

# LEGAL ALERT

To: All School Committee Members and Superintendents  
From: Stephen J. Finnegan Esq., MASC General Counsel  
Re: Student Walkouts & Mass Protests  
Date: March 6, 2018

Since the Florida school shooting various student protests in favor of gun control have occurred on a nationwide basis. Any such protest, especially a student walkout that takes place on school grounds during a time when school is in session may cause legal problems. NSBA has provided the following guidance for navigating student walkouts. This Guidance provides commonsense advice

that you may find helpful. However, I strongly urge you to seek advice from your local legal counsel concerning the preparation for properly addressing the legal issues that may arise due to a student walkout or related issues. I view this Guidance as a checklist to ensure that various matters addressed herein are considered by school committees or superintendents.

## Navigating Student Walkouts & Mass Protests<sup>1</sup>

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The media has widely reported what appears to be a growing student protest movement centered around the tragic February 14, 2018, school shooting in Florida. This checklist aims to help school boards and district leaders prepare for these activities in their schools and communities. Because student protests may vary in intensity and form, we have identified below a variety of possible scenarios, as well as operational questions to consider. Chief among our recommendations is that to the extent possible, school districts should plan ahead and engage your students, parents, and stakeholders.

This brief outline will help school districts identify issues and potential responses to meet the challenges arising in this area. We encourage you to share this checklist with your school community and stakeholders. Because this list is not legal advice, we urge you to confer with your school attorney member of the NSBA Council of School Attorneys, as well as your state school boards association, before implementing any policies. For further reading, please access NSBA's legal guide for public schools on the regulation of student and employee speech: <http://www.nsba.org/coercion-conscience-and-first-amendment>.

### I. THINGS TO THINK ABOUT

- 1) Meet with your community and stakeholders to identify the time, place, duration, and logistics accompanying the protest, whether on campus or by means of a "walk-out." Consider including:
  - a) Student groups/leaders,
  - b) Staff and union representative,
  - c) Parent-teacher organization leaders,
  - d) Community groups,
  - e) Parents,
  - f) Law enforcement, and
  - g) Local officials (mayor, county board, etc.).
- 2) Consider identifying the teachable moment in civics education, and explore the possibility of conducting an educational, curriculum-related assembly, debate, or other activity that provides a forum for students to express their views. Some schools are adopting creative solutions in coordination with staff and student leaders, such as a special bell schedule allowing additional unstructured time at school for students to gather for peaceful protest.
  - a) Be careful not to regulate political content based on viewpoint.

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<sup>1</sup>Appendix to Coercion, Conscience and the First Amendment: A Legal Guide for Public Schools on the Regulation of Student and Employee Speech (National School Boards Association, 2018)

- b) Be inclusive in terms of opposing political views.
  - c) Be aware that you may be establishing a precedent for future educational events.
- 3) Develop a plan or protocol for each potential protest scenario, and clearly communicate it to stakeholders.
- a) Be clear with students about what is acceptable in the school setting.
    - i) Describe what, if any, consequences will result from “walking-out,” “walking in” to an administrative office, or otherwise missing instructional time, including any opportunity for make-up work. For example, perhaps a student’s first “walk-out” is excused, but future ones are unexcused.
    - ii) Make sure any consequences are consistent with district policy, the student code of conduct, and past practice.
    - iii) Be careful not to apply consequences based on viewpoint.
    - iv) Distinguish between conduct (leaving class unauthorized) and expression (participating in a protest).
  - b) Be clear with instructional staff about district policy on student expressive activity like walk-outs, as well as their role in a student walk-out or other protest.
    - i) If students walk-out in the middle of the school day, where do they go?
    - ii) If students remain on campus, who supervises them?
    - iii) Do teachers/staff report immediate absence/departure of students? To whom? What does an administrator do with that information? Are there different expectations for children of different grade levels?
    - iv) Be clear that teacher and staff roles do not extend to supporting the message being expressed by the students. Though staff have rights when they engage in speech on matters of public concern, those rights are significantly less when staff are on duty as district employees.
  - c) Be clear with all staff about their own obligations during a walk-out or protest.
    - i) Some staff may wish to participate in walk outs and other protest activities. As a result, staff should be alerted to any potential consequences for their participation.
    - ii) Communicate state law and local policies that may restrict public employee political expression while on duty, as well as any specific district directives that have been issued regarding the present controversy.
    - iii) Consider whether scheduling a separate event for staff to express themselves outside of school time would be helpful, in consultation with staff representatives.
- 5) Be clear with central office and building staff about the public message, and how it will be communicated through spokespersons and online communications.
- a) If district leadership decides to “speak” favorably of a movement, public policy, or event, consult with your state school boards association and legal counsel first to weigh potential risks and precedent-setting.
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- b) Review applicable district policy regarding communications with the school community and follow it consistently.
- c) Address how the district will be dealing with participation in the protest by members of the community, including parents. Will community members or parents be permitted on campus, or will they be considered trespassers? If the parents or community members are disruptive while on campus, how will school officials or law enforcement respond?
- 6) Confer with local law enforcement about potential safety implications, and define the role of law enforcement as necessary. Should law enforcement assist with the safety of students who walk out?
- 7) Incorporate discussion of student protests and other expression, and district protocols, into regular staff training.
- 8) Review state laws and relevant local policies regarding attendance. How will absences be categorized? What if parents are involved in signing the student out of school? If the walk-out happens at a time of day when attendance is recorded, how will the reduced attendance affect the district financially?
- 9) Be prepared to debrief and respond quickly after a protest event. If a walk-out occurs, have a team designated in advance to review the circumstances and communicate future expectations. For example, after a walk-out, have a plan for moving safely and swiftly back to regular operations. Communicate clearly what the attendance and disciplinary consequences will be, as well as expectations for future conduct.

## II. POTENTIAL SCENARIOS

### Scenario #1

Students plan to protest on campus by wearing armbands, pins, t-shirts or other expressive clothing on a specific day or series of days. There is no planned activity to congregate or group together.

**Law:** Unless the clothing or pins are disruptive to the school setting or order, the schools cannot regulate the political expression.

**Consider:** Reminding schools and teachers about the right of students to protest in ways that are not disruptive to the school setting. Authorize teachers to encourage appropriate conversation about dissent, civics, and the right to petition government in democratic societies.

### Scenario #2

Students plan to leave class at a specific time, and congregate on school property for a portion of the day. Some refer to this as a walk-in.

**Law:** Generally, students leaving class is considered disruptive to the educational environment. The schools may regulate this activity.

**Consider:** Deciding in advance whether the activity will be permitted by the school. If so, ensure the appropriate staff is assigned to monitor the activity so it happens in an orderly fashion. Identify a gathering place for the activity and determine whether it will be a silent activity or whether students will be allowed to speak to the group. Be sure all understand the time limits/constraints of the event. Remind teachers and staff that they should remain neutral about the viewpoints expressed by students. Communicate to parents in advance, if possible, or shortly after an event occurs.

**Note:** Be careful about creating a limited public forum, which limits a district's ability to regulate speech, and opens the possibility of a viewpoint discrimination claim. In other words, if a district establishes a precedent of allowing students to protest by expressing a particular point of view, students expressing opposing or unrelated

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unpopular political views could demand school sponsored assemblies or gatherings of their own. If your school is planning a “teach-in,” be sure that the choice is curriculum-based, that the pedagogical rationale for the programming is clear and sound (such as civics lessons on participatory democracy), and that the school district stays clear of promoting political views of any kind.

### **Scenario #3**

Students plan to leave class at a specific time, and depart campus, but may congregate on adjoining public sidewalks or other public, non-school property.

**Law:** Generally, students leaving class is considered disruptive. Schools may regulate this activity.

**Consider:** Working closely with local officials, including law enforcement and community leaders, about safety concerns associated with students congregating on nearby property. Also consider communicating with the school community about district policy for this and other “walk out/in” activity.

**Note:** Remember that schools stand in *loco parentis* during school hours. Keeping in mind the ages, grade levels, and special needs of students, determine whether parent releases are needed for students planning to walk out. Consult your school attorney member of COSA to determine appropriate steps.

### **Scenario #4**

Students do not show up for class on a specific preplanned day as a protest.

**Law:** Generally, truancy is addressed through state law and district policy, and mass preplanned absence would be considered disruptive. It is likely schools will treat these absences as unexcused.

**Consider:** Clearly notifying the school community about how absences will be treated under these circumstances, and apply the same rules to similar activities. If exceptions are granted on a temporary basis, be clear about the reasons and be careful about establishing a precedent.

### **Scenario #5**

Students walk out of class, and walk in to the administrative office to voice a concern. The district is unaware of this plan ahead of time.

**Law:** Again, students interrupting class time is considered disruptive, as is interruption of office operations. The schools may regulate this activity.

**Consider:** Addressing mass walk out/in activity by students in permanent board policy and clearly communicating that policy to staff.

### **Scenario #6**

Students advocate political positions and encourage school walk-outs or other school-based demonstrations on social media.

**Law:** A school’s ability to address online speech will be dependent on disruption or a reasonable forecast of disruption.

**Consider:** Whether the social media speech by students has caused actual or reasonably foreseen disruption, and whether district policy clearly addresses speech via social media. Consult with your school attorney member of COSA and your state school boards association about applicable law in your jurisdiction.

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