

## NEW YORK COURT OF APPEALS

# Santer v. Board of Education of the East Meadow Union Free School District

23 N.Y.3d 251 (2014) · Decided May 6, 2014

### SUMMARY

The New York Court of Appeals considered whether disciplining public-school teachers for a union picketing demonstration violated their First Amendment rights. Applying the Pickering balancing test, the court held that the teachers' labor-related expression addressed a matter of public concern, but that the school district's interests in student safety and effective operations outweighed the teachers' interests in conducting the demonstration in the manner used. The court therefore upheld the disciplinary arbitration awards and reversed the Appellate Division.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | New York Court of Appeals                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| WRITING FOR THE COURT | Abdus-Salaam, J.; Abdus-Salaam; Lippman; Pigott; Read; Rivera; Smith                                                                                                                                                                                                                                                                                                                                                                                        |
| JURISDICTION          | New York                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| DECIDED               | May 6, 2014                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| DISPOSITION           | reversed                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| PROCEDURAL POSTURE    | The Board of Education appealed as of right to the New York Court of Appeals from Appellate Division orders reversing Supreme Court orders and vacating arbitration awards disciplining teachers for a parking-based picketing demonstration.                                                                                                                                                                                                               |
| STANDARD OF REVIEW    | Under Education Law § 3020-a (5) and CPLR 7511, judicial review of an arbitration award is narrowly limited to whether the award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power. In compulsory arbitration, the award must also have evidentiary support and cannot be arbitrary and capricious. The First Amendment Pickering balance is reviewed as a question of law. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                                                                                                                                                                              |
| PARTIES               | Board of Education of the East Meadow Union Free School District v. Richard Santer, Barbara Lucia                                                                                                                                                                                                                                                                                                                                                           |

## TOPICS

first amendment

free speech

employment arbitration

labor law

municipal law

## PRACTICE AREAS

constitutional law

employment law

labor law

employment arbitration

municipal law

## QUESTIONS PRESENTED

1. Whether the teachers' car-based picketing demonstration constituted speech or expressive conduct protected by the First Amendment.
2. Whether the teachers' speech addressed a matter of public concern under the Pickering framework.
3. Whether the District's interests in student safety and effective school operations outweighed the teachers' First Amendment interests in using this particular manner, time, and place of protest.
4. Whether the arbitration awards were subject to vacatur under CPLR 7511 because they violated a strong public policy, were irrational, or exceeded the arbitrators' authority.

## HOLDINGS

1. The teachers' demonstration constituted speech or expressive conduct subject to First Amendment protection, even though it involved conduct that the arbitrators found was intended to create a disruption.
2. The teachers' speech concerning the ongoing labor dispute and collective bargaining negotiations addressed a matter of public concern.
3. The District justified disciplining the teachers because their interests in engaging in protected speech in the manner employed were outweighed by the District's interests in protecting students and maintaining effective school operations.
4. The arbitration awards did not violate a strong public policy, were not irrational, and did not clearly exceed a specifically enumerated limitation on the arbitrators' power; therefore, the awards were confirmed.

## KEY QUOTATIONS

*“Accordingly, we conclude that petitioners’ demonstration constituted “speech” subject to First Amendment strictures, and now consider that speech in the context of the Pickering balancing test.” (263)*

*“the public employer need only “make a substantial showing that the speech is . . . likely to be disruptive” to satisfy the balancing test and meet its burden under Pickering” (266)*

*“petitioners’ interests in engaging in that constitutionally protected speech in a manner that interfered with the safety of students were outweighed by the District’s interests in maintaining an orderly, safe school” (269)*

## FACTUAL BACKGROUND

Teachers at Woodland Middle School had engaged in weekly picketing concerning a stalled collective bargaining agreement. On March 2, 2007, during heavy rain, 16 teachers used eight legally parked cars on both

sides of the public street in front of the school and displayed picketing signs from the cars. The arrangement prevented parents from using the ordinary curbside drop-off area, causing children to exit vehicles in the middle of congested traffic and in the rain. The demonstration caused actual traffic and operational disruption, including late-arriving teachers, parent complaints, police involvement, and the need to arrange homeroom coverage, although no child was injured.

#### **PROCEDURAL HISTORY**

The District commenced disciplinary proceedings under Education Law § 3020-a against Santer, Lucia, and other teachers after a demonstration in which teachers parked on both sides of a public street in front of the school. Arbitrators found Santer and Lucia guilty of misconduct and imposed fines of \$500 and \$1,000, respectively. Supreme Court denied their CPLR article 75 petitions to vacate the awards. The Appellate Division reversed, concluding under *Pickering* that the teachers' speech addressed a matter of public concern but that the District had not shown sufficient disruption to justify discipline. The Court of Appeals reversed the Appellate Division in both proceedings, denied the petitions, and confirmed the awards.

#### **DISPOSITION**

reversed

#### **REMAND INSTRUCTIONS**

No remand was ordered. In each proceeding, the Appellate Division order was reversed, the petition was denied, and the arbitration award was confirmed.

#### **CASES CITED**

- *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968)
- *Matter of Santer v. Board of Education of East Meadow Union Free School District*, 101 A.D.3d 1026 (2d Dep't 2012)
- *Matter of Lucia v. Board of Education of East Meadow Union Free School District*, 109 A.D.3d 545 (2d Dep't 2013)
- *Matter of United Federation of Teachers, Local 2, AFT, AFL-CIO v. Board of Education of City School District of City of New York*, 1 N.Y.3d 72 (2003)
- *City School District of the City of New York v. McGraham*, 17 N.Y.3d 917 (2011)
- *Matter of Sprinzen (Nomberg)*, 46 N.Y.2d 623 (1979)
- *Matter of New York State Correctional Officers & Police Benevolent Association v. State of New York*, 94 N.Y.2d 321 (1999)
- *Matter of Motor Vehicle Accident Indemnification Corp. v. Aetna Casualty & Surety Co.*, 89 N.Y.2d 214 (1996)
- *Rankin v. McPherson*, 483 U.S. 378 (1987)
- *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006)
- *Melzer v. Board of Education of City School District of City of New York*, 336 F.3d 185 (2d Cir. 2003)

- United States v. National Treasury Employees Union, 513 U.S. 454 (1995)
- Texas v. Johnson, 491 U.S. 397 (1989)
- Spence v. Washington, 418 U.S. 405 (1974)
- United States v. Grace, 461 U.S. 171 (1983)
- Carey v. Brown, 447 U.S. 455 (1980)
- Gregory v. Chicago, 394 U.S. 111 (1969)
- Connick v. Myers, 461 U.S. 138 (1983)
- Waters v. Churchill, 511 U.S. 661 (1994)
- Snyder v. Phelps, 562 U.S. 443 (2011)
- San Diego v. Roe, 543 U.S. 77 (2004)
- Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)
- State Employee Bargaining Agent Coalition v. Rowland, 718 F.3d 126 (2d Cir. 2013)
- Vernonia School District 47J v. Acton, 515 U.S. 646 (1995)
- Lewis v. Cowen, 165 F.3d 154 (2d Cir. 1999)
- Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002)
- Heil v. Santoro, 147 F.3d 103 (2d Cir. 1998)
- Shelton v. Tucker, 364 U.S. 479 (1960)
- Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011)

## OPINION

Santer v. Board of Education 23 N.Y.3d 251

ABDUSSALAAM, J.

## OPINION OF THE COURT

Abdus-Salaam, J. This appeal involves a teachers' union picketing demonstration that took place on a public street in front of Woodland Middle School (Woodland) in Nassau County. On the morning of March 2, 2007, petitioners-respondents Richard Santer and Barbara Lucia and other members of the East Meadow Teachers Association (EMTA) displayed picketing signs from their cars parked where parents were dropping their children off at school. Respondent-appellant Board of Education of the East Meadow Union Free School District (the District) charged petitioners with misconduct related to the demonstration, alleging that petitioners created a health and safety risk by parking their cars so that students had to be dropped off in the middle of the street instead of at curbside. After their respective hearings, petitioners were found guilty of misconduct and directed to pay a fine. \*255 Petitioners thereafter commenced these proceedings to vacate the arbitration awards, arguing that the disciplinary proceedings commenced against them, and the discipline ultimately imposed, violated their right to free speech under the First Amendment to the United States Constitution. Supreme Court denied the petitions but the Appellate Division reversed in each case. Applying the two-part balancing test from *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.* (391 US 563 [1968]), the court concluded, first, that

petitioners' speech addressed a matter of public concern and, second, that the District failed to meet its burden of demonstrating that petitioners' exercise of their free speech rights "so threatened the school's effective operation as to justify the imposition of discipline" (Matter of Santer v Board of Educ. of E. Meadow Union Free Sch. Dist., 101 AD3d 1026, 1028 [2d Dept 2012]; Matter of Lucia v Board of Educ. of E. Meadow Union Free Sch. Dist., 109 AD3d 545, 547 [2d Dept 2013]). We agree with the Appellate Division that the picketing demonstration, a form of "speech" protected by the First Amendment, addressed a matter of public concern. We come out differently, however, on the second step of the Pickering test. Viewing the record evidence in light of established federal precedent, we conclude that petitioners' interests in engaging in constitutionally protected speech in the particular manner that was employed on the day in question were outweighed by the District's interests in safeguarding students and maintaining effective operations at Woodland. The District also satisfied its burden of proving that the discipline imposed here was justified because petitioners created a potential yet substantial risk to student safety and an actual disruption to school operations. We therefore reverse. I. At all relevant times, petitioners were teachers at Woodland and members of the EMTA, the collective bargaining unit for the District's teachers. The collective bargaining agreement (CBA) expired on September 1, 2004, and for several years following its expiration, the District and the EMTA were unable to reach an agreement over a new CBA. To express their dissatisfaction with the lack of progress, teachers at Woodland engaged in weekly protest activities, including picketing, for over two years prior to the demonstration on March 2, 2007. The teachers generally picketed on Monday and Friday mornings, usually \*256by walking along the sidewalk in front of Woodland carrying union signs as students were arriving for school. Woodland includes grades six through eight, and its students are between 11 and 14 years old. Students typically begin arriving at Woodland at 7:30 a.m. for homeroom class, which begins at 8:12 a.m. Teachers must report to work by 7:55 a.m.; those who drive to Woodland generally park in a teachers' lot behind the school. Woodland is located on the north side of Wenwood Drive, a relatively narrow, two-way public street that runs in front of the school's main entrance. On an average school day morning, approximately 100 parents drive down Wenwood Drive, pull alongside the curb, and drop off their children at school. The north side of the street has two curb cuts giving access to the sidewalk and pathways that lead to the school buildings. Children exiting cars on the north side generally may proceed directly from the curb to the school without setting foot in the street. Children who are dropped off on the south side of the street, however, must wait at the curb and cross the street as traffic permits. During the week of February 26, 2007, Woodland EMTA members held a meeting, at which Santer was present,<sup>1</sup> to plan a picketing demonstration to be held on March 2nd. The weather forecast called for heavy rain that day, and the members, evidently not wanting to stand out in the rain but also not wanting to cancel the demonstration due to inclement weather, voted to park their cars along Wenwood Drive and place picketing signs in their car windows so that parents, seeing the signs as they drove by, would be reminded of the ongoing labor negotiations. Santer did not vote because

he was the EMTA's building president but he "spoke against" the proposed parking demonstration. According to his hearing testimony, Santer told his colleagues that they could not park in front of the curb cuts on Wenwood Drive because it was illegal to block access to them.<sup>2</sup> The members amended their vote to keep the curb cuts clear, but Santer still "never personally supported" \*257the demonstration because he was concerned about student safety. Particularly, Santer "didn't want someone doing something stupid [like] pulling out at 7:50 [a.m.] and hitting a kid." At approximately 7:30 a.m. on March 2nd, 16 EMTA members parked their cars — eight in total — in front of Woodland along both sides of Wenwood Drive. The weather was rainy as forecasted. The participants parked in legal parking spots off of school property and, as planned, did not block any of the curb cuts. Santer testified that the participants placed picketing signs in their car windows facing the street "so parents going by would see them." While the participants' cars were parked on Wenwood Drive, parents dropping off their children could not pull their cars alongside the curb as they regularly did each morning. Because the curb cuts were only about one car-length long, parents would have had to parallel park into them to reach the curb, which proved too difficult on such a narrow two-way street. Consequently, parents driving on both sides of Wenwood Drive had to stop their cars in the middle of the street to drop off their children. This caused traffic to become congested in both directions, and children had to cross through the traffic in the rain to reach the school. At around 7:30 a.m., Woodland's dean of students, Terrence Chase, and principal, James Lethbridge, observed the teachers' parked cars from inside the school; they could also see the ensuing traffic backup on Wenwood Drive and students having to exit cars in the middle of the street. Chase and Lethbridge testified that the cars were parked end-to-end on both sides of the street for the entire length of the school. The administrators agreed that traffic on Wenwood Drive was much worse than usual as a result of the parked cars, and that they had never before seen parents drop off children in the middle of the street as they were required to do that morning. According to Lethbridge, the parked cars created "a very dangerous situation" by forcing children to exit cars in the middle of the street and "walk[ ] between cars" to get to the school. Neither administrator, nor any District official, asked the participants to move their cars or assisted children in crossing the street, however. In \*258fact, Lethbridge and Chase watched the events unfold from inside the school building.<sup>3</sup> As the parents' cars became more and more backed up, Lethbridge called the police because, in his judgment, they were best equipped to handle the "traffic situation." Meanwhile, secretaries in Woodland's main office fielded a number of phone calls from parents concerned about the traffic backup on Wenwood Drive. Several teachers also called to report that they would be late because of the traffic. Ultimately, 16 of the 19 teachers who arrived late to work on March 2nd cited traffic as their excuse. To compensate for the unprecedented amount of tardy teachers, Chase and Lethbridge had to arrange for coverage of homeroom classes so children would not be left unattended in the classrooms. The parking demonstration concluded at approximately 7:50 a.m. It is undisputed that no child was hurt during the demonstration. Also, the police never intervened because, according to Lethbridge, they

arrived after the demonstration had concluded. As Santer entered the school (he and Lucia arrived on time), Lethbridge directed him to his office, where he asked Santer to explain why he and the other teachers had parked in front of the school and blocked the drop off area. Santer stated that the teachers were informing the public about the EMTA's ongoing labor dispute with the District and that they had a legal right to park along Wenwood Drive, as signs on that street only prohibited parking between 8:00 a.m. and 4:00 p.m. Lethbridge later asked Lucia if she had participated in the demonstration, and Lucia refused to respond to his questions because they involved what she did on her personal time. On March 16, 2007, the District commenced disciplinary proceedings pursuant to Education Law § 3020-a against petitioners and other teachers who had allegedly participated in the picketing demonstration. The District preferred a single charge of misconduct against petitioners, which stated that, on March 2nd, they "intentionally created a health and safety risk by purposely situating [their] vehicle[s] alongside the \*259curb on Wenwood Drive in front of the Woodland Middle School in order to preclude children from being dropped off at curbside. The action resulted in children being dropped off in the middle of the street which resulted in an otherwise avoidable and unnecessary health and safety hazard." There is no dispute that this was the first time the District took disciplinary action against Woodland teachers for picketing over the collective bargaining dispute, and that teachers at Woodland have continued to hold weekly picketing demonstrations without receiving discipline. After their respective hearings, petitioners were found guilty of the misconduct charge and assessed a fine of \$500 to Santer and \$1,000 to Lucia. In their decisions, the arbitrators acknowledged that the parking demonstration was conducted on public property while petitioners were off duty, and that their cars were legally parked. The arbitrators nonetheless concluded that petitioners intended to (and did) disrupt the student drop-off on Wenwood Drive, and that the parked cars created a health and safety risk to children who had to be dropped off in the middle of a busy street in the rain.<sup>4</sup> While it was "fortunate" that no child was injured, the arbitrators determined that fact was irrelevant to their findings that petitioners' intentional conduct posed a potential threat to student safety. Petitioners thereafter commenced separate CPLR article 75 proceedings to vacate the arbitration awards imposed against them. Supreme Court denied the petitions, holding that the arbitrators' determinations do not violate a strong public policy, are not irrational, and do not exceed a specific enumerated limitation of the arbitrators' power.<sup>5</sup> Petitioners appealed. \*260The Appellate Division, in separate decisions, reversed the Supreme Court orders, granted the petitions, and vacated the arbitration awards (see *Matter of Santer*, 101 AD3d at 1026; *Matter of Lucia*, 109 AD3d at 546). The court first held that the evidence at the hearings provided a rational basis for the arbitrators' decisions, and the awards were not arbitrary and capricious (*Matter of Santer*, 101 AD3d at 1027; *Matter of Lucia*, 109 AD3d at 547). Noting that petitioners argued that the District's disciplinary actions violated their First Amendment rights, the court proceeded to analyze those claims under *Pickering* (see *Matter of Santer*, 101 AD3d at 1027-1028). Applying the first step of the *Pickering* test, the court determined that

petitioners’ “ ‘speech’ regarding collective bargaining issues indisputably addressed matters of public concern” (id. at 1028; *Matter of Lucia*, 109 AD3d at 547). As for the second step, which requires balancing the employee’s interest in free speech against the employer’s interest in effective government operations, the court concluded that “despite the evidence establishing that the manner in which the protest was carried out interfered with the safe and effective drop-off of students” (*Matter of Santer*, 101 AD3d at 1028), the District failed to meet its burden of showing that petitioners’ exercise of their First Amendment “rights so threatened the school’s effective operation as to justify the imposition of discipline” (id.; *Matter of Lucia*, 109 AD3d at 547). The court further cautioned in *Matter of Santer* that “[t]he disciplinary measures imposed [here] . . . would likely have the effect of chilling speech on an important matter of public concern — the negotiation of a collective bargaining agreement” (101 AD3d at 1029).<sup>6</sup> The District now appeals as of right pursuant to CPLR 5601 (b) (1) from both Appellate Division orders of reversal. II. Education Law § 3020-a (5) requires a court to review an arbitrator’s determination pursuant to CPLR 7511, which \*261permits vacatur of an award on three narrow grounds: “it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator’s power” (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003] [internal quotation marks omitted]; see CPLR 7511 [b] [1]). “[T]he scope of the public policy exception to an arbitrator’s power to resolve disputes is extremely narrow” (*Matter of United Fedn. of Teachers*, 1 NY3d at 80), and “[c]ourts will only intervene in the arbitration process in those ‘cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator’ ” (*City School Dist. of the City of N.Y. v McGraham*, 17 NY3d 917, 919 [2011], quoting *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631 [1979]; see also *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). “Where, as here, parties are subject to compulsory arbitration, the award must satisfy an additional layer of judicial scrutiny — it ‘must have evidentiary support and cannot be arbitrary and capricious’ ” (*McGraham*, 17 NY3d at 919, quoting *Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]). Although the Appellate Division determined that the awards satisfied the “additional layer of judicial scrutiny” (*McGraham*, 17 NY3d at 919) in that they are supported by a rational basis and are not arbitrary and capricious (see *Matter of Lucia*, 109 AD3d at 547; *Matter of Santer*, 101 AD3d at 1027), the court did not identify which of the narrow grounds under CPLR 7511 (b) (1) it relied upon in vacating the awards (see generally *Matter of United Fedn. of Teachers*, 1 NY3d at 79). Parsing the court’s reasoning, however, it appears the awards were vacated on the ground that they violate a strong public policy against disciplinary actions that “chill[ ]” teachers’ constitutionally protected speech related to the collective bargaining process (*Matter of Santer*, 101 AD3d at 1029). It is well settled that a public employer may not discharge or retaliate against an employee based on that employee’s exercise of the right of free speech (see *Rankin v McPherson*,

483 US 378, 384 [1987]; see also *Locurto v Giuliani*, 447 F3d 159, 183 [2d Cir 2006]). Equally well settled, however, is that “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in \*262connection with regulation of the speech of the citizenry in general” (*Pickering*, 391 US at 568), meaning that public employers “may impose restraints on the First Amendment activities of its employees that are job-related even when such restraints would be unconstitutional if applied to the public at large” (*Melzer v Board of Educ. of City School Dist. of City of N.Y.*, 336 F3d 185, 192 [2d Cir 2003], citing *United States v National Treasury Empls.* [National Treasury], 513 US 454, 465 [1995]). Thus, although “public employees like . . . teacher[s] do not leave their First Amendment rights at the schoolhouse door, . . . it is plain that those rights are somewhat diminished in public employment” (*Melzer*, 336 F3d at 192). The District argues that, as a threshold matter, petitioners’ parking demonstration did not qualify as a form of “speech” entitled to First Amendment protection.<sup>7</sup> To support this claim, the District relies on the Supreme Court’s decision in *Texas v Johnson* (491 US 397 [1989]), in which the Court explained that “conduct possesses sufficient communicative elements to bring the First Amendment into play” if there was “ ‘an intent to convey a particularized message . . . , and the likelihood was great that the message would be understood by those who viewed it’ ” (491 US at 404, quoting *Spence v Washington*, 418 US 405, 410-411 [1974] [alterations omitted]). It is established that, as a general matter, “peaceful picketing” is an “expressive activit[y] involving ‘speech’ protected by the First Amendment” (*United States v Grace*, 461 US 171, 176-177 [1983], citing e.g. *Carey v Brown*, 447 US 455, 460 [1980]; *Gregory v Chicago*, 394 US 111, 112 [1969]). The arbitrators determined here that, on the morning of March 2, 2007, petitioners engaged in picketing from their cars parked on Wen-wood Drive. The evidence at the hearings provided a rational basis for this finding of fact, affirmed by the courts below, and \*263had it been made in error, we still would not be compelled to vacate the arbitration awards (see *Matter of New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326 [“(E)ven in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice”]; *Matter of Sprinzen*, 46 NY2d at 629).<sup>8</sup> Moreover, although the arbitrators determined that petitioners intended to create a disruption by parking in the student drop-off area, that finding does not, under these circumstances, deprive petitioners’ picketing activity of its status as “speech.” Accordingly, we conclude that petitioners’ demonstration constituted “speech” subject to First Amendment strictures, and now consider that speech in the context of the *Pickering* balancing test. Under *Pickering*, the determination whether a public employer has properly disciplined a public employee “for engaging in speech requires ‘a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [public] . . . employer, in promoting the efficiency of the public services it performs through its employees’ ” (*Rankin*, 483 US at 384, quoting *Pickering*, 391 US at 568). This balancing test recognizes that the public employer must be permitted a level of control over its employees so it may fulfill essential services, such as public safety and

education, efficiently and effectively (see *Connick v Myers*, 461 US 138, 150-151 [1983]; see also *Waters v Churchill*, 511 US 661, 675 [1994 plurality]), but also that “[v]igilance is necessary” to ensure public employers do not use their authority “to silence discourse . . . not because it hampers public functions but simply because superiors disagree with the content of [the] employees’ speech” (*Rankin*, 483 US at 384). The *Pickering* test involves a two-part inquiry, the first part being “whether the speech which led to an employee’s discipline \*264relates to a matter of public concern” (*Melzer*, 336 F3d at 193, citing *Rankin*, 483 US at 384; see *Connick v Myers*, 461 US 138, 146 [1983]). “Speech deals with 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 public’ ” (*Snyder v Phelps*, 562 US —, —, 131 S Ct 1207, 1216 [2011], quoting *San Diego v Roe*, 543 US 77, 83-84 [2004], and *Connick*, 461 US at 146). Whether a public employee’s speech addresses a matter of public concern is a question of law to be determined in light of “the content, form, and context of a given statement, as revealed by the whole record” (*Connick*, 461 US at 147-148; see *Bose Corp. v Consumers Union of United States, Inc.*, 466 US 485, 499 [1984]). We agree with the Appellate Division that petitioners’ speech related to a matter of public concern (see e.g. *Snyder*, 562 US at —, 131 S Ct at 1216). The ongoing labor dispute between the EMTA and the District, although of personal concern to petitioners and other teachers, is a political and social issue of broad public import (see generally 562 US at —, 131 S Ct at 1217; cf. *State Emp. Bargaining Agent Coalition v Rowland*, 718 F3d 126, 132, 134 n 7 [2d Cir 2013] [“the ‘economic’ advocacy of public employee unions touches directly on matters of public concern”]). Moreover, the picketing demonstration was conducted outside the workplace on a public street and was addressed to a public audience: parents dropping their children off for school (see *National Treasury*, 513 US at 466; see also *Snyder*, 562 US at —, 131 S Ct at 1217). The District suggests that the “real objective” of the demonstration was to entangle parents in the labor dispute so the District would be pressured to give in to the EMTA’s demands. However, the arbitrators did not conclude, nor does the record support, that petitioners intended to create a disruption for any reason other than to bring attention to the collective bargaining dispute. Thus, the record as a whole indicates that petitioners’ speech was on a matter of public concern and entitled to First Amendment protection (see *Connick*, 461 US at 147-148). Since petitioners’ speech satisfies *Pickering*’s first step, we now move on to the second, balancing step of that test (see e.g. *Rankin*, 483 US at 388). Under it, we must weigh the employee’s First Amendment rights against the public employer’s interest “ ‘in promoting the efficiency of the public services it performs \*265through its employees’ ” (*id.*, quoting *Pickering*, 391 US at 568; see *Connick*, 461 US at 150). In performing the balancing, the employee’s speech “will not be considered in a vacuum; the manner, time, and place of the employee’s expression are relevant,” as is the extent that the speech “interferes with the regular operation” of the public employer’s enterprise (*Rankin*, 483 US at 388; see e.g. *Melzer*, 336 F3d at 197). To satisfy the second step of *Pickering*, the public employer

bears the burden of showing that the discipline arising out of the employee's protected activity was justified (see *National Treasury*, 513 US at 466, citing *Rankin*, 483 US at 388; see also e.g. *Melzer*, 336 F3d at 193 [(“T)he government has the burden of showing that despite First Amendment rights the employee's speech so threatens the government's effective operation that discipline of the employee is justified”). The interests the District asserts in this case are legitimate: ensuring the safety of its students and maintaining orderly operations at Woodland. The District argues that the evidence adduced at the hearings showed that the parking demonstration created dangerous traffic conditions in front of the school that could have injured a student and that caused actual disruption to the school's operations. This evidence, the District maintains, was sufficient to justify its discipline of petitioners, and it was not required to prove, as the Appellate Division decisions suggest, that a student was actually injured for the *Pickering* balance to tip in the District's favor. We agree. “It cannot be disputed that the State has a public policy in favor of protecting children” (*McGraham*, 17 NY3d at 919-920), and that a school has a duty to ensure the safety of its students “in its physical custody or orbit of authority” (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 378 [1995]; see also *Vernonia School Dist. 47J v Acton*, 515 US 646, 654 [1995] [(“T)eachers . . . stand in loco parentis over the children entrusted to them”). Petitioners acknowledge that the District has a significant interest in ensuring that Woodland students arrive to school safely. The Appellate Division, however, does not appear to have given “full consideration” to the District's interest in the “effective and efficient fulfillment” of this duty (*Connick*, 461 US at 150). The court concluded that because no District official asked petitioners to move their cars and no student was hurt on account of the parking demonstration, “the danger presented by the legally parking teachers could not have been substantial” and the District failed to meet its burden \*266under *Pickering*'s second step (*Matter of Santer*, 101 AD3d at 1028-1029; see *Matter of Lucia*, 109 AD3d at 547 [dismissing the award “for the same reasons as those stated in *Matter of Santer*”). It is true that “[t]he more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government [employer] that must be shown” (*Lewis v Cowen*, 165 F3d 154, 162 [2d Cir 1999]; see *Melzer*, 336 F3d at 197). As the Supreme Court has explained, however, “an employer is never required ‘to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action’ ” (*Lewis*, 165 F3d at 163, quoting *Connick*, 461 US at 152). Interpreting this mandate, the Second Circuit has held that a public employer's “right to discharge an employee by reason of his [or her] speech in matters of public importance does not depend on the employer's having suffered actual harm resulting from the speech” (*Pappas v Giuliani*, 290 F3d 143, 151 [2d Cir 2002]; see e.g. *Melzer*, 336 F3d at 197; *Heil v Santoro*, 147 F3d 103, 109 [2d Cir 1998]). While evidence of actual harm or disruption is certainly “persuasive” (*Melzer*, 336 F3d at 197), the public employer need only “make a substantial showing that the speech is . . . likely to be disruptive” to satisfy the balancing test and meet its burden under *Pickering* (*Waters*, 511 US at 674 [plurality opinion]; see also *id.* at 673 [giving “substantial weight to government employers’

reasonable predictions of disruption”]; Pappas, 290 F3d at 151 [“The employee’s speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer’s mission”]). Considering the record evidence under these standards, we conclude that the District met its burden of proving that petitioners’ speech was disruptive enough to justify the imposition of discipline (see e.g. Melzer, 336 F3d at 197). Thankfully, no student was injured on account of the parking demonstration, but the District nonetheless established that petitioners’ actions created a potential yet substantial risk to student safety (see Waters, 511 US at 675). The evidence adduced at the hearings showed that petitioners and the other participating teachers purposefully blocked a familiar student drop-off point by parking their cars along both sides of Wenwood Drive. Lethbridge and Chase observed that the parked cars caused traffic to become congested and \*267prevented children from safely disembarking at the curb. Instead, students exited cars from the middle of the street in the rain. Wenwood Drive is a relatively small suburban road, but that does not mean it was safe for students to exit amidst an unexpected traffic jam during the crush of morning drop-off. Tellingly, Santer testified that he never supported the parking activity because of the safety risk to students and the potential that the teachers would “block[ ] egress” to Woodland. And in Lethbridge’s view, the demonstration did, in fact, create “a very dangerous situation” because it forced children to “walk[ ] between cars” to reach the school. Lethbridge also stated that the teachers’ cars blocked the full length of the street where the children were exiting, and that the cars were parked so close together that children had difficulty reaching the curb. Although Lethbridge did not intervene in the demonstration or help students cross the street, he called the police for assistance with the disruptive traffic situation. This evidence, viewed as a whole, led the arbitrators to determine that petitioners created a health and safety hazard, and we now conclude that it demonstrated a potential risk to student safety that outweighed the First Amendment value of petitioners’ speech about collective bargaining (see Waters, 511 US at 681).<sup>9</sup> Further, the “manner, time, and place” of petitioners’ speech (Rankin, 483 US at 388) tips the balance in favor of the District. The arbitrators found that petitioners intended for the parking activity to create a disruption, and the District presented evidence of “actual disruption” to the school’s effective operation (Melzer, 336 F3d at 197). Particularly, the traffic caused by the parking demonstration led 16 teachers to arrive late to work, requiring that homeroom classes be covered so students were not left unsupervised.<sup>10</sup> A number of parents and teachers also called the school to express their concern about the traffic along \*268Wenwood Drive. It is true, as the Appellate Division noted, that petitioners’ “parking was entirely legal” (Matter of Santer, 101 AD3d at 1028), but while that weighs in petitioners’ favor, it does not outbalance the evidence of disruption.<sup>11</sup> We are mindful that teachers “do not leave their First Amendment rights at the schoolhouse door” (Melzer, 336 F3d at 192; Shelton v Tucker, 364 US 479, 487 [1960]), and that courts must be vigilant in ensuring that teachers are not disciplined “simply because superiors disagree with the content of [their] speech” (Rankin, 483 US at 384). The evidence here, however, does not indicate that the

District's disciplinary actions were motivated by the content of petitioners' speech. EMTA members have picketed about the collective bargaining dispute almost every week since the CBA expired in September 2004. The District never took disciplinary action before or after the parking demonstration on March 2, 2007, and since that event, teachers have continued to picket in front of Woodland. Thus, there is no evidence that the discipline here has "chilled" or will "chill" speech on matters of public concern or discourage union picketing. And although petitioners suggest that the District's actions were intended to silence their constitutionally protected speech, that assertion is not supported by the record, which indicates that, as the District contends, petitioners were disciplined because the parking demonstration was disruptive and created potentially unsafe conditions for students. \*269III. We conclude that, although petitioners' speech as embodied in the parking demonstration was protected by the First Amendment, petitioners' interests in engaging in that constitutionally protected speech in a manner that interfered with the safety of students were outweighed by the District's interests in maintaining an orderly, safe school, and the District satisfied its burden under Pickering of proving that the discipline imposed here was justified. Petitioners have relied solely on their First Amendment claims as the basis for vacating the arbitration awards; having determined that those claims lack merit, we can discern no other reason to conclude that the arbitration awards violate a strong public policy, exceed a specifically enumerated limitation on the arbitrators' power, or are in any way irrational. Accordingly, in each case, the Appellate Division order should be reversed, with costs, the petition denied, and the arbitration award confirmed. . The record does not indicate whether Lucia attended the meeting. . Santer testified at the hearing that the EMTA members originally voted "to park completely along the curb and leave no space" between the cars. Santer "objected to that," telling the members that, from a legal perspective, they "needed to keep the curb cut clear, so that parents could . . . pull to the curb and drop[ ] off children." Santer "was unhappy with what [the EMTA members] were doing" and "thought they were going too far." He also \*257"wanted to make sure [the demonstration] was a community information activity, and not a[bout] blocking the egress to school." . Chase testified that, from his vantage point inside the school, he did not see signs displayed in any of the cars parked along Wenwood Drive. This testimony conflicted, at least somewhat, with Santer's testimony and petitioners' assertions that the parked cars displayed picketing signs. The arbitrators appear to have resolved this factual dispute in favor of petitioners, however, and that determination need not be disturbed on appeal. . The arbitrator presiding over Lucia's proceeding rejected her claim that the District failed to adequately prove that she was physically present during the parking demonstration. The arbitrator credited Chase's testimony that he recognized Lucia's black Chevrolet Camaro because he had developed "familiarity" with teachers' cars after having regularly parked with the teachers in the school parking lot. . In Matter of Lucia, Supreme Court additionally noted that, although it was "mindful of the fact that Lucia, and other similarly situated teachers, have a constitutionally protected right to engage in union activity," it declined to vacate the arbitration award on public policy grounds because that

exception “is ‘extremely narrow’ and the exercise of teachers’ free assembly and \*260speech rights are circumscribed to the extent that such exercise endangers the safety of children” (32 Misc 3d 1208[A], 2011 NY Slip Op 51210[U], \*2 [2011] [citation omitted]). . In *Matter of Lucia*, Justice Roman “concur[red] in the result on constraint of’ *Matter of Santer*, stating that “[t]he mandate of the school district to provide for the safety of the children and to ensure the proper functioning of the school is paramount, and overrides any manifestation of First Amendment rights that were embodied in this protest by the teachers” (109 AD3d at 548 [Roman, J., concurring] [citations omitted]). . This argument was one of the first raised in the District’s briefs to this Court. When pressed on this point at oral argument, however, the attorney for the District responded that, for the purposes of his argument, he would focus instead on the District’s claims related to the second step of the Pickering balancing test. Although not conceding that petitioners’ conduct constituted speech (cf. *Johnson*, 491 US at 405 [noting that the State of Texas “conceded for purposes of its oral argument” that Johnson’s burning of an American flag “was expressive conduct”]), the District’s attorney later stated at argument that, to the extent petitioners displayed signs during the demonstration and those signs related to collective bargaining, their conduct “is likely protected speech.” . Even if picketing were not already considered an expressive activity for First Amendment purposes (see e.g. *Grace*, 461 US at 176), the demonstration here still qualifies as “expressive conduct” under *Johnson*. Enough record evidence exists to support petitioners’ assertion that the demonstration was “inten[ded] to convey a particularized message” related to the EMTA’s stalled collective bargaining negotiations with the District. And given that the teachers had picketed in front of Woodland about that same issue for years before March 2nd, it seems likely that this message would have been understood by its intended audience: parents dropping their children off for school, many of whom were probably familiar with the protracted labor dispute from having observed the teachers’ prior picketing demonstrations. . The dissent asserts that we should not be permitted to “ignore[ ] the Appellate Division’s conclusions” regarding the disruptiveness of petitioners’ speech or otherwise diverge from the Appellate Division’s constitutional analysis (dissenting op at 274). “[T]he Appellate Division was well within its authority to consider the teachers’ claims and apply the Pickering balancing test to the facts in the record” (id.). But the balancing of the competing interests under Pickering is undoubtedly a question of law (see e.g. *Waters*, 511 US at 668; *Jackler v Byrne*, 658 F3d 225, 237 [2d Cir 2011]), and contrary to the dissent’s view, we are not constrained to accept the Appellate Division’s application of the Pickering test to the facts of this case. . The dissent, accusing the Court of having engaged in “dubious” fact-finding, contends that “there is scant record evidence that the parking demonstration caused teachers to arrive late” (dissenting op at 275-276). The \*268testimony and documentary evidence presented at both hearings, which largely was not refuted by petitioners, showed that 16 teachers signed in late to work on March 2nd because of traffic. We need not discount or disregard this record evidence of actual disruption, as the dissent suggests, simply because it was not a factor in the Appellate Division’s Pickering analysis.

Ironically, while asserting that this Court has engaged in impermissible fact-finding and exceeded our role as a court of law (see *id.* at 274, 276), the dissent has no qualms about making credibility determinations to bolster its conclusions (see dissenting op at 276 [characterizing the school administrators’ hearing testimony as “self-serving”]). . The Appellate Division also asserted that the District would have “no recourse” over members of the public who parked on Wenwood Drive in compliance with the posted street signs (*Matter of Santer*, 101 AD3d at 1028). Whether or not this is true, it has little bearing on whether the District demonstrated that petitioners’ particular parking activity caused a substantial disruption in these circumstances. Moreover, the District, as a public employer, “may impose restraints on the First Amendment activities of its employees . . . even when such restraints would be unconstitutional if applied to the public at large” (*Melzer*, 336 F3d at 192).