



School Law FYI

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“Taking a Knee”: The First Amendment Implications of National Anthem Protests by Students

In recent months, many students, including student athletes, have “taken a knee” during the performance of the National Anthem prior to school sporting events. Few issues are more sensitive in America right now than standing or kneeling during the National Anthem. Unlike the NFL, public schools are subject to the requirements of the First Amendment. Accordingly, Wisconsin school districts must proceed with caution if students “take a knee” or otherwise choose not to participate in patriotic displays.

OVERVIEW OF THE LEGAL ISSUES

In *West Virginia State Board of Education v. Barnette*, the U.S. Supreme Court held that students cannot be compelled to recite the Pledge of Allegiance in school. 319 U.S. 624, 626 (1943). While *Barnette* applies to the recitation of the Pledge of Allegiance, a similar rule is likely to apply in the context of the singing of the National Anthem. Requiring students to stand and face the flag during the performance of the National Anthem is similar to the type of compelled patriotic activity the Court found unconstitutional in *Barnette*.

Wisconsin’s statute requiring the recitation of the Pledge of Allegiance or the singing of the National Anthem every school day embodies principles similar to the *Barnette* ruling. Wis. Stat. § 118.06(2) provides that: “No pupil may be compelled, against the pupil’s objections or those of the pupil’s parents or guardian, to recite the pledge or to sing the anthem.” By analogy, it is likely that school boards cannot require students to stand and face the flag during a performance of the National Anthem within the context of extracurricular or other school-sponsored events. For this reason, even a board policy or student code of conduct that requires students to stand for the National Anthem, while not imposing consequences for noncompliance, could be a violation of the First Amendment.

Moreover, students may not merely be abstaining from participation in a patriotic activity when they “take a knee.” Rather, some students may “take a knee” to affirmatively express their opinion on racial or political issues. Expression of this type raises issues beyond the scope of the *Barnette* ruling. Among other rights, students generally have a First Amendment right to engage in such symbolic speech so long as school administrators cannot reasonably forecast a substantial disruption of, or material interference with, school activities, and so long as the expression does not intrude on the rights of other students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969). Note that any analysis under the *Tinker* rule is highly fact-specific and requires an individual analysis of the circumstances surrounding the student speech.

STUDENT ATHLETES BEFORE THE GAME

Under existing case law, the primary applicable legal rule is that student athletes generally maintain their right to engage in free speech while participating in athletics, so long as school administrators cannot reasonably forecast a substantial disruption of, or material interference with, school activities. Accordingly, it is likely that a court would hold that by choosing to participate in the athletic program, student athletes are not inherently agreeing to participate in patriotic activities.

In order to regulate student athletes' expressive activity, school administrators need to identify the school activity that the student athletes' expressive activity may disrupt or interfere with. Then, administrators have to determine whether they can *reasonably* forecast that the student athletes' expressive activity will *substantially* disrupt, or *materially* interfere with, that school activity. Administrators should take a cautious approach to student athletes "taking a knee" because of the difficulty in forecasting that a silent protest will meet that legal standard, particularly in light of *Barnette* likely granting students the right not to participate in patriotic activities such as performances of the National Anthem. Additionally, administrators need a sufficient factual basis in order to regulate student athletes' expressive activity. Such a factual basis may be difficult to establish given that, according to general reports in the press, several high schools across the country have permitted such protests without any substantial disruption of, or material interference with, a school activity.

Administrators likely cannot identify the National Anthem as a school activity being substantially disrupted or materially interfered with. "Taking a knee," generally, is not likely to disrupt or interfere with the performance of the National Anthem and is not likely to prevent spectators and other athletes from participating in the National Anthem performance. Additionally, administrators will have difficulty identifying a substantial disruption, or material interference with, the performance of the National Anthem given that, in light of *Barnette*, students likely cannot be compelled to stand and face the flag during a performance of the National Anthem.

Similarly, administrators likely cannot identify the football game as a school activity being substantially disrupted or materially interfered with. After the performance of the National Anthem, regardless of anyone "taking a knee," the athletes will likely still take the field and play the game with minimal disruption.

Finally, administrators may or may not be able to identify the entire football program as a school activity being substantially disrupted or materially interfered with. Administrators have to analyze the specific facts surrounding their school's football program. In general, if certain athletes cause grumbling and mild disagreement among the team by "taking a knee," that will not be sufficient to demonstrate a substantial disruption, or material interference with, the football program. By contrast, if certain athletes cause great anger, hostility, or violence among the team by "taking a knee" such that the football program ceases to function, administrators may be able to take careful actions to restore the functioning of the program. However, administrators must be cautious not to suppress students' expressive activity due to the retaliatory conduct of persons offended by the expressive activity. Administrators must also avoid favoring one player's viewpoint over another's. One possible solution in this situation may be for administrators to keep all the players in the locker room during the performance of the National Anthem.

MUSICIANS PERFORMING THE NATIONAL ANTHEM

Some students are required to perform the National Anthem at a football game as part of an academic class, such as band or choir. In general, these students should be permitted to opt out of these patriotic performances for political or religious reasons. However, it may be permissible for the school board to require these students to complete a make-up assignment in lieu of this performance, consistent with board policy on make-up assignments, if the performance is a mandatory part of that academic class.

For students who choose to perform the National Anthem, administrators likely may regulate personal student speech during the course of such a co-curricular student performance if administrators have legitimate pedagogical concerns justifying that regulation. When a performance is part of the curriculum, that performance is disseminated by the school under its auspices, and the school may refuse to disseminate student speech that does not meet those standards, so long as the school’s action is reasonably related to legitimate pedagogical concerns. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

Here are two examples of potential legitimate pedagogical reasons not to permit band or choir members to kneel during a performance. One, kneeling could limit students’ ability to perform by obstructing proper breathing technique. Two, kneeling could impair students’ ability to manipulate their instruments. Such concerns, along with others, could serve as legitimate pedagogical reasons to prohibit students from “taking a knee” during a performance of the National Anthem.

STUDENT AUDIENCE MEMBERS

Students in the audience of a football game are likely to have broader First Amendment protections for “taking a knee” than students participating in an extracurricular activity. Student audience members’ expressive activity is not under the auspices of the school. Additionally, these students are attending a school-sponsored activity that is generally open to the public. Administrators would need a factual basis to reasonably forecast a substantial disruption of, or material interference with, school activities prior to regulating student audience members’ expressive activity. Administrators are likely to have difficulty establishing such a factual basis for student audience members attending a school-sponsored activity that is open to the general public.

CONCLUSION

It is understandable that school districts are concerned with how their students act at a public athletic event during the National Anthem. The promotion of good citizenship may be a valid educational interest. Nevertheless, caution is advised as this educational interest must give way to protected student speech. However, as stated by the Seventh Circuit Court of Appeals, “Objection by the few does not reduce to silence the many who want to pledge allegiance to the flag ‘and to the Republic for which it stands.’” *Sherman v. Cmty. Consol. Sch. Dist.* 21, 980 F.2d 437, 445 (7th Cir. 1992). It is important to keep this principle in mind as school district officials seek to promote safe and efficient school-sponsored events, while also honoring the First Amendment rights of students.

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