

Insights, News & Events

# NATIONAL ANTHEM PROTESTS: HOW SHOULD SCHOOLS, COLLEGES, AND UNIVERSITIES RESPOND?

Insights  
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It's the night of the big game. Parents, students, and fans fill the stands. The marching band takes the field, but as the band begins to play the national anthem, the football team's star player drops to one knee – similar to the rash of professional sports figures that have recently done so – 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 a unique confluence of the law, politics, and unwanted publicity.

## Public Schools Face Unique Obligations

The potential response by public schools in the above scenario will be limited by the First Amendment. National anthem protests culminate in the convergence of two First Amendment student speech principles: the student's right to be free from compelled speech, which has been largely developed in the Pledge of Allegiance context; and the student's right to free speech.

In the school context, a student's right to free speech is not without limitation. Schools have the ability to discipline or restrict student speech in certain delineated circumstances. Examples include situations where the student's speech is likely to cause a substantial disruption of or material interference with school activities, or where the student speech bears the imprimatur of the school resulting in the speech being viewed as school-sponsored.

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Over the years, courts have frequently addressed a similar issue: compulsory recitation of the Pledge of Allegiance. The Supreme Court has found that the First Amendment prevents a state from requiring students to salute the flag while reciting the Pledge of Allegiance, while lower courts generally conclude that schools cannot require a student to stand for the Pledge of Allegiance.

These principles would seemingly also apply to public schools and the national anthem. Therefore, it seems likely that public schools cannot affirmatively compel students to participate in (i.e., require them to stand during) the national anthem through policy or practice. You will need to be particularly vigilant in ensuring that individual coaches do not implement such policies on their own before first consulting with appropriate school administrators.

### **What Should A Public School Do?**

The prohibition against compelled speech, however, does not necessarily mean a public school cannot respond to a student's expression or protest during the national anthem. In particular, if the student's expression or protest is likely to cause a substantial disruption of or material interference with school activities, the speech will be deemed unprotected by the First Amendment. In that scenario, your school may legally discipline the student for that speech.

Ultimately, in light of these two First Amendment student speech principles, public schools must proceed with extreme caution should they decide to discipline a student for engaging in a silent protest during the national anthem. The legality of such discipline is far from certain and will be extremely fact specific.

### **Private Schools Have Greater Leeway**

Should a similar protest occur at a private school, these First Amendment issues will not be in play. Instead, private schools must look to their internal policies and student handbooks to determine the appropriate response and discipline 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 implement discipline should you determine that discipline for a national anthem protest is legally permissible under the specific circumstances.

## **Industry Focus**

### Education

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### ***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, and it will most likely be unwanted and negative in nature. Consequently, you must consider the fact that decisions on these issues will likely be the subject of considerable public visibility.

It is critical to recognize any situation involving a national anthem protest could spread like wildfire within moments, subjecting your school and students to immediate and overwhelming public attention. Acting without an appreciation for this reality could result in unintended and unnecessary consequences to your institution as well as the individuals involved.

### ***Privacy Concerns***

Given each school's *in loco parentis* obligations and the spirit and intent of legal confidentiality requirements, you should consider how you would respond to students who may choose to act in protest in ways that have already garnered significant public attention in non-school settings. Although you technically may not violate any privacy statutes, immediate and legally appropriate discipline of a student may raise questions about whether your response is handled in a manner that implements the spirit and intent of protecting students' personally identifiable information, especially since news of the events could instantaneously ripple across social media.

If you know that the situation is likely streaming live as it occurs or is simply a click away from being shared, your reaction in the moment could be the difference between whether you cause mass publicity of the student's self-imposed situation or not. The wiser alternative is often to wait to address these types of matters in a private setting after the event is concluded. Remember, student discipline is a private matter and you should be careful to not transform it 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. This enables you to proactively reframe the circumstances. However, while you may believe that such a maneuver will offer better support to students, the reality is that students will inevitably find a way

for the expression to be heard or seen (and could include pledge of allegiance protests in the classroom).

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

### **Conclusion**

Where substantial disruption or material interference may exist with national anthem protests, public school officials should reinforce the process for properly examining the matter: referring the matter to school administrators to assess appropriate handling of the situation. As noted above, private institutions may choose a different course of action given the lack of constitutional implications, while keeping in mind the practical considerations outlined above.

If you have any questions about how national anthem or pledge of allegiance protests affect your institution or wish to discuss an appropriate response to any such protest that occurs at your institution, please contact your Fisher Phillips attorney or any member of our [Education Practice Group](#).

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