Wisconsin Association of School Superintendent Assistants

Sixteenth Annual Spring Conference

Social Media – The Legalities and Their Impact on School Districts

MICHAEL J. JULKA | APRIL 25, 2019

BoardmanClark

INTRODUCTION

Given the developing laws and judicial decisions that have attempted to deal with the issues that arise out of social media use by board members, administrators, teachers, staff, and students, school districts have necessarily had to respond in many ways, including by having policies adopted by school boards.

Board and Board Member Issues

Social Media and Records Retention

- Access to electronic records and retention are common concerns.
- Emails sent from personal email addresses and texts from personal cell phones can be public records subject to disclosure. Intermingling personal and district communications creates legal and practical issues when requests are made for such records. Records custodians must screen emails and texts that fall within the scope of a request to determine if they are purely personal and need not be released.

Electronic Records

- The Wisconsin Public Records Law defines a record so broadly as to encompass **electronically stored information** as long as the information is created or kept in connection with governmental business.
- It is the **content** of the material that determines if a document is a record, not the **medium or format** of the material.
- The **content** of the record, not its **location**, determines whether it is subject to disclosure.

Electronic Records

- Purely personal email if sent by a school district computer constitutes a record, but is not subject to disclosure if purely personal. *Schill v. Wisconsin Rapids Sch. Dist.*
- Social media posts and messages, even on someone's personal social media account can meet the definition of a record subject to retention and potential disclosure.

Records Retention Procedures

- Districts need to consider developing policies regarding the retention and storage of electronic communications and other computerized documents, including whether they may be transferred to, and retained in, an alternative format.
- If an authority makes use of social media, or its employees use mobile devices to conduct government business (whether the device is personal or provided by the authority), the authority should adopt procedures to retain and preserve all such records consistent with the law.
- The Wisconsin Department of Administration (DOA) has rule-making authority to prescribe standards for storage of electronic records. DOA has promulgated Wis. Admin. Code ch. ADM 12 which governs the management of records stored exclusively in electronic format.

Possible Solutions to Records Retention

- Texts, social media posts, and social media messages can often be forwarded to an official district email account to be retained.
- Texts, social media posts, and social media messages can be "screen captured" as a photograph and forwarded to an official account.
  - This approach makes it hard for the District's records custodian to locate these records using a key word search.
  - The records are generally stored as a picture and not as a set of words that can easily be searched, unless special technology arrangements are made.
- Channeling communications regarding district business should be channeled to official platforms whenever possible, *i.e.* official district email addresses.

Social Media and Open Meetings Law

- In general, telecommunications, such as emailing, texting, or social media messaging, to all board members should be limited to one-way distribution of information. Board members "replying all" to such one-way telecommunications to discuss official business might be creating an improper meeting. Matters that might generate discussion among board members should not be communicated via telecommunications to limit the potential for Open Meetings Law violations.

Social Media and Open Meetings Law

- School board members may not decide matters via electronic voting (such as voting through email), even if the board later ratifies the result of the electronic vote at a properly noticed meeting. *Informal Opinion of Wis. Att'y Gen to Stephanie Jones*, I-01-10 (Jan. 25, 2010).
- A walking quorum can be established if board members participate in a series of meetings among separate groups of members each with less than a quorum to discuss business and come to tacit or express consensus over an issue that will come before the entire board. A walking quorum can occur in person but is most likely to be created inadvertently through use of the phone, email, social media, or text messaging. A walking quorum violates the Open Meetings Law.

Even Private Social Media Pages Can Be Subject to Public Records Law

The Wisconsin Attorney General explained that a limited access website used by an elected official to gather and provide information about official public business could be subject to public records requests. *See Informal Opinion of Wis. Att'y Gen. to Ms. Gail Peckler-Dziki*, I-06-09 (Dec. 23, 2009).

- A town chair's Google group website "Making Salem Better" created records subject to request.
- It was maintained by the town chair who is an authority under public records law.
- The Attorney General emphasized that it was "the content of the record and not its format or location, that is determinative."
- However, the Public Records Law did not create a right for the public to participate in the Google group.

Policy Suggestions

- Board members should be directed to use only official district email accounts to conduct district business.
- District social media accounts (such as a District Facebook page) are better managed by administration, because an individual board member has no individual authority to speak on behalf of the district.
- Board members should avoid discussing district business on personal social media pages. If a member of the public attempts to discuss district business on a board member's personal page, the board member should direct the member of the public to the board member's official email account.

Blocking the Public from District Social Media Accounts

- Developing case law indicates that blocking a member of the public from posting comments (or deleting a member of the public's comments) on an official public social media page might violate the First Amendment.
- If a district activates the comments feature of a district social media page, the district likely creates a public forum wherein the district is extremely limited in its capacity to regulate speech, other than speech that is not protected by the First Amendment such as bona fide threats of violence, or speech that completely prevents the use of the forum (such as someone spamming the district's page every minute with advertisements).

Blocking the Public from District Social Media Accounts

- A district could place restrictions on the topics that can be discussed on the district's social media pages (through board policy), thereby potentially creating a limited public forum, wherein the district could delete comments that are outside the subject matter of the forum, so long as the district does not discriminate based on viewpoint in determining what to delete.
  - If the district announces on one of its social media pages the district's "teacher of the year," the district could not delete a reply to that post just because that reply was critical of the teacher.
  - If the district adopts a board policy that comments on its social media pages must related to district activities, the district could likely delete posts that advertise someone's personal business that does not relate in any way to district activities.

Blocking the Public from District Social Media Accounts

- However, the law is unsettled as to whether topic limitations constitute a content-based regulation of speech that must be narrowly tailored to serve a compelling government interest. This is an extremely difficult test to meet, so if a court were to take this approach, a district's topic limitations would have to be extremely carefully designed to potentially meet this test.
- In light of the complexity of this issue, some districts have chosen simply to disable the public commenting feature on the district's social media accounts. This allows a district to post comments, but not allow others to reply to those comments. In this way, no public forum or limited public forum is created. At the same time, the district can use social media to communicate to the public.

Teacher and Staff Issues

Social Media and the Right to Privacy

Wisconsin recognizes an individual's right to privacy.

- An invasion of privacy includes, "(i)ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass." Wis. Stat. § 995.50(2)(a).

Employers who access employee and applicant information stored on social media sites should proceed with caution. Generally, if an employee or applicant uses social media and the employee or applicant's profile is open to the public, then the employee or applicant will not have a claim for invasion of privacy. However, under no circumstances should an employer ever access an employee or applicant's information on a social media site through false pretenses.

Legal Protection for Social Media Passwords

Wisconsin law prohibits employers from:

- Requesting or requiring an employee or applicant, as a condition of employment, to disclose access information (e.g., passwords, usernames), to a personal social media account or to otherwise grant access to or allow observation of the account.
- Terminating or otherwise discriminating against an employee because the employee:
  - Refused to provide the employer access to a personal social media account; or
  - Opposed the employer's potential violation of the law, or filed a complaint or testified or assisted in an action against employer for such violation.
- Refusing to hire an applicant because the applicant refused to provide access to a personal social media account.

Wis. Stat. § 995.55

Legal Protection for Social Media Passwords

The law does retain certain important rights for employers:

- Employers may require access information in order to gain access to an electronic communications device (such as a computer or cell phone) supplied by or paid for by the employer.
- Employers may require access to an account or service provided by the employer, obtained by the employee due to the employee's employment or which is used for the employer's business.
- Employers may discipline or discharge an employee for transferring the employer's confidential or financial information to the employee's personal social media account without the employer's authorization.

Legal Protection for Social Media Passwords

The law does retain certain important rights for employers:

- Employers may require can employee to grant access to or allow observation of the employee's personal Internet account if there is a reasonable belief that the employee has transferred confidential or financial information without authorization to the employee's personal Internet account or has engaged in another work-related violation or misconduct, if there is a reasonable belief that activity on the employee's personal Internet account relates to that misconduct or violation. Employers are not permitted to require the disclosure of access information to the account in such cases.
- Employers may comply with a duty to screen applicants for employment prior to hiring and may comply with a duty to retain employee communications that is established under state or federal law, rules or regulations.

Concerted Activity

- Employees have the right to organize and to engage in concerted activity for mutual aid and protection, including the right to speak out on behalf of fellow employees; districts may not interfere with, restrain, or coerce employees in the exercise of their rights.
- Concerted activity involves two or more employees working together to address matters involving wages, hours or other terms and conditions of employment, including when an employee acts in good faith with or on the authority of other employees, but not solely by or on behalf of himself or herself, and activities through which individual employees work to initiate group action.

Concerted Activity, con't.

- Examples of Concerted Activity.
  - Presentation of two or more employees' viewpoints and concerns about wages and benefits
  - Employees' postings on Facebook or other social media discussing complaints about their terms and conditions of employment.
- The right to engage in lawful concerted activity is in addition to the First Amendment rights public employees have to speak out on matters of public concern, outside their official duties, that do not cause a disruption to district operations.

NLRB General Counsel Memo on Handbooks

- While the NLRB does not have jurisdiction over school district employees, the Wisconsin Employment Relations Commission (WERC), which does have jurisdiction, may look to NLRB decisions as persuasive authority.
- On June 6, 2018, the NLRB general counsel issued a memo interpreting the NLRB's decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). This decision established a new standard for determining if a workplace rule, such as a social media policy, interferes with employees' right to engage in concerted activity. This memo focused on balancing a handbook rule's negative impact on employees' right to engage in concerted activity with the employer's right to maintain discipline and productivity in the workplace.

NLRB General Counsel Memo on Handbooks

- This memo emphasizes that ambiguities in the drafting of employment policies should not be interpreted against the drafter and that a generalized provision in an employment policy should not be interpreted as banning all activity that could conceivably be covered by the provision.
- The decision and the memo seem to indicate that on the whole, employee handbook provisions will face less scrutiny by the NLRB and that the NLRB will be less likely to hold that certain provisions interfere with employees' right to engage in concerted activity.

First Amendment

- "Speech" made pursuant to an employee's ordinary official duties is unprotected. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- "Speech" which is not on a matter of public concern is unprotected. *Connick v. Meyers*, 461 U.S. 138 (1983).
- Speech that is merely of personal concern to an individual employee is not protected.
- Speech" which is as a citizen on a matter of public concern is protected, but only if the employee's First Amendment speech rights outweigh the district's interest as an employer. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). This is called the "Pickering Balancing Test."

First Amendment, con't.

Factors that a court in the Seventh Circuit will consider when applying this balancing test include:

- Whether the speech would create problems in maintaining discipline or harmony among co-workers;
- Whether the employment relationship is one in which personal loyalty and confidence are necessary;
- Whether the speech impeded the employee's ability to perform his or her responsibilities;
- The time, place, and manner of the speech;
- The context in which the underlying dispute arose; and
- Whether the matter was one on which debate was vital to informed decision-making.

First Amendment and Social Media

- Districts may discipline employees for off-duty social media use when a connection exists between the district's interest and the employee's social media use, and the employee's social media use is not protected by the First Amendment.
- A district properly dismissed a teacher who posted a highly critical blog where she called her students a variety of insulting and offensive terms. The court found that the teacher's "expressions of hostility and disgust against her students would disrupt her duties as a high school teacher and the functioning of the School District." Therefore, the teacher could not prevail on her First Amendment claim against the district. *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 476 (3d Cir. 2015).

"Black Lives Matter"/ "All Lives Matter"

- A white employee that was exceeding performance standards alleged that he was terminated for posting critical comments about "Black Lives Matter" on his personal social media (including the comment "All Lives Matter"), whereas African-American employees were permitted to post about "Black Lives Matter" without discipline or termination.
- The court denied the employer's motion to dismiss, holding that employee stated a potential claim for race discrimination.
- Note, this was a private sector case, so the court did not have to analyze any potential First Amendment issues.
- *Kane v. Fin. of Am. Reverse, LLC*, No. 117CV02266JMSTAB, 2018 WL 2001810, at *3 (S.D. Ind. Apr. 30, 2018).

Additional Employment Issues Involving Social Media

What does board policy say about employees interacting with students through social media?

- Sometimes employees use social media to easily send communication to students such as the need to reschedule an athletic practice.
- However, sometimes employees use social media to develop relationships with students that cross the appropriate professional boundaries.
- Public Records Laws are implicated when these communications are not properly retained by employees.

Additional Employment Issues Involving Social Media

Do employees post pictures and names of students on social media?

- Might constitute a FERPA violation unless the information is classified as directory information, and the student has not opted out of disclosure of directory information.
- Might constitute an invasion of the student's privacy if the information is particularly sensitive.

Boundary Violations With Other Staff Members?

- Ensure the district's harassment policy addresses the potential for off-duty social media communication to constitute harassment.
- Example, a principal might constantly use SnapChat to flirt with a teacher who does not welcome some flirtation. This conduct might constitute sexual harassment if it continues and the conduct is severe or pervasive.

Student Issues

Liability for Student-on-Student Harassment

- A student with Asperger's Syndrome was being bullied by his classmates for years and despite the school district's efforts, the bullying did not stop.
- The student and his parents complained of more than 30 acts of bullying. The district investigated each complaint, sometimes referring the matter to the police, sometime speaking to classroom teachers. The district would call home and institute corrective action plans for the students found to be participating in bullying including suspending students from athletics and extracurricular activities and requiring them to read a book on bullying and write a report. The student and his parents complained that the district's response was not adequate.

Liability for Student-on-Student Harassment, con't.

- The student sued the district and two of its principals under Section 1983 alleging violations of the ADA, Title IX, and the Equal Protection clause. In order to prevail, the student had to show that the defendants were deliberately indifferent to the bullying, which required him to show that the district's "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."
- The court held that the district's responses were not clearly unreasonable. To call the district's measure clearly unreasonable "would be to engage in the kind of second-guessing of school administrators' disciplinary decisions that the Supreme Court and the Seventh Circuit have instructed district courts to avoid."
- *Bowe v. Eau Claire Area Sch. Dist.*, No. 16-CV-746-JDP, 2018 WL 791416 (W.D. Wis. Feb. 7, 2018).

Liability for Student-on-Student Harassment, con't.

- By analogy, student-on-student harassment might take place over social media and outside of school hours.
- Districts do not have a duty to police student social media activity that does not relate to school. To the extent student social media activity does reach the school (such as by causing a fight between students), districts should respond in such a way that the districts are not acting with deliberate indifference.

Liability for Student-on-Student Harassment, con't.

- Districts should be cautious that they are not inadvertently assuming a duty to police student social media activity by using software to track such activity and notify administrators of activity that might be violent or harassing.
  - Once a district has taken on such a duty, it should not act negligently in the performance of that duty.
  - Districts need to ask themselves if it is reasonable and responsible for districts to get involved in non-school related student social media activity.
  - If districts are using such software, are administrators reviewing the notices and responding appropriately?

Social Media and Suspensions

The school administration may suspend a pupil (without a disability) from school for up to 5 school days (or up to 15 days if a notice of expulsion is sent) for the following reasons:

- noncompliance with school rules;
- knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives;
- conduct while at school or while under the supervision of a school authority that endangers the property, health or safety of others; or
- conduct while not at school or while not under the supervision of a school authority that endangers the property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.

Under this statute, conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

Social Media and Expulsions

The school board may expel a pupil from school whenever it finds the pupil:

- guilty of repeated refusal or neglect to obey the rules;
- knowingly conveyed or caused to be conveyed any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives;
- engaged in conduct while at school or while under the supervision of a school authority which endangered the property, health or safety of others; or
- while not at school or while not under the supervision of a school authority engaged in conduct which endangered the property, health or safety of others at school or under the supervision of a school authority or endangered the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.

Under this statute, conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

Social Media and Expulsions Example

- A student posted a threat on social media to carry out a school shooting.
- The student posted a photo of himself and another student with the text "schoolshootersquad" and a caption reading "Don't come to school Monday guys [gun emoji] #shootitup #justcaughtabody #maybe2"
- On appeal, the student argued it was just a joke. DPI held that a reasonable view of the evidence supported the school board's findings and decision to expel the student for conduct while not at school or while under the supervision of a school authority which endangered the property, health, or safety of others at school or under the supervision of a school authority, and that the interests of the school demanded the student's expulsion.
- Among other things, the student had made a threat before, and after the prior incident the District informed all students of its zero tolerance policy regarding threats to safety.
- Oconomowoc Area Sch. Dist. Bd. Of Educ. Dec. and Order No. 737 (June 14, 2016).

Student First Amendment Rights

- The First Amendment does not protect the following on-campus student speech:
  - Speech within the context of school-sponsored and controlled curriculum, such as the contents of a student newspaper prepared by a journalism class;
  - Speech that can reasonably be viewed as promoting illegal drug use;
  - Speech that is a true threat;
  - Speech that is obscene, vulgar, lewd, indecent, or plainly offensive.
- If neither of these tests are satisfied, school officials can restrict student speech if they can forecast that the expressive activity will materially interfere with or substantially disrupt a school activity, or if the expression intrudes on the rights of other students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Social Media and the First Amendment

- When the speech originates off-campus, there is not one clear test that is applied to determine if school officials can take action based on a student's off-campus speech.
- When does *Tinker* apply to off-campus speech?
  - Courts have taken five different approaches!
- When can a school district take disciplinary action for off-campus speech?
  - Speech that disrupts or interferes with the learning environment.
  - Does the speech impinge upon the rights of others?
    - Is the content offensive or just controversial?
    - Does the speech cause "hurt feelings" or does it substantially disrupt the educational mission?

Social Media and the First Amendment, con't.

- A high school student posted to social media a profane and threatening rap song about two high school coaches wherein he accuses them of inappropriate relationships with female students.
- A federal district court ruled in favor of the school district finding that the rap song created a substantial disruption at school in accordance with *Tinker*.
- A panel of the Fifth Circuit Court of Appeals subsequently reversed, refusing to decide if *Tinker* applied, but deciding that even if *Tinker* applied, a substantially disruption did not occur and could not have reasonably been foreseen.
- An *en banc* decision from the entire Fifth Circuit Court of Appeals reversed again deciding that *Tinker* did apply to this situation, and that the district could have reasonably forecasted a substantial disruption.
- The Supreme Court denied certiorari and will not hear an appeal of this case.

"Not much good takes place at slumber parties for high school kids…"

- At a sleepover, two sophomores took a number of suggestive photographs and posted the photos on social media. The images were not brought to school, nor did the photos identify the girls as students of the high school.
- The principal received a copy of these photos from parents. He suspended the girls from extracurricular and co-curricular activities for a calendar year. The girls sued, alleging a violation of their First Amendment rights.
- The court concluded:
  - that the students' actions constituted speech within the meaning of the First Amendment and were not obscene or child pornography;
  - that the photos could not have caused a substantial disruption to school activities, nor was it reasonably foreseeable that such a disruption would occur in the future.

Search and Seizure

- *TLO* Principles
  - Reasonableness at its inception.
  - Reasonableness in scope.
- Cellphones
  - Great caution should be used before searching a student's cellphone because students have a strong expectation of privacy in the contents of their cellphones.

Student Use of Cell Phones and Social Media and Criminal Law

- Wis. Stat. 947.0125 makes it a Class B misdemeanor, fine of up to $1,000, or imprisonment of 90 days for sending electronic threats or using lewd/profane language in electronic communications
- Wis. Stat. 942.01 is Wisconsin's defamation statute. If someone spreads false information that damages someone's reputation, that person can be charged with a Class A misdemeanor.
- Wisconsin's restraining order statute can be used against someone using technology to harass someone.

Student Use of Cell Phones and Social Media and Criminal Law, cont.

- Wis. Stat. 948.12 is Wisconsin's child pornography statute.
  - Students are at risk of violating 948.12 (a Class D **felony**) when they possess and distribute images of minors.
  - An adult who sends a sexually explicit text message image to a child may face felony charges, as described below. (948.055.)
- In juvenile court, a conviction for possessing or viewing child pornography may include a fine of up to $10,000, up to three years and six months in custody, or both.
- Adults who possess or view child pornography—including sext messages with sexual images of children— may face child pornography charges with penalties including a fine of up to $100,000, up to 20 years in prison, or both.

Questions?