court's apparently categorical exclusion of speech "pursuant to . . . official duties" from the protection of the First Amendment. The *Garcetti* opinion itself introduced an ambiguity in the application of the "official duties" doctrine in the education setting, when the Court observed "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. The Court explicitly declined to decide "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 547 U.S. 425.[2]

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[2] Whether the First Amendment protects a distinct right of academic freedom has never been answered by the appellate courts. *Hosford v. Sch. Comm. of Sandwich*, 421 Mass. 708, 712 (1996). The Supreme Court's reference to "scholarship and teaching" in *Garcetti* suggests that it had higher education in mind, and the application of a potential "academic scholarship or classroom instruction" exception to the "pursuant to . . . official duties" rule to elementary and secondary education is unclear. Generally speaking, "a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern; and (2) the school provided the teacher with notice of what conduct was prohibited (internal citations omitted)." *Ward v. Hickey*, 996

The post-*Garcetti* cases applying the "official duties" exclusion have varied. The case law in Massachusetts suggests a relatively broad interpretation: if the speech is made in the course of the employee's duties it is unprotected by the First Amendment. *Foley v. Town of Randolph*, 598 F.3d 1, 9 (1st Cir. 2010) (Fire Chief's observations about inadequate fire department funding and staffing at impromptu press conference following fire where two children were killed is unprotected because, under all the circumstances, he "was speaking in his official capacity as Chief").[3] Other courts appear to follow a narrower interpretation. The 4th Circuit Court of Appeals found that a command officer of the Baltimore Police Department was, arguably, not acting "pursuant to . . . official duties," when he provided an internal memorandum, critical of the use of deadly force, to the press. His lawsuit alleging that he was dismissed for exercising First Amendment rights stated a cognizable claim. The Court interpreted *Garcetti* so as not to significantly alter the *Pickering* balancing of the employee's and employer's interests. *Andrew v. Clark*, 561 F.3d 261, 268 (4th Cir. 2009); s*ee generally* Erika Eisenoff, Hear No Evil, See No Evil. . . Speak No Evil? A Re-Examination of Public Employee Free Speech Rights, 9 First Amend. L. Rev. 643 (2011).[4]

In an important case just decided in the most recent Supreme Court Term, the Court reaffirmed the framework for analysis in determining whether employee speech is protected. *Lane v. Franks*, 13-483, 2014 WL 2765285 (U.S. June 19, 2014). The decision continues to distinguish between speech required as part of an employee's "official duties," which is unprotected under *Garcetti*, from speech about events at a public employee's work, which may be protected if they meet the *Connick* public concern test. It further clarifies that, under *Garcetti*, an employee is not acting within the scope of employment when he or she speaks publicly about matters learned in the course of employment. Accordingly, the Court found that truthful testimony, under subpoena, by an administrator about financial corruption at a community college was about a "public concern" and was not part of the administrator's "official duties." In the *Pickering* balancing of the employer's and employee's interests, the Court observed that a public employer has no legitimate interest in stifling truthful testimony about corruption.

A teacher wishing to express opinions about PARCC or other similar matters should avoid engaging in such expression in the course of his or her teaching or administrative responsibilities, particularly if these responsibilities include any phase of training or

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F.2d 448, 452 (1st Cir. 1993); *cf., Hosford, supra.* However, like all public employees, elementary and secondary teachers' speech is protected under the First Amendment to the extent outlined under general principles above.

[3] How broadly *Foley* applies to other situations or non-managers is ambiguous. The Court emphasized that its holding was limited to the facts of the case, and the fact the employee was the Fire Chief was highly significant. *Id.* Because Massachusetts is in the 1st Circuit, *Foley* is theoretically a binding precedent, but this is, in effect, contradicted by the Court's own statement that its holding is limited to its facts. *Foley* does suggest that the panel which heard the appeal was less concerned about employee free speech rights than the panel of the 4th Circuit Court of Appeals which decided *Andrew*, discussed below. Because Massachusetts is not in the 4th Circuit, *Andrew* is not a binding decision for the lower courts here, although it may be cited for persuasive value.

[4] Reviewing the post- *Garcetti* cases, two commentators have suggested that the distinction whether speech is "pursuant to . . . official duties" should rest on "whether, had the employee remained silent on the incident in question, he would have then been in breach of his employment contract." Scott R. Bauries & Patrick Schach, Coloring Outside The Lines: *Garcetti v. Ceballos* in the Federal Appellate Courts, 262 Ed. Law Rep. 357, 2011 WL 486582 (Feb. 3, 2011)

implementation of the program. As the Supreme Court noted, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane* at 10.

II. OTHER SOURCES OF FREE SPEECH RIGHTS

A. The State Constitution

The Declaration of Rights of the Massachusetts Constitution provides that "[t]he right of free speech shall not be abridged." Mass. Const. pt. 1, art. XVI. The Supreme Judicial Court ("SJC") has treated free speech and religious freedom rights under the state constitution as coextensive with the equivalent rights under the First Amendment. *Hosford, supra* 421 Mass. 712, 659 N.E.2d 1180, n. 5, citing *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 558, 392 N.E.2d 1195 (1979) (establishment of religion provisions of state constitution equivalent to federal constitution). Although *Hosford* left some room for state free speech rights to develop independently from federal rights (the Court found that it did not need to reach the question of rights under the state constitution because it found that the First Amendment had been violated), no separate and more protective state constitution free speech rights have been developed to date. Thus, the rights and legal analysis for protected pubic employee speech under the Massachusetts Constitution appears to be the same as under the First Amendment to the U.S. Constitution.

B. General Laws Chapter 71, Section 44

Massachusetts General Laws, chapter 71, section 44 provides as follows:

> No [school] committee shall by rule, regulation, or otherwise, restrict any teacher in, or dismiss him for, exercising his right of suffrage, signing nomination papers, petitioning the general court or appearing before its committees, to the extent that such rights, except voting, are not exercised on the school premises during school hours, or when their exercise would actually interfere with the performance of school duties.

This statute was enacted in 1913, and there are no reported cases interpreting or applying its provisions. In this historical period, public employers often acted with impunity in conditioning public employment upon an employee's willingness to forego political activities. See, *McAuliffe v. City of New Bedford*, 155 Mass. 216 (1892) (upholding city requirement that "[n]o member of the [police] department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever.") As then-Chief Justice Oliver Wendell Holmes, Jr. wrote for the SJC, "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." In this context, G.L. c. 71, § 44 was likely intended to accord a measure of protection to teachers for free speech and political rights at a time when those rights were not sufficiently protected against adverse employment actions. The rights protected under the statute are quite specific (voting, signing nomination papers and appearing before the Legislature, all while off duty). These rights now are all constitutionally protected under the First Amendment.

However, on the margins, § 44 may have a beneficial effect in the *Pickering* balancing of employer and employee interests. Under *Pickering*, it is hard to imagine how a public employee's interest in the off-duty voting and petitioning activity described in § 44 would be outweighed by any legitimate interest of a public employer. However, if, in a given situation, there were ambiguity on this point, § 44 might help tip the balance in the employee's favor. Section 44 is, in

effect, a declaration by the Legislature that school committees in Massachusetts have *no* interest in off-duty voting, signing of nomination papers and appearances before the Legislature by teachers. Thus, for the activities specifically protected under § 44, school committees can have no interest which outweighs teachers' First Amendment rights under a "*Pickering* balancing" analysis.

The statute also reflects that protection of these basic rights of political participation by teachers is a long-standing policy value in Massachusetts, where voting and petitioning rights were protected from adverse employment action under § 44 long before they were protected under the First Amendment.

C. The "Anti-SLAPP Statute"

Massachusetts General Laws, chapter 231, § 59H does not grant any substantive rights but does provide an expedited procedure to dismiss "civil claims, counterclaims, or cross claims … [which] are based on [the] party's exercise of its right of petition under the constitution of the United States or of the commonwealth" in lawsuits in state court.[5] The statute requires that a motion to dismiss a lawsuit on this basis be heard expeditiously and that the dismissal must be granted unless both of the following conditions are met: "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party."

This statute was designed to end "strategic litigation against public participation" ("SLAPP"), where lawsuits against citizens were filed to chill public participation in zoning appeals and other regulatory matters where well-funded actors, like real estate developers, had large sums at stake in favorable government action. The application of this statute to PARCC-related issues appears limited, although situations where it might apply could be imagined. For example, the statute could be used to expedite dismissal of a lawsuit against an educator based on testimony before the Board of Elementary and Secondary Education that had a negative effect on a private stakeholder, such as a vendor providing PARCC-related services to the state.

D. G.L. c. 150E and Collective Bargaining Agreement

Speaking out on PARCC or other educational policy issues may also be protected under the Massachusetts Public Sector Labor Law, G.L. c. 150E, which prevents adverse action against an employee who is engaging in "concerted, protected activity." The protection of employee concerted activity is a core principle of federal and state labor law. Conduct or speech is concerted when it involves an employee (1) speaking with another employee or employees about their terms and conditions of employment, (2) engaging in mutual aid and protection, (3) organizing a union, or (4) participating in union-related activities. Posting individual comments or opinions about PARCC on a web blog or a public Facebook page or other similar public

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[5] Section 59H states " 'a party's exercise of its right of petition' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government."

forum is not concerted activity. But an educator using the same public forums to discuss with a co-worker or co-workers PARCC's impact on working conditions is clearly engaged in "concerted" activity and an employer cannot take adverse action against the educator(s) for the content of the speech.

The power and advantage of G.L. c. 150E over the First Amendment as a source of protection for employee speech is that analysis under c. 150E does not involve a *Pickering*-style balancing test. Teachers are protected by law, for example, when they discuss or engage in a "work-to-rule" action, even though work-to-rule by its nature can have a disruptive effect on school operations. The loss of c. 150E protection involves not a balancing of interests but rather a determination whether the concerted speech or conduct went "beyond the pale," i.e., whether the act or speech was so disloyal or outrageous or intentionally disruptive that it exceeds its concerted purpose and loses its c. 150E protection. The cross-over line can only be determined on a case-by-case basis, but for purposes of this advisory letter, it is sufficient to note that the test is *not* a balancing of equal but competing interests.

Employees may also have protection under negotiated collective bargaining agreements. For example, a collective bargaining agreement may provide protections for employees in the exercise of academic freedom and prevent any disciplinary action unless there is just cause for the discipline imposed. Or an agreement may include a provision that expressly bars employer retaliation against employees in the exercise of state or federal rights or that explicitly incorporates external law into the four corners of the contract. There are many ways that bargaining agreements integrate external rights and, in many such instances, bring violations of these external rights within the scope of the grievance and arbitration provisions. There is great value in being able to force the employer into the grievance process so that the issues can be discussed promptly and perhaps resolved prior to litigation. The relation between bargaining agreements and external law (and the availability of arbitration as a mechanism for redress) is a complex area of law, but as is true anytime a union member runs into difficulty with his or her employer, a union should first determine whether the dispute is covered by the terms of the applicable collective bargaining agreement. That guiding principle also applies when a union member is in trouble with his or her employer for speaking out on educational matters of public concern.

III. CONCLUSION

We hope that this opinion is helpful. Should any MTA member be threatened with adverse action resulting from his or her advocacy on matters of public concern, he or she should contact their local association immediately. MTA's Divisions of Affiliate Services and Legal Services are available for further advice and guidance.

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