



The Do's and Don'ts of Social Media Usage by School Board Members

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- Attorney & Adjunct Professor
- Employment, Business & Education Law
- Families First Coronavirus Response Act (FFCRA)
- Discrimination, Title IX, Workplace Investigations
- Special Education
- Nonrenewal & Discharge Hearings
- Contract Drafting & Review
- Policy Review & Development
- Wage & Hour Compliance
- HR Counseling & Training
- Litigation / Administrative Complaints

Today's Agenda



** What do School Board members need to know about their obligations and their school district's obligations online?*

- I. Open Records vs. Confidential Information
- II. Free Speech
- III. Anti-Discrimination/Harassment Laws
- IV. Intellectual Property
- V. School District Policies & Social Media Use

I. Open Records & Exemptions/ Confidential Info.



Open Records

- Definition:

- All records of a public entity, including school district = open to public (*unless exempt or required to be confidential*)
- Must be released upon request.
- E.g., meeting minutes, agendas, meeting notices, financial records, contracts, personnel files, etc.
- What a school district's social media posts and page(s)? VERY LIKELY.

E.g. = School District FB Page

- What is an open record on a school district's Facebook Page?
 - *Most Everything* – posts, comments, pictures, information, videos, etc.
 - What about private messages? Very likely – district business.
 - Is anything exempt?.....

Exemptions/ Confidential Info.

- What is exempt from an open record?
 - Certain employee personal, medical, employee assistance records
 - Certain law enforcement, juvenile court or probation officer information
 - Ongoing complaint and investigation records
 - Attorney work product
 - Reports of child abuse or neglect
 - Student records

Preservation of Open Records

- Social Media Preservation

- Make a ***Social Media Record Retention Plan!***
- Know the preservation limits of the social media account/site your school district uses.
- Consider investing in archiving software.
- Consider making PDF documentation on a regular basis
- Appoint an Administrator(s) to oversee preservation of social media open records

Preservation of Open Records

- Social Media Preservation

- Ensure a degree of separation between a public employee's personal social media and the school district's social media page
- Why?
 - Avoid confusion with Administrator's personal positions/statements versus School positions/statements.
 - Help avoid open record requests into personal social media.
- Note: that any duplicative information maintained in a separate publically-available format can be produced in that alternative.

II. Free Speech & Social Media



Establishing a Social Media Account in a Free Speech World

- School district should immediately decide:
 - Will we allow public comments?
 - How much?
- Essentially, School is deciding whether its social media will be:
 - Traditional Public Forum (allowing comments)
 - Government Communication (no comments, just information posted)

Social Media = Public Forum?

- U.S. Supreme Court has stated = will look to policy or practice of a governmental entity to determine if entity intended to designate a “non-traditional” forum as a “designated” public forum.
- Social media page = non-traditional, but certainly public.
- So is a FB page a **traditional public forum** = aka a space (like a board meeting) open for public expressive activity? *It depends on how school uses it!*

What Forum will your school's Social Media be?

- Designated or Limited Public Forum
 - Comments allowed on some posts or for a specific period of time creates a “designated” or “limited” public forum
 - Comments allowed on specific posts & limits to certain topics (restrictions must be content-neutral) = designated public forum
 - Comments allowed for specific period of time on any topic = limited public forum
- Traditional Public Forum
 - Open public commenting on all topics and at all times = traditional public forum akin to courthouse steps

Can we (or should we) DELETE public comments?

- **BE VERY CAREFUL!**
- Open record issues (*review record retention plan*)
- First Amendment = free speech applies
- Limited Forum = deletion “must not discriminate against speech based on viewpoint and must be reasonable in light of forum’s purpose.
- Traditional Forum = deletion must be based on a “compelling state interest” (a high standard)

Also...watch for Quorums!

- “Walking” quorums may be created via Twitter, Facebook posts/comments, Instagram comments, etc.
- If Board members engage in a manner so that a “meeting” occurs in a social media venue, there can be issues.

III. Anti-Discrimination/ Harassment Laws



Free speech is allowed, *BUT*...

- School Districts:

- Do NOT need to allow your school social media forums to allow for the violation of other laws.
- Students & employees are protected from discrimination/retaliation based on protected class statuses (e.g., race, color, religion, sex, age, national origin, disability, etc.) – Title IX, Title VII, ADA, etc.
- Threats of violence, assault, harassment, etc. can (and should be) monitored.

Cyberbullying

- ND Revised Law – Cyberbullying (NDCC § 15.1-19-17; § 15.1-19-18)
- Law prohibits certain bullying-type “CONDUCT” including use of technology or other electronic media occurring on a school premises or sponsored activity (*could include social media sponsored by the school!*) OR received/sent by student off premises.

Cyberbullying

- Example of Prohibited Conduct Online:
 - Severe, pervasive, or objective offensive and substantially interferes with educational opportunities
 - Places student in actual and reasonable fear of harm
 - Places student in actual and reasonable fear of damage to property of student
 - Substantially disrupts orderly operation of school

Other Anti-Discrimination Laws

- Students:
 - Sexual harassment – Title IX
 - Disability/special education – Americans with Disabilities Act (ADA); Section 504 of Rehabilitation Act of 1973; Individuals with Disabilities Education Act (IDEA)
- Employees:
 - Sexual harassment – Title IX; Title VII of the Civil Rights Act
 - Disability (ADA); Age (ADEA); Race, Color, Religion, sex (including pregnancy), national origin (Title VII)

What should schools do?

- Ensure policies are followed in social media venues!
- Review/apply those policies:
 - Bullying Policy (usually Policy ACEA) – follow same procedures for addressing the conduct
 - Other applicable policies (E.g., AAC & AAC-BR1- Nondiscrimination and Anti-Harassment; AAC-BR2- Title IX; AACA, et. al. – Section 504)
- Remove social media content in violation of policy
 - BUT, also review social media document retention plan

IV. Intellectual Property



Trade Secrets

- Info (1) maintained in confidence, (2) has commercial value from not being generally known, and (3) not readily ascertainable by proper means.
 - Essentially...the more detailed the info & difficult to obtain = trade secret.
- Very little (if any) info in a school district would be considered a “Trade Secret.”

Copyrights

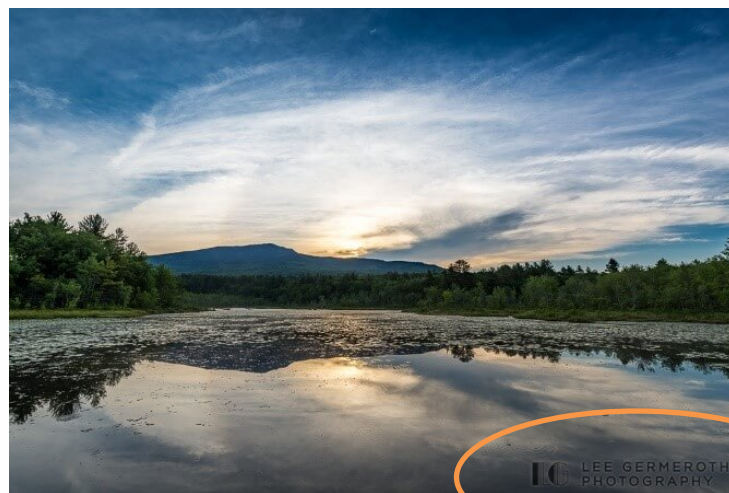
- No registration required. Use of work + © = enough to protect the work.
 - Examples = image, song, design, html, etc.
 - Social Media Use = need owner's consent – otherwise, copyright infringement.
- **School could be liable even if School did not commit the infringement IF it benefits from infringement (e.g., employee used copyrighted material to bring in new service or benefit to the School).

Trademarks

- Usually registered with USPTO. Word, phrase, symbol, or design that is identifiable & distinguishable. Could be any original work of authority in any medium (image, song, design, html)
- Therefore...Cannot use trademark on social media in any manner that could cause confusion or dilute the famous mark.
- E.G. = your new School slogan cannot be “Just Do It.”

Intellectual Property Law & School Compliance

- Get permission from content owner.
- Only use imagery that has proper attribution to author.
- Use free images (pixabay, unsplash, pexels, stock.xhng, morguefile, stock free images)
- Keep posts simple (and without copyrighted material)



V. School District Policies & Social Media Use



Overall Goals

- Set expectations for Board Members, Employees, Students, and Community members
- Identify acceptable use on behalf of school district (versus use that is personal)
- Ensuring productivity and no interference with education at school
- Ensuring limitations and boundaries are clear

What can a school district control?

- CAN control its own social media accounts; who is allowed to administer those accounts; the forum set up for those accounts; who can speak on behalf of District; prohibiting unlawful activity; proper use; etc.
- CANNOT CONTROL: *“Lawful activity off the employer’s premises during nonworking hours, as long as the activity is not in direct conflict with the essential business-related interests of the employer.”* ND Human Rights Act, NDCC Sec. 14-02.4-03 (1)

School Board Internet & Social Media Use

See NDSBA Policy BA-BR2

- Individual Board Members:
 - Often perceived as District spokespersons.
 - BUT, have no authority to take action unless delegated authority by majority vote of Board at public meeting
- When commenting on District business online:
 - Avoid posting opinion on matter pending before Board
 - Avoid dissenting opinion on matter decided by Board
 - Clarify when commenting as individual & NOT in a Board member capacity
 - Report to Superintendent public comments that violate policy or law

District Social Media Accounts Policy

- **OVERALL:**
- A separate policy on the social media accounts themselves can set clear expectations and requirements for establishment, administration, and forum types for any social media created on behalf of school district.

(1) Forum Type

- *EXAMPLE Policy Language:*
 - **Information Forum.** The primary purpose of any District social media account established pursuant to this policy shall be to create a forum for communication of information from and about the District to school families and the larger community. No District social media account is intended to create an unlimited, open public forum.

(2) Social Media Administrators

- *EXAMPLE Policy Language:*
 - For the purposes of this policy, “**social media administrator**” is defined as an individual who establishes social media accounts, generates and posts social media content, monitors social media content, and maintains social media login information and passwords on behalf of the District. At all times, there will be no less than two (2) social media administrators with full access and login/ password knowledge for all District social media accounts. The Superintendent of the District must be one (1) of those social media administrators, and s/he may assign the other(s) social media administrator roles to other District administrators and/or the District Business Manager within his or her discretion.

(2) Social Media Administrators

- EXAMPLE Policy Language:
 - Social media administrators may generate content and posts on District-sponsored social media accounts in compliance with this Policy; but they may not generate content, comment, or **post on any other private or third-party social media accounts** on behalf of the District.
 - Any **personally-held, private social media accounts** belonging to a District social media administrator **must be kept and maintained entirely separately** from the District's social media accounts. No District social media administrator may use a District-sponsored social media account as a platform for his or her personal views, opinions, or information.

(3) Official District Contact Information

- *EXAMPLE Policy Language:*
 - **Official District Contact Information.** The main page of any District’s social media account(s) for public communications shall include the display of the District’s name, the URL of the official District website, and the main telephone number and address of the main administrative office of the District.

(4) Official District Website

- *EXAMPLE Policy Language:*
 - **Official District Website.** When providing information on any District-sponsored social media account, the social media administrators should redirect the public to the official District website (e.g., using an electronic link) whenever that information (and/or additional information) is also available on the District website.

(5) Allowable Content Posted

- *EXAMPLE Policy Language:*
- At the discretion of the social media administrators, the District may choose to use its social media account(s) to include District announcements of School Board meetings and activities or the activities, meetings, and accomplishments of any groups that have been organized primarily to support a school-related purpose (such as parent-teacher organizations), provided that the same standards apply to all such groups when similarly-situated. The non-school events, activities, or accomplishments of third-party groups or organizations that are not organized primarily to support a school-related purposes shall not be advertised or promoted through any District social media account(s).

(6) Supplemental Information on Meetings

- *EXAMPLE Policy Language:*
- A District-sponsored social media account established under this Policy shall not be relied upon to establish compliance with the requirements for giving public notice of open Board meetings or the meetings of other governmental bodies that fall under the purview of the Board or the District. Any notice of such meetings that may be provided through a District-sponsored social media account shall be considered exclusively supplemental in nature.

(7) Public Posting/Commenting

- *EXAMPLE Policy Language:*
- Only social media administrators are authorized to generate new content and postings on a District-sponsored social media account. Any feature on a social media platform that would allow the public to generate new content or postings must be disabled by the District's social media administrators. The public may be encouraged to contact the main office with specific questions, which then may be directed to the appropriate District representative.

(8) Exception: Live Meeting Commenting

- *EXAMPLE Policy Language:*
- Any option that would allow public posting or commenting on content or posts generated by social media administrators on a District social media account must be disabled, with the exception of the following: public commenting or posting may be enabled during “live-streamed” administrator announcements or open board meetings streamed on a District social media account [*only during the duration of the live meeting*]. All commenting or posting options may be disabled after the meeting concludes.

(9) Proper Monitoring

- *EXAMPLE Policy Language:*
- The social media administrators reserve the right within their discretion to monitor and remove any post or comment on a District account that may be reasonably believed to violate a District policy and/or violate a local, state, or federal law. This may include comments or posts that present a threat of violence, assault, harassment, or student bullying. Any posts or comments removed must be retained in accordance with a social media record retention plan established by the District's social media administrators.

(10) No Closed Groups

- *EXAMPLE Policy Language:*
- The District's social media account(s) for public communications shall not make use of any private or closed networks or groups. Any member of the public interested in accessing the information the District provides through its public information social media account(s) shall be permitted to have such access.

(11) Student Information

- *EXAMPLE Policy Language:*
- To the extent consistent with the District's policies and notices regarding student directory data and other student records, pictures of individually-identifiable students engaged in school-related activities may be posted or displayed through a District-sponsored social media account, provided that the student(s) in the pictures are not also identified by name in the posting or display. Any time the District wishes to post or use any student directory data that identifies students by name through a District-sponsored social media account, the District shall first obtain the advance written consent of the student's parent or guardian (or the adult student, if at least 18 years of age).

(12) Record Retention Plan

- *EXAMPLE Policy Language:*
- Prior to approving the establishment and use of any District-sponsored electronic social medial account under this Policy, the social media administrators must ensure that there is a social media record retention plan in place for managing the open records created or maintained through the account.

(13) Approved Accounts

- *EXAMPLE Policy Language:*
- Except for District-sponsored social media accounts that have been approved by the District Superintendent pursuant to this Policy, no social media administrator, District employee, member of the Board, or other person acting as an agent of the District shall establish any account, site, page, blog or other similar presence on a third-party website or on any other third-party electronic social media application that purports to represent, or that a member of the public would be likely to reasonably believe represents (e.g., due to the manner in which information is presented), an official or authorized account, site, page, blog or other similar presence of the full Board, the District, any District school, or any District-sponsored program or activity (e.g., athletic teams).

(14) Other Clauses

- Consider other clauses:
 - Directing the Superintendent to notify the School Board when a social media account is established.
 - Noting that the social media policy is separate from any other District policy regarding technology, e-mail, electronic student information systems, use of the internet, School Board use, etc.
 - Cross-reference policies – e.g., “Responsible Use” (ACDA)

Questions & Answers



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Thank You!

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