



## STUDENT PROTESTS:

### Trouble or a Teachable Moment?

The students who survived the school shooting in Marjory Stoneman Douglas High School in Parkland, Florida, have inspired students across the country to protest school shootings and to advocate for stricter gun control laws. Other students are protesting limitations on the constitutional right to bear arms. All of this follows a year of students protesting racial profiling.

This article addresses a number of legal and practical issues schools should consider when addressing these protests.

### Using The Board's Voice

State statute prohibits school boards from using public funds to oppose or support a ballot issue. *§115.646, RSMo.* However, state statute does not prohibit Board members from issuing press releases on political topics. Further, when students are protesting about issues not on the ballot, the Board can use district resources and endorse messages. But should the Board do so or remain neutral?

School board members need to keep in mind that weighing in on controversial topics might impact the relations the district has with the public. There is a great political and emotional debate on how to make school safe. Although the community looks to the Board for guidance on these issues, the Board should take care not to isolate or scare constituents. Ultimately, the district has the legal responsibility to educate all students living in the district and must work with the parents of these students, regardless of their views on these issues. School boards should be careful not to take actions that would impede good relations with all families in the district.

If the Board does decide to express an opinion, it must be careful not to discourage, disparage, or otherwise take negative action against students, parents or employees with different opinions. It could violate constitutional freedom of speech rights under the First Amendment, or lead to accusations that the Board attempted to stifle differing opinions.

Understandably, many districts will decide not to officially step into the political fray. That said, the Board should not be silent. MSBA recommends the Board reinforce the message that schools are safe places for children, that the district is constantly looking for ways to make schools even safer, and that the Board is interested in community input.

## Student Legal Issues

### **Student Free Speech Rights**

While the school has an interest in maintaining safety and an uninterrupted learning environment, students have First Amendment rights to free speech in school. Notably, political speech has the most protection under the First Amendment, and peaceful protest to enact legislative change is normally political speech. But, the school may prohibit student speech or discipline students for speech that:

- Would materially and substantially disrupt the school. *Tinker v. Des Moines*, 393 U.S. 503 (1969).
- Is vulgar or lewd, or interferes with the district's educational mission. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).
- Promotes illegal drug use. *Morse v. Frederick*, 551 U.S. 393 (2007).
- Constitutes a true threat. *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8<sup>th</sup> Cir. 2011)

Given these restrictions, a student could be disciplined for protests that disrupt the educational environment. For example, encouraging all the students to walk out of a class is disruptive to the class as a whole. Students could also be disciplined for chanting during a math test, or singing a noncurricular protest song during a choir concert. Staging a sit-in in a busy hallway or office would also be disruptive to district operations.

School districts cannot ban speech simply because someone might be offended by the student's viewpoint. Before disciplining students for speech, make sure that the educational environment was actually disrupted or that the district reasonably anticipates disruptions will occur. In *Tinker*, students were suspended for wearing black armbands to protest the Vietnam War. The school district argued it had the authority to suspend a student to avoid a potential disturbance, but the United States Supreme Court disagreed:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . , and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

But courts have also recognized that schools are allowed to limit free expression when the speech occurs in school and school officials "reasonably suspect material and substantial discipline disruption" based on the context. In *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8<sup>th</sup> Cir. 2009). A school district could ban display of the confederate flag because there had been recent racial incidents in the community, some of which involved students.

### **Districts Must Enforce Rules Evenly: Avoiding Viewpoint Discrimination**

Administrators must enforce district rules evenly for a variety of reasons, including avoiding claims of illegal discrimination and maintaining a culture of fairness. Another reason to do so is to avoid claims of viewpoint discrimination under the First Amendment. Part of a student's free speech right is a guarantee that the district will not favor one opinion over the other. While the district has almost absolute control over the curriculum it delivers and has some control over the type of student speech in the educational environment, as described above, the district cannot and should not favor some student expressions over others.

For example, if the district agrees not to enforce its truancy rules during a protest to ban weapons, the district must provide the same concession to students planning a protest in support of arming teachers.

### **Stronger State Law Protection for Emblems, Insignia or Garments**

In some circumstances, Missouri law provides students more protection than the U.S. Constitution. Section 167.166 prohibits district employees or school board members from directing a student to remove an emblem, insignia, or garment unless it promotes “disruptive behavior.” This term has not been defined, but it appears to be a narrower exception than those applicable to the First Amendment. This means that even if a district could limit speech under the First Amendment, the district might violate state law at the same time.

So, for example, if a student wore a T-Shirt with a picture of a marijuana leaf that stated, “Legalize Pot” the district would, under state law, have to argue that the shirt promoted “disruptive behavior” before the student was asked to change shirts. The district could not suspend the students simply because the shirt promotes drug use – contrary to district anti-drug curriculum.

### **Student Distribution of Protest Materials (Policy IGDBA)**

Whether it is a petition, flier or button, students have the right to hand out materials on school property. But school districts can regulate those activities to ensure the educational environment is not disrupted. MSBA’s policy IGDBA allows students to distribute materials on school property if the students first submit the materials for approval from the principal.

In general, the principal must allow the distribution as long as it is not disruptive or blocking regular traffic flow in the hallways. But, the principal can refuse distribution if the materials:

- Are obscene to minors.
- Are libelous.
- Are pervasively indecent or vulgar (secondary schools)/contain any indecent or vulgar language (elementary schools).
- Advertise any product or service not permitted to minors by law.
- Constitute insulting or fighting words, the very expression of which injures or harasses other people (e.g., threats of violence, defamation of character or of a person's race, religion or ethnic origin).
- Present a clear and present likelihood that, either because of their content or their manner of distribution, will cause a material and substantial disruption of the proper and orderly operation and discipline of the school or school activities, will cause the commission of unlawful acts or the violation of lawful school procedures.

### **The School Must Adequately Supervise Students**

The school district is responsible for student safety during their protests. The district’s duty varies depending on the age and maturity of the students. Elementary students, for example, should not be allowed to leave the building or school property without an adult. Alternatively, many districts allow high school students to leave campus unaccompanied and would have a difficult time physically preventing a large number of students from walking out of school, though the district might later discipline students for doing so.

While the district might not be able to physically prevent older students from leaving a class or the building, the district should take reasonable steps to keep students safe regardless. The district should prepare staff to supervise any protest on school property and might have law enforcement available to block traffic or ensure that the crowd is orderly. If students leave campus, the district should notify law enforcement and the student’s parents. Further, the consequences for leaving campus without permission should be reinforced prior to any anticipated protest.

### **Campus Safety**

Some school districts are concerned that members of the public might come onto the district campus to join the protests. Unlike students, members of the public do not have a right to be on school property, and the district can ask them to leave or have them removed by law enforcement. *See Policy KK.*

## **School Protest Hypotheticals:**

- A large group of students walk out of the school building in the middle of class to protest in front of the school. The students are loud, the teachers are not able to finish the lesson, and visitors to the school cannot get in the front door due to the crowd.  
*The district could discipline these students for the disruption and skipping class.*
- A single student walks out of class to hold a sign in front of the school building calling for gun control. The student leaves quietly and is not otherwise disruptive.  
*The district could discipline the student for skipping class.*
- A large group of students skip first period to protest at city hall, and come to their second period class for its normal start time.  
*The district could discipline these students for skipping a class or for being tardy.*
- During lunch, students lie down in the hallways, mimicking victims of a school shooting. The protest blocks traffic in the hallways.  
*The district should ask the students to get up and if they do not, can discipline them for causing a disruption.*
- A student spray paints a protest message on the front wall of the school building.  
*The district could discipline this student for destroying school property, regardless of the message.*
- A student wears a black arm band to school to protest school shootings.  
*This case is identical to Tinker, mentioned above. The district should not discipline this student for this display unless there is a disruption or the district has articulable facts justifying a reasonable belief that a material and substantial disruption will occur.*
- A student wears a t-shirt that says “F\*\*\* the NRA. They are murderers.”  
*The district could discipline this student for violating dress code standards that ban profanity on clothing. (MSBA assumes that wearing profanity promotes disruptive speech in the school environment) But, if the shirt simply said “The NRA Supports Murder,” the shirt would be allowed unless there is a material and substantial disruption or the district has articulable facts justifying a reasonable belief that a material and substantial disruption will occur. Remember that mere discomfort with the message is not enough!*
- A student wears a t-shirt with a photograph of a gun, and no text.  
*The district should not discipline this student. While students cannot carry guns onto school property, they are legal and the district probably has pictures of guns in its history books. Wearing a picture of a gun is not in and of itself disruptive.*
- A particularly talented drama student comes to school with lifelike blood, gory simulated bullet wounds, and a T-shirt that says “this wouldn’t have happened if I had my gun on me.”  
*The district should only ask the student to remove the makeup if it limits the student’s ability to participate in class or the district has articulable facts justifying a reasonable belief that a material and substantial disruption will occur. Even if the gory makeup is removed, the student should be allowed to wear the T-shirt unless the disruptive standard is met.*
- A large group of high school students sit in a circle on the front lawn, singing “Kumbaya” during a lunch time hunger strike.  
*The district should not discipline these students, as long as the students are allowed to leave the building during lunch.*
- A large group of high school students sit in a circle in the school parking lot, singing “Kumbaya” during a lunch time hunger strike, blocking traffic to and from the school.  
*The district can discipline these students for the disruption.*

## **Employee Rights and Staff Relations**

### **Employee First Amendment Rights**

District employees have First Amendment rights, but courts analyze employee speech differently than student speech. While there is a right for a student to attend school, there is no constitutional right to be a district employee. Because there are many court cases debating the protection of employee speech, MSBA strongly recommends that districts consult an attorney before disciplining an employee for their speech – whether written, spoken, or pictorial.

The district can prohibit a district employee from encouraging or participating in a student protest when the employee is acting as an employee in the district. Usually they are acting as an employee during working hours and while on school property or at district activities. School employees can be required to remain politically neutral while they are performing their jobs and interacting with students.

Even off-campus or off-duty speech can be curbed if the employee is speaking on a matter of purely private concern, such as complaints about his or her job. For example, an off-duty employee complains in detail on social media that she personally is scared to go to school and in doing so discourages parents from sending their students to school. This expression is likely a matter of private concern that the district can investigate, even though it happened when the employee was not working.

School employees are citizens as well. They have a political voice and may exercise it on matters of public concern just like other citizens. They may participate in off-campus protests, write letters to the editor, put bumper stickers on their cars, sign petitions, raise funds for candidates and campaign for change, as long as it does not negatively impact their ability to do their jobs. Employees who speak as a citizen on matters of public concern are protected as long as the speech does not disrupt district operations.

For example, if a teacher expresses on social media that they oppose gun control and believe that schools will be safer if adults are allowed to carry weapons on school property, that is an expression that would be protected under the First Amendment, and no action should be taken against the teacher.

### **Staff Relations**

School safety is just as important to school district employees as it is to the students. While districts can require employees to remain neutral on controversial issues during the school day, MSBA encourages districts to provide adequate opportunities for employees to express their opinions on these issues as well. School climate surveys, employee forums, safety committees and staff meetings devoted to school safety are just a few opportunities for collaborative dialog that will ultimately make staff better informed and the district safer. MSBA recommends that administrators keep their doors and ears open to staff concerns and recommendations for improvement.

### **Use the District's Safety Coordinator!**

State law and Policy EB require the superintendent to designate a district safety coordinator. That person is required to be trained regarding state, federal, and local violence prevention programs and available resources. Make sure the district develops and uses this person's expertise.

## **Student Protests Can Be Teachable Moments**

Just because a district can legally discipline a student does not mean that the district should do so. Most districts strive to teach students to be good citizens, and the United States has a history of political change due to peaceful (and sometimes not-so-peaceful) protests by its citizens; the Boston Tea Party, the Civil Rights Movement, and the Vietnam War protests, to name a few. MSBA recommends that districts take this opportunity to work with students to learn from these experiences.

While districts should be careful not to endorse the student's message and careful not to discourage contrary messages, districts that know a protest is coming can take measures to minimize the disruption, ensure student safety, prevent truancy, and still allow students to speak their mind. For example, the district can work with student leaders to designate a location and time for the protest. Students should not be required to attend the protest, but the district can make an exception to its normal truancy rules for participating students, if they are willing to work with the district.

The district could also provide students other outlets for expression, such as a school-sponsored forum on the topic, an invitation to legislators to meet with students and hear their concerns, a letter campaign by the student body to governmental officials, or an opportunity to express themselves through art, speech, or video.

### ***Should the District Waive Normal Discipline Rules?***

School principals have a certain amount of discretion when enforcing the rules. That discretion should be used evenly and wisely. While most districts would prefer not to entertain a walk-out or other disruption to the normal class schedule, some districts recognize that the disruption is inevitable and have decided to work with students to minimize the disruption and maximize the teaching experience. In some cases, the students themselves have come forward and asked to work with the administration.

While districts should not waive normal rules lightly, they can do so and it is reasonable to do so in situations where the students are willing to work with the administrative staff. It is also reasonable to apply those rules in situations where student protesters have not attempted to work with the administration. Be careful to explain to students, staff, parents and the public that the difference is not based on the students involved or the opinion expressed, but the fact that one protest was coordinated with the district and the other was not!

For example, if the student council approaches the district to discuss a protest, the district can work with the students, set a time, designate a supervised place, communicate with staff that the students are allowed to leave class without consequence, and communicate with parents and the public regarding the rules. The district may allow the students to walk out of class without consequence at that time as long as the students do not misbehave during the protest and return to class. But, if a different group of students decides the next day to do the same thing without the knowledge of administration, those students may be disciplined. Administration needs to explain the difference between the situations to students and parents.

### ***Is the District Required to Entertain Multiple Protests?***

Some administrators might be willing to waive the rules for a single protest, but worry that students will want to protest every week and that the district is setting a precedent. Obviously, the district cannot tolerate that continuous level of disruption, but the district also does not want to create the impression that it agrees with, and therefore allowed, one protest while prohibiting and disciplining students who protest with opposing views.

To minimize this problem, once the administration has approved a protest by one group, the administration should set a deadline by which other groups wanting to protest on the same topic must notify the administration. While many administrators might be concerned that this would encourage protests that would not otherwise happen, it will make administration more able to refuse future protests by students who did not use the opportunity to protest.

The district may also distinguish this particular protest from others. The planned protests regarding school shootings are particularly relevant to schools and students, have been well advertised, and are part of a national movement led by and directed at students. In many districts it is likely that multiple students will participate, whether the district likes it or not. This is an attempt to keep students safe and engaged and prevent what many see as an inevitable disruption to the school environment. In many respects, this situation is unique and can be distinguished.

***Students Are Not Required To Participate***

Districts must work with students to understand that not every student will agree with the protest. No student should be required to participate, pressured to participate or disparaged for failing to participate in the protest. Freedom of speech works both ways! Employees should likewise plan meaningful activities for students who choose not to participate so that the educational opportunity is not wasted.

***What About Counter Protests?***

Districts must also prepare students for the possibility that not all students who protest will agree with the students planning the protest. There could be a counter-protest at the same time and location and the district cannot allow one group of students to speak and discourage or discipline the other group. What the district can do is require all students to respect each other's opinions and right to speak. The district should be very clear that foul language, threats, and violence will not be tolerated.

***Staff Must Remain Neutral While Working***

The district must not only direct district employees to remain neutral regarding the protest, but also explain the reasons why. The district wants to protect the staff member from a lawsuit.

Students are sensitive to the opinions of their teachers and other influential adults in the schools. If, for example, a teacher expresses a particular viewpoint and then disciplines a student with a differing viewpoint, the student could accuse the teacher of doing so because of the differing opinion, claiming that the teacher is "tougher" on students with whom he disagrees. This could lead to a First Amendment lawsuit against the teacher himself.

## Communicate, Communicate, Communicate

Communication is particularly important when emotions are high. Once the district decides what to do, it must clearly communicate the decision to the entire community. This communication should be accomplished using more than one medium, and care must be taken to ensure the message is consistent.

**Board:** Inform the Board of any decisions made, so that the Board can adequately discuss (or defend) decisions to the public.

**Administrators:** Administrators might need a refresher on First Amendment law. Hopefully this guidance will help.

**Employees:** Make sure employees understand their obligations during the protest – particularly if the district is expecting employees to help supervise the students. If they are in a position to discipline students, inform them of the district’s decisions regarding student truancy. Give instructional staff as much notice as possible so that they can rearrange instructional activities and plan instruction for students who do not participate in the protest. Tell all employees they must remain neutral while working, and the reasons why that is important to them individually and the district as a whole. Remind staff members that while they have First Amendment rights to speak on matters of public concern while not working, that they need to do so in a manner that does not disturb district operations. This can be a teachable moment for employees as well as students!

**Students and Parents:** Be clear with both students and parents on the potential consequences involved in a student protest. If the district makes exceptions to policies, make it clear that these exceptions will only apply on a particular day and time, and will not be applied to protests that have not been coordinated with the administrative staff.

**Media and the Public:** Media and non-student visitors will be allowed on campus according to policy KK. During school hours, only parents, guardians, and patrons of the district are allowed on campus, and they must check in at the building office. The district prohibits any filming of students under district policy KKB.

## Your District Is a Symbol of Your Community

Districts should also be aware that the public and the media are watching. Students are struggling with the same serious issues that are hotly debated by adults in their communities. Disciplining students for truancy or disruption for these issues might seem quite petty in comparison. School districts will be judged by their constituents and, planning the district’s response now will help the district avoid missteps.