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Post-election unrest: Balancing the rights of all students

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In the days after the election, many schools have received reports of verbal remarks and conduct by students related to election results — some of which may violate board policies on bullying, harassment and discrimination. Responding to these reports requires careful consideration of safety concerns as well as the rights of all students involved. The legal rules in this area are complex and fact-specific.

The following is a brief, general overview of the law to help guide your analysis of situations that may arise. However, this should not be considered legal advice for any specific problem or issue.

Political speech and the First Amendment

Civil political speech by students may be protected under the First Amendment, but schools retain significant authority to regulate harmful or disruptive student speech. The standard established by the United States Supreme Court in the *Tinker* case^[1] permits regulation of expressive conduct if the school reasonably believes that the speech will “substantially and materially interfere” with schoolwork or discipline. A school cannot prohibit student speech merely to avoid controversy or the expression of an unpopular viewpoint, but schools can prohibit speech and have authority to discipline a student for speech that is vulgar, lewd, indecent or plainly offensive^[2] or that constitutes unlawful bullying, harassment and/or discrimination, as discussed below.

Bullying, harassment and discrimination

Schools have responsibilities under both state and federal law to protect students from bullying, harassment or discrimination. Under O.R.C. 3313.666, schools must prohibit harassment, intimidation and bullying (HIB) of any student by another student on school property, on a school bus or at school-sponsored events. This includes cyberbullying. The statute defines HIB as:

Any intentional written, verbal, electronic or physical act that one student exhibits toward another student more than once, and the behavior both:

1. causes mental or physical harm to the other student; and
2. is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for the other student.

Some incidents may also amount to discrimination on the basis of race, color, national origin, sex and/or disability, which are prohibited under federal law. Discrimination may require a response that goes beyond the district's usual approach to bullying under anti-HIB policies. Districts must identify whether a reported incident, no matter how it is labeled, amounts to unlawful discrimination and, if so, respond in a manner in accordance with Section 504 (which prohibits discrimination on the basis of disability), Title VI (which prohibits discrimination on the basis of race, color or national origin) or Title IX (which prohibits sex discrimination).

In the case of an incident of alleged bullying, the school must have a strategy for protecting a victim, or other person, from additional harassment, intimidation or bullying and from retaliation during investigation and following a report of HIB, including a means by which a person may file an anonymous report. Similarly, if peer-on-peer harassment or discrimination has occurred, the school must take prompt and reasonable steps calculated to end the harassment, eliminate any hostile environment and prevent its reoccurrence. Under federal law, as well as state law, harassment may include verbal, written or physical conduct, including acts using cell phones or the internet or other conduct that may be physically threatening, harmful or humiliating. Harassment under federal law does not have to include intent to harm, be directed at a specific target or involve repeated incidents, if severe enough.

Special consideration must be given if a special education student is harassed. In addition, special consideration must be given before imposing discipline on a special education student for committing acts of bullying, harassment or discrimination.

Considerations

In managing this post-election unrest, schools should always make student and staff safety their first priority. However, in addressing the underlying issues, it is imperative that schools understand and balance the obligations under federal and state law and board policies with respect to First Amendment protection, nondiscrimination, harassment, intimidation and bullying. Considerations may include:

- Is the behavior speech protected by the First Amendment or is other conduct involved?
- Does the behavior rise to the level of a threat or could it cause another student to fear physical harm?
- Does the behavior constitute a hate crime or other crime?
- If so, is there a mandatory duty to report to law enforcement?
- Does the behavior constitute bullying?
- Does the behavior constitute discrimination or harassment under your non-discrimination policies?

- Does the behavior otherwise violate the Student Code of Conduct?
- While you investigate, have you taken appropriate interim measures to protect the complaining student(s)?
- If a special education student is involved, have you made the appropriate considerations?

Be proactive

Whether or not your school has received reports of student unrest following the election, you may help to diffuse the situation and encourage civil discourse by reviewing your policies and Student Code of Conduct with both the student body and staff and encouraging prompt reporting of any incidents to the administration. You may also want to remind staff of the many resources available to help schools teach tolerance and civility.

[1] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

[2] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

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