On The Alert!

Date: October 26, 2017
Attention: ASCIP Members
Affected Department(s): Risk Management, Admin, Athletics, Coaches, Staff
Applicability: K-12 and Charter Schools

KNEELING DURING THE NATIONAL ANTHEM AND DISTRICT RISK

The controversy of kneeling during the national anthem has received a lot of attention over the past year. Apparently, high school athletics is not immune to the controversy, and some high school coaches are ordering players to stand during the national anthem or else not play in the game.

Silent protests, such as kneeling during the national anthem, is an expression of speech that the U.S. Constitution and California law prohibits restricting unless it meets specific criteria as referenced below.

CALIFORNIA STUDENT FREE SPEECH EXPANSIONS

The California legislature enacted Education Code sections 48907 and 48950.2 expanding the First Amendment rights of California students beyond the protections of the First Amendment to the U.S. Constitution. California public school pupils, including charter schools, have the right to exercise freedom of speech and of the press, including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges, and other insignia, and the right of expression in official publications, whether or not the publications or other means of expression are supported financially by the school or used by school facilities. However, expression that is obscene, libelous, or slanderous is prohibited, as is material which so incites pupils as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school. [1] Addendum 1 contains examples of First Amendment court rulings.

RECOMMENDATIONS

Absent the existence of any of the limited criteria discussed above, coaches and other district employees cannot order their players to stand or not play. It is recommended that districts not impede student athletes from engaging in silent protests, such as kneeling during the national anthem, unless general counsel has been consulted first. Coaches should be encouraged to neutrally ask their players if they intend to engage in any such protests. Coaches should then be instructed to explain to their players that participation or nonparticipation is completely voluntary and at the discretion of each individual student. If a protest is anticipated, then districts should consider their local environment and evaluate whether there may be security concerns. If security concerns are present, then districts should consult with school security and/or local law enforcement officials in advance. Finally, districts should also review and seek to ensure compliance with their own internal rules, regulations, and procedures concerning student expression and school security.

[1] 56 Cal. Jur. 3d Schools § 332

Please contact your ASCIP's risk services consultant at (562) 404-8029 to discuss further.

ADDENDUM 1
FIRST AMENDMENT COURT RULINGS EXAMPLES

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) is a decision by the U.S. Supreme Court which holds that the Free Speech Clause of the First Amendment to the United States Constitution protects students from being forced to salute the American flag and say the Pledge of Allegiance in public school. It was a significant court victory won by Jehovah's Witnesses, whose religion forbids them from saluting or pledging to symbols, including symbols of political institutions. In its decision, the Court ruled that the state did not have the power to compel speech in this manner for anyone.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) is a decision by the U.S. Supreme Court that defines the constitutional rights of students in U.S. public schools. The Tinker test is used to determine whether a school's disciplinary actions violate students' First Amendment rights. In 1965, five Des Moines, Iowa minor students (four of whom were Tinker siblings) wore black armbands to their schools in protest of the Vietnam War and in support of Senator Robert F. Kennedy's Christmas Truce. They had decided to violate a policy forbidding these armbands. The three older children were suspended. After litigation, the court decided that the First Amendment applied to public schools, and that administrators would have to demonstrate constitutionally valid reasons for any specific regulation of speech. The court observed, "*It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate*".

There are, however, still some limitations under the First Amendment. For example, in **Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)**, the U.S. Supreme Court held that a school acted within its authority when it imposed sanctions in response to a student's offensively lewd and indecent speech given at a school assembly. Later, in **Hazelwood School District et al. v. Kuhlmeier et al., 484 U.S. 260 (1988),** the Court held that public school curricular student newspapers that have not been established as forums for student expression are subject to lesser First Amendment protection than independent student expression or newspapers established as forums for student expression. This case concerned the censorship of two articles in The Spectrum, the student newspaper. When the principal removed two articles, the student journalists sued. After litigation, the court determined that school administrators could exercise prior restraint of school-sponsored expression, such as newspapers and assembly speeches, if the censorship is "*reasonably related to legitimate pedagogical concerns*".