Board Members & Technology: What do they need to know?

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Where are we going today?

• Technology and Public Relations (Student Privacy Issues)
• Technology Off the Clock (Discipline Issues)
• Technology and Sunshine Laws (Board Member Considerations)
• Recent Cases about Technology
Disclaimer

OSBA attorneys provide legal information, but do not give legal opinions or advice.

Consult with your board’s counsel if you require specific legal advice.

Student Privacy & Social Media
FERPA Requirements

- FERPA regulates student education records. Those are records:
  - maintained by the school district, and
  - pertaining to individual students.
- FERPA and Ohio law prohibit the release of personally identifiable information (PII) unless:
  - an exception applies, or
  - the district has consent from the parent (or student, if 18+) to release the information.

Personally Identifiable Information

Direct identifiers: Name, SSN, photo

Indirect identifiers: parent’s names, family’s address, personal characteristics

Bottom line: Does the information allow someone in the school community who does not have personal knowledge of relevant circumstances to identify a specific student?
“Directory Information”

What is included in “directory information” is defined by district policy. It can include:

- Name, address & telephone
- E-mail
- Date & place of birth
- Grade level & enrollment status
- Dates of attendance
- Participation in extracurricular activities
- Weight/height of athletes
- Honors and awards
- Degree awarded

A caution about photographs...

Ohio law appears to require written consent to release photographs and images of students.

Be careful when releasing photos of students (including on social media!).
Side Note: District Pages

- Does your district have a social media policy?
- Does someone manage your social media sites?
- Can anyone post and comment?

Regulating Social Media Pages

- Consider a disclaimer
  - Purpose of website
  - Moderated online discussion site; not a public forum
  - What posts will be deleted?
    Examples: vulgar language, content that perpetuates discrimination, content that advocates illegal activity, etc.
  - Comments don’t represent opinions of school district or its employees
  - Unsolicited hyperlinks/ads
Controlling social media is difficult!

In 8 hours, this post from Facebook was shared 108,000 times and reached 33 states and 5 other countries (England, Germany, Spain, Saudi Arabia, and Australia).

The teacher removed the post after 8 hours, but it had hundreds of thousands more shares, and reached all 50 states and dozens of countries in just 1 week.
Duke v. Hamil

“[d]espite his intentions and his quick removal of it, the post illustrates the very gamble individuals take in posting content on the internet and the frequent lack of control one has over further dissemination.”
Best Practices

- Check annual FERPA notices to make sure social media is included.
- Obtain written consent for publishing photos.
- Consider a disclaimer on social media sites.
- Consider establishing guidelines for board members’ use of social media in their board member capacities.

Discipline Issues
Student Discipline

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (Tinker v. Des Moines, 1965)

- Tinker outlined some situations that allow school districts to regulate speech at school:
  - Dress codes
  - Aggressive, disruptive actions
  - Certain group demonstrations
- Key: Does the speech materially and substantially interfere with operations?

The Supreme Court has carved out other exceptions:

- Lewd, vulgar, and indecent speech on the school campus can be restricted (Bethel School District No. 403 v. Fraser, 1986)
- Speech in school-sponsored publications can be restricted based on “legitimate pedagogical concerns” (Hazelwood School District v. Kuhlmeir, 1988)
- Speech advocating illegal drug use can be restricted at school-sponsored events (Morse v. Frederick, 2007)
“True Threats”

Constitutional protection does not apply to student expressions that are “true threats.”

Incidents found to be true threats:

• Icons depicting a bullet to the head with blood spattering, referring to a specific teacher, and sent to 15 other students (Wisniewsky v. Weedsport Central School District, 2nd Cir. 2007)

• A journal with writings and drawings of a mass attack on the school that the student brought to school (Ponce v. Socorro, 5th Cir. 2007)

• A journal recording a student’s dream where she shot her teacher during class, when she brought the journal to school and failed to exercise “strict control” over it (Boim v. Fulton County School District, 11th Cir. 2007)

• MySpace page comments outlining detailed plans for a school shooting, where student had access to weapons, and friends were alarmed (Wynar v. Douglas Co. School District, 9th Cir. 2013)
Disruptions

Courts have also upheld student discipline where social media posts at home caused a disruption or intended to cause a disruption at school:

- Blog entries from a student encouraging people to contact the principal to “piss her off more” (Doninger v. Niehoff, 2nd Cir. 2008)
- Cyberbullying (Kowalski v. Berkeley Cty. Schools, 4th Cir. 2011)
- Offensive and racist comments, and sexually explicit and degrading comments directed at certain female classmates (S.J.W. v. Lee’s Summit R-7 School Dist., 8th Cir. 2012)

Employee Discipline

The First Amendment does not protect school employees when they make statements pursuant to their official duties. (Garcetti v. Ceballos, 2006)

Certain speech is never protected: obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct. (United States v. Cassidy, D.Md. 2011)

Caution: First Amendment may not be the only protection that applies!
Employee Discipline

The *Pickering* test:

1. Is the employee speaking about a matter of public concern?
2. Is the employee speaking in his or her capacity as an employee or in a personal capacity?
3. Do, on balance, the needs of the employer to maintain order justify or outweigh the intrusion on free speech?

*(Pickering v. Bd. of Educ., 1968)*

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A note on searches

Searches of electronic devices are subject to the same legal search and seizure requirements of a person’s physical possessions.

Considerations:

- Is the scope of search justified based on concern?
- Does an employee have a “legitimate expectation of privacy”?
- Effect of school administrator vs. School Resource Officer conducting search
A note on searches

The Stored Communications Act of 1986 prohibits accessing electronic communications in electronic storage without authorization.

• Cannot access social media sites by false means

• Employees with public pages or who grant access to private pages to supervisors do so at their own risk.

• Employees who grant co-workers access to private pages do so at their own risk.

Don’t forget mandatory reporting obligations…

• R.C. § 3319.313: Report to ODE Licensure Office
  • Certain felony offenses
  • Termination or non-renewal proceedings initiated for conduct unbecoming

• R.C. §2151.421: Mandated reporting of child abuse to children services or law enforcement

• Federal law: Report child pornography to the National Center for Missing and Exploited Children CyberTipline
Best Practices: Discipline

- Consider a disclaimer regarding the use of school electronic systems that indicates employees have no expectation of privacy when using the system.

- Work with counsel to establish search protocols that properly address Fourth Amendment concerns.

- Because the legal landscape changes in this area frequently, engage counsel very early in the process of discipline proceedings that involve off-campus behavior for both students and employees.
Technology & Sunshine Laws

The Open Meetings Act
Emails among board members: do they violate the OMA?

On one hand...

Under the Open Meetings Act, a meeting is
  • any prearranged
  • discussion
  • by a majority of the members of a public body
  • about public business.

Note: It doesn’t matter what you call it if the four criteria are met!
On the other hand…

R.C. § 121.22(C) requires a board member to be present in person to be considered present at the meeting and to vote.

**Best practice:** avoid discussions/deliberations via email.

- one-way pushes of information are ok.
- emails dealing with logistics of meetings are ok.
Sometimes, it just depends…

Does one email violate the OMA?

A board member sends a letter to the editor that is printed in the paper.

Another board member sends an email to two other board members indicating they should write a response to the paper.

- The recipients did not reply to the e-mail.
- The board member brought a draft letter to the board meeting (they did not collaborate over email).

The board member that wrote the original letter sued for violation of the OMA.
Does one email violate the OMA?

The 1st District says no violation.

- Email was unsolicited: did not meet the “prearranged” requirement for a meeting under the OMA.
- No one responded: did not meet the “discussion” requirement for a meeting under the OMA.
- No official act resulted from the communications.

The Ohio Supreme Court declined appellate review.

(Haverkos v. Northwest Local Bd. of Ed., 1st Dist., 2005)

What if we change the facts: emails go back and forth between board members?

Do multiple emails violate the OMA?

Board member independently investigated expenditures by school district staff, leading to the resignation of one of the staff members.

Board members votes 4-1 to enact a policy that board members had to pass communications to staff through the superintendent.

The local newspaper published an editorial criticizing the board’s action.
Do multiple emails violate the OMA?

The board president emailed the four members that voted for the policy that they should draft a joint response to the editorial.

Series of emails ensued, and a letter was sent to the paper without board action (it was later “ratified”).

Board member sued other members.

Do multiple emails violate the OMA?

The 5th District says no violation.

• Cited precedent in 1st and 4th districts that e-mail was not included in the definition of meeting in the OMA.
• Content did not deal with anything pending before the board.

The Ohio Supreme Court accepted review; decision is forthcoming.

(White v. King, 5th Dist., 2014)

What if we change the facts: what if the emails have something to do with a pending resolution?
The Public Records Act
Public Records Act

- Public records must be made available for inspection.
- Copies of records must be provided if requested.
  - District can require the requester to pay costs of production if the requester asks for hard copies or disks.
- School districts must have a records policy and post it in district buildings.

Is it a public record?
It’s a public record if:

- It is kept by a public office;
- It contains information stored on a **fixed medium**;
- It is created, received, stored or sent under the jurisdiction of the public office; and
- It documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

Some Public Records Exceptions

- Student records
- Certain personnel information
- Security records
- Attorney-client privileged material
- Medical records
- Drafts of audit reports (until final filed with the district)
Personnel Records

Personnel files are generally not exempted from public records release, but certain information can be redacted under Ohio law.

<table>
<thead>
<tr>
<th>Confidential Information</th>
<th>Authority for withholding</th>
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<tbody>
<tr>
<td>BCII criminal records checks</td>
<td>R.C. § 3319.39(D)</td>
</tr>
<tr>
<td>Misconduct investigations by Department of Education</td>
<td>R.C. § 3319.311(A)(2)</td>
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<tr>
<td>Social security numbers</td>
<td>State ex rel. Beacon Journal Publishing v. Akron 70 Ohio St.3d 605, 612 (1994)</td>
</tr>
<tr>
<td>Banking information</td>
<td>State ex rel. Dispatch Printing Co. v. Johnson 106 Ohio St.3d 160, 2005-Ohio-4384</td>
</tr>
<tr>
<td>Medical records</td>
<td>R.C. § 149.43(A)(1)(a) &amp; (A)(3)</td>
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<tr>
<td>Workers’ compensation claim info</td>
<td>R.C. § 4123.88</td>
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“Non-records”

Items the district maintains for administrative ease are not public records.

- Emergency contact information
- Insurance beneficiary designations
- Certain home addresses
- Personal cell phone numbers (if the employee has not published the number related to her work duties)
Challenges with Electronic Records

Electronic Records Issues

- Original vs. duplicate copies
- Location of records can be dispersed across district.
  - Individual drives on computers
  - Smartphones
  - Personal e-mail accounts
- Temporary nature (texts and instant messages)
- Risk of improper destruction
Board Records

• The recording of the board meeting is a public record.
  • This is the case even after the written minutes are produced.
  • Follow your district’s records retention schedule for the recordings.

• Board member home addresses are public record (because they are required to be residents of the district to serve their role).

Is this a public record?

From: boardpres@gmail.com
To: boardveep@yahoo.com
Re: Touching base

Hey, Veep:

Hope everything went well with your husband’s surgery.

Can you believe new joker on our board thought he was going to take over the mic at the basketball game last night?!?!?!?

I think we need a discussion of public records issues at our next board meeting because our school district isn’t following proper procedures, but didn’t want mention to Mr. Superintendent until I got your thoughts. What do you think?
Board Records

- E-mails to and from board members that deal with school business may be public records.
  - This is true even if the e-mail is sent to the board member’s private e-mail address!

**Best practice:** board members use a school district e-mail account for board business.

Records Retention

- Every district has a records retention schedule.
  - Groups records into categories
  - Identifies how long to keep records in each category
  - May specify whether to keep paper or electronic copies
Examples:

- Student transcripts: **permanently**
- Student medical records: **7 years after student graduates or withdraws**
- Recording of board meetings: **2 years after minutes are approved for the meeting recorded**
- Board meeting minutes: **permanently**

Note: *Your district’s schedule may differ!*

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**Records Retention**

What is schedule for keeping electronic drafts of documents?

- If board members use Google Docs, does each version need to be archived?
- If board members are using their own email:
  - how are you instructing them to maintain records?
- Who takes possession of the records when they leave the board?
Important Cases

- Records that are not properly destroyed per records retention schedules are still public records, and must be produced if they meet the request criteria.
  (State ex rel. Dispatch Printing Co. v. City of Columbus, 2000-Ohio-8)

- Public entities may be responsible for the costs of forensic recovery efforts if electronic records are deleted in violation of the records retention schedule.
  (State ex rel. Toledo Blade Co. v. Seneca Co. Bd. of Commissioners, 2008-Ohio-6825)
Best Practices

• Review your public records policies and records retention schedules for inclusion of electronic records.

• Review your training procedures to ensure staff know and are regularly reminded how to store electronic records properly.

• Backup electronic systems regularly and centralize storage for individual machines.

• Provide board members school district e-mail addresses.

Questions?

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OSBA’s legal hotline is available to member districts.

855-OSBA-LAW