

## "Are Your District's Social Media Accounts a Ticking Legal Time Bomb?" Article by Zachary D. Schurin Appears in CABA Journal

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While district-controlled Facebook, Instagram and Twitter/"X" accounts can certainly be a great tool for engaging stakeholders – particularly Gen X and Millennial parents – it is important for board members and administrators to recognize that such accounts may be a "legal time bomb." Here is an overview of key legal pitfalls for districts to be aware of and some tips for mitigating the risks:

### BEWARE THE LIMITED PUBLIC FORUM!

In a number of recent cases, courts from around the country – including the Second Circuit Court of Appeals which has jurisdiction over Connecticut – have found that the interactive comment space on governmentally-controlled social media accounts can be what is known as a "limited public forum." As such, when left open for comments and other interactions (i.e. "likes" "retweets," etc.) school district social media accounts operate a lot like the public comment portion of board meetings. If speech from the public is allowed First Amendment protections apply. This means that while content-neutral time, place and manner restrictions are permissible, selectively deleting comments or blocking accounts based on the content of a user's speech is problematic.

For example, a district Instagram post with the score and a picture from last-night's game would certainly seem innocuous enough. However, if the post is open to comments and parents publicly praise the coach for a well-coached game, district leaders will have a hard-time legally deleting subsequent comments that call for the coach's immediate termination based on his decision to sit senior players in favor of star freshmen. This is because once a forum for speech is open to the public for one viewpoint, selectively restricting an opposing viewpoint likely runs afoul of the First Amendment.

As such, it doesn't take much imagination to see why it may be important to limit social media "comment wars" before they become a distraction. FERPA and Directory Information

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"FERPA" – the federal Family Educational Rights and Privacy Act -- requires that schools obtain prior written consent from parents or eligible students prior to the disclosure of personally identifiable information from a student's education record except in limited circumstances. One such circumstance is for the disclosure of so-called "directory information" which FERPA defines as information that would generally not be considered harmful or an invasion of privacy if disclosed (i.e. honors, awards, extracurriculars, photographs and any other similar student information designated by the district).

While most of what gets posted on district social media accounts likely qualifies as directory information, districts still need to be mindful of FERPA's directory information disclosure rules before posting student pictures or other information to social media. Under FERPA, parents have the right to "opt out" of the disclosure of directory information even though the disclosure may not be considered offensive to most people. Moreover, administrators should check to make sure that annual FERPA notifications to parents properly designate the type of content that may be posted on a district social media account as directory information. For instance, if the annual notification designates student pictures as directory information but not videos, posting a video that depicts students on the district's Instagram account could pose a FERPA issue.

### SOCIAL MEDIA CONTROVERSIES

Beyond these issues there are of course other factors to consider when it comes to social media. In October, Connecticut joined 42 other states in suing Facebook and Instagram's parent company Meta for allegedly engaging in practices designed to addict children and teens to their platforms. Also, in recent months a number of advertisers have abandoned Twitter/X following controversial comments by owner Elon Musk. While the risk of legal liability to Connecticut school districts by simply using social media is highly remote, school leaders should certainly consider whether district-use of such social media platforms sends an appropriate message in light of such controversies.

### BEST PRACTICES

For districts that elect to use social media to connect with district stakeholders here are a few best practices to consider:

- **Disable Comments:** Instagram, Facebook and Twitter all have settings that allow posters to disable comments and other responses. In light of the public forum/First Amendment issues explained above it may be a good idea to disable comments on all district social media posts to avoid unwanted "comment wars."
- **Require Parental Consent:** As explained above, while most student information that gets posted to social media likely constitutes directory information under FERPA, it still may be a good idea to ask for parental

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permission before a student picture or video gets posted online. If somehow a district post goes viral for the wrong reasons having parental consent in advance can avoid difficult conversations.

- **Adopt a Policy:** When it comes to district social media accounts, policy language that addresses the issues identified above can be very helpful, but there are other practical questions to consider. Who is authorized to post on behalf of the district? What is the process for obtaining parental consent? Who has the actual account password (it's best to give more than one person access)? What restrictions apply to posts while a referendum is legally pending? Well-drafted policy language can avoid legal issues before they occur.

As with so much else in the law, an ounce of prevention is worth a pound of cure. As such, with careful consideration districts should be able to sort through the best ways to use social media while minimizing the legal risks.

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