

NATIONAL ANTHEM PROTESTS: HOW SHOULD EDUCATIONAL INSTITUTIONS RESPOND?

Publication
Oct 3, 2016

Picture this scenario at your school: parents, students, and fans fill the stands on the night of the big game. The marching band takes the field, but as it begins to play the national anthem, the football team's star player drops to one knee – similar to the recent actions by multiple professional sports figures – leaving district or university administrators scrambling to determine the appropriate response.

Until recently, such a situation seemed unlikely to occur on a widespread scale, but it may become a new norm during this school year. This form of protest could put schools and universities at the forefront of an unusual confluence of the law, politics, and unwanted publicity.

Public Schools Face Unique Obligations

The potential response by public schools in such a scenario is limited by the U.S. Constitution. Two First Amendment speech principles converge when dealing with national anthem protests: students' right to be free from compelled speech, and students' right to free speech.

Over the years, courts have frequently examined these rights with respect to a similar issue: compulsory recitation of the Pledge of Allegiance. The Supreme Court found that students cannot be required to salute the flag while reciting the Pledge, while lower courts generally conclude that schools cannot require a student to stand.

These same principles would seemingly apply to national anthem protests. Therefore, it seems likely that public schools cannot compel students to participate in (i.e.,

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require them to stand during) the national anthem. You will need to be particularly vigilant to ensure that individual coaches do not implement such policies or practices on their own before first consulting with appropriate school administrators.

Industry Focus

Education

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The prohibition against compelled speech, however, does not necessarily mean a public school cannot respond to a national anthem protest. In particular, if the student's actions are likely to cause a substantial disruption of or materially interfere with school activities, or where the protest bears the imprimatur of the school and is therefore viewed as school-sponsored, the speech is not constitutionally protected. In that scenario, your school may legally discipline the student for that speech.

Private Schools Have Greater Leeway

Should a similar protest occur at a private school, these First Amendment issues will not come into play. Instead, private schools must look to their internal policies and student handbooks to determine the appropriate response, and then discipline appropriately in each individual circumstance.

Practical Considerations For All Schools

Regardless of whether your school is public or private, practical considerations may ultimately affect whether you want to and how you implement discipline even if you determine it is legally permissible to do so under the specific circumstances.

Unwanted Attention

In the current climate, any discipline in response to a national anthem protest is almost certain to draw substantial media and social media attention, most likely unwanted and negative in nature. It is critical to recognize any situation involving a national anthem protest could spread like wildfire within moments, and you should act with an appreciation for this reality.

Privacy Concerns

Given each school's *in loco parentis* obligations and the spirit and intent of legal confidentiality requirements, you should consider how you will respond should students protest the anthem. Although you may not technically violate any privacy statutes, immediate discipline of a student may run counter to the spirit and intent of protecting students' private information, especially since news of the event could swiftly ripple across social media.

The situation could easily stream live online or be a simple click away from being shared, so your reaction in the moment could determine whether the student's self-imposed situation receives mass publicity. Often the wiser alternative is to wait to address these matters in a private setting after the event is concluded, avoiding the transformation of a private disciplinary matter into a matter of public concern.

Will Workarounds Work?

Numerous schools have already implemented a creative workaround to this situation – playing the national anthem prior to teams taking the field, enabling them to proactively reframe the circumstances. However, while this may avoid a scene at the game, the reality is that students will inevitably find a way for the expression to be seen or heard (and could include pledge of allegiance protests in the classroom).

This reality makes it incumbent upon school administrators to train teachers and coaches to respect student expression. You can usually diffuse the matter by not drawing more attention to it than necessary.

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