Ohio Education Law Monthly (May 2010)

May 10, 2010

Legal issues for a school board to consider before creating or approving a Facebook page

The rise of social networking sites, such as Facebook, has created new forums to interact and share information. Some school districts and/or individual schools have already created Facebook pages to publicize curricular and extracurricular programs, operations, activities, finances and events. The following are a few issues a school board should consider before creating or approving a Facebook page devoted to school district business.

First and foremost, any school board contemplating the creation of a Facebook site for school district business should carefully consider how the site will be administered. Will the site be "read-only" and have content posted solely by the school board or its designated employees? Or will the school board allow "fans" of the site to post comments and opinion? The level of access granted to the general public may have a profound impact on the board's control of its Facebook site.

Public Forum

The First Amendment to the United States Constitution, which guarantees freedom of speech and press, protects the rights of members of the public to speak in any "public forum". Traditionally, courts have held that a public body does not create a public forum by inaction or by permitting limited discourse. Rather, the public body must take some action to intentionally open a non-traditional forum for public discourse in order for a public forum to be created.

To date, no court has addressed whether a school board establishes a "public forum" by creating or approving a Facebook site that is devoted to school district business and that allows the general public to post comments and opinions. An argument could be made that such a forum would be similar to a school board creating a public forum by allowing public comment at its school board meetings. In both forums, the business of the school district is discussed. In both forums, the public is given an opportunity to comment.

If a public forum is established by a school board creating, approving or directing its employees to post content on the school district's Facebook site that is open to public comment, the board generally may not restrict access to that forum except for reasonable regulations as to time, place and manner in which the forum is used. This generally means that a school board may not regulate the content of a fan's speech on the Facebook site based upon his/her ideas, opinions or statements. Likewise, if the Facebook site is deemed a public forum, the equal protection clause of the Fourteenth Amendment may prohibit a school board from restricting speech on account of the identity of the speaker or any groups he/she may represent.

A conceivable example of a potential public forum/free speech issue may play out as follows. A school board creates or approves a school district Facebook page that allows "fans" to comment. The school board post information on the Facebook page concerning an upcoming levy. Fans of the site post comments urging support for the levy. However, some "fans" begin to post their opinions on why the levy should fail. In addition, noted members of anti-tax groups submit fan requests seeking to be granted access to the page. If a school board is found to have created a public forum, the board may be restricted in removing a fan's

opinions that are critical of the levy. Likewise, the board may not have the right to deny a fan's request to be granted access to post on the Facebook site due to their affiliation with groups known to be adverse to the levy.

Therefore, if a school board creates or approves a Facebook site that is open to public comment, it should be prepared to entertain widely divergent viewpoints on school district business. If considered a public forum, a school board may be constrained in editing or removing a "fan's" post based upon the content of the speech. And unlike a board meeting where the public may briefly comment on school business, a fan's written comments on a Facebook wall may remain accessible for a much longer duration.

Public Records Law

Ohio's Public Records Act ("PRA") defines a public record as any record that serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the public body. This definition includes electronic communications. If public records are maintained or created by another entity that is performing a public function for a public office, such records may be "under the public office's jurisdiction" for purposes of the PRA.

With this in mind, is the school board in the previous example creating a public record by posting data and information about its upcoming levy on its board-approved Facebook page? If public records are created, what obligation (if any) does the school board have to archive or maintain these records pursuant to its records retention and disposal schedule? To date, no court or agency has rendered a decision clarifying these issues. Nonetheless, a school board may consider policies or procedures to preserve or archive content posted by the school district on its Facebook site that are consistent with its records retention and disposal schedule.

Open Meetings Law

Most of us are aware that Ohio's Open Meeting Act ("OMA") requires that all deliberations and communications leading to official board action be conducted in open meetings unless specifically recognized as a permissible topic of discussion in executive session. To that end, at least one Ohio court has held that a public body violates the OMA when it conducts several "round-robin" or "serial" meetings between small groups of members, which, when taken in aggregate, constitute the discussion of public business by a quorum of the public body.

It is conceivable that three or more individual board members could post comments or opinions on the school district's Facebook site on issues up for board consideration. Depending upon the specific facts of each case, there is a risk that such communications, when taken in aggregate, could constitute a prearranged discussion of the public business of the board by a majority of its members in violation of the OMA. This specific issue has yet to be addressed by the courts. Nonetheless, a school board contemplating using Facebook to publicize the business and operations of its school district, should consider policies and procedures to address individual board members posting on the site.

Confidential Student and Health Information

Both state and federal law strictly limit the disclosure of personally-identifiable student information. Likewise, the Health Insurance Portability and Accountability Act of 1996 ("HIPPA") prohibits the disclosure of protected health information for both students and employees. A school board can protect the confidentiality of such information when it posts content on Facebook. However, members of the general public who are permitted to post on the site may not be aware of these protections or may simply chose to ignore the law.

Since "fan" postings on Facebook are in real-time, it would not be reasonable to have an employee or agent of the school board monitoring the Facebook wall at all times. Whether the school board has an affirmative

duty to promptly remove confidential student or protected health information posted on the board's Facebook site by persons not affiliated with the school board is unclear. However, the Board should consider procedures to monitor and respond to such content should it allow the general public to freely post on its Facebook site.

Student Discipline

If granted access, student "fans" of the school board's Facebook site could potentially post content that is controversial, harassing, disrespectful or otherwise not tolerated in a school setting. However, can a school board discipline a student whose Facebook post arguably violates the board's student code of conduct, or are such activities protected by the First Amendment?

In Ohio, a student code of conduct may apply to misconduct that occurs off school premises if the misconduct is connected to activities or incidents that have occurred on district owned or controlled property, or the conduct is directed at a district official or employee or the property of a school official or employee. Oftentimes courts deciding school discipline cases involving off-campus student speech require some nexus between the offending conduct and school district activities or operations. This usually requires the school district to prove either the offending content was created or accessed on school property, or the speech created a material or substantial disruption to school district operations or the educational environment. Without such nexus, a school district may not have the legal authority to discipline a student for such off-campus speech.

Nonetheless, a school board would have the authority to remove speech on its Facebook site that is vulgar, lewd, indecent, racist, obscene or otherwise inappropriate in a school setting, irrespective of whether the school board can discipline the student for such speech.

Conclusions

If administered correctly, Facebook is a valuable tool to disseminate information and keep the school community apprised of the educational programs, district operations, school finance, student achievement, employee awards, and other information to promote the school district. However, a school board should strongly consider the legal and policy implications of approving or creating a Facebook site that allows members of the general public to freely post comments and opinions.

Seventh Circuit rules that summaries of witness interviews taken by a school board's attorney are not discoverable in Title IX lawsuit

The Seventh Circuit Court of Appeals in Sandra *T.E. v. South Berwyn School District 100* recently held that summaries of witness interviews and concluding memoranda prepared by a school board attorney were protected from disclosure by the attorney-client privilege and work product doctrine. This case highlights the potential protections afforded to school boards who retain legal counsel to investigate allegations of harassment, discrimination, abuse, bullying or other misconduct.

In *Sandra T.E.*, a male elementary school teacher was arrested for repeatedly sexually abusing numerous female students, ages 9 to 12, from 1998 through January 2005. Some of the victims claimed they reported the abuse to the principal after it occurred, but the principal failed to take appropriate action against the teacher. Shortly after the teacher’s arrest, the victims and their families filed a civil lawsuit against the school board and principal under Title IX of the Education Amendments of 1972 and various state laws.

Due to the public outrage over the extent and duration of the abuse, the school district retained a law firm to conduct an internal investigation. The law firm and the school board signed an engagement letter stating that the law firm was “to investigate the response of the school administration to allegations of sexual abuse

of students" and "provide legal services in connection with the specific representation."

Over three months, the firm's attorney interviewed school district employees and other third parties who had never been employed by the school board. During the confidential interviews with these witnesses, the attorney provided the so-called "Upjohn warnings", emphasizing that the attorney represented the school board and not the witness and that the school board had control over whether the conversations remained privileged. No third parties attended the witness interviews. The attorney took notes of the witnesses' answers and then memorialized the interviews in a written memoranda. A written executive summary marked "privileged and confidential", "attorney-client communication" and "attorney work product" was prepared by the attorney, delivered to the school board, and discussed in private executive session.

During discovery for their lawsuit, plaintiffs sought to compel the law firm to disclose the notes and memoranda from the witness interviews and the executive summary of the investigation prepared for the school board. The law firm asserted the attorney-client privilege and work product doctrine and refused to produce these documents. Nonetheless, the trial court ordered the school board to disclose any documents relating to the law firm's investigation that the school board had in its possession.

When it became clear that the law firm, not the school board, had the documents plaintiffs sought, the plaintiffs filed a motion asking the trial court to hold the law firm in contempt of court for failing to produce the summaries of the witnesses interviews and the executive summary to the school board. The trial court held the school board hired the law firm in the role of an "investigator" and not as an attorney. Therefore, the court ruled the attorney-client privilege and work product doctrine did not apply, and the law firm was ordered to produce the requested documents. The school board and law firm both appealed the court's ruling.

On appeal, the Seventh Circuit noted that the test for determining whether a communication falls within the protection of the attorney-client privilege is: (1) whether "legal advice of any kind [was] sought…from a professional legal adviser in his capacity as such;" and (2) whether the communication was "related to that purpose" and "made in confidence…by the client." The court emphasized how the trial court seemingly ignored the engagement letter between the law firm and the school board, which clearly stated the law firm was retained to both investigate and to provide legal services.

The court then determined that although the attorney conducted a factual investigation, this investigation was an integral part of the legal services for which the law firm was hired, and a necessary prerequisite to providing legal advice on how the school board should respond. The court noted that the attorney-client privilege protects not only the attorney-client relationship in imminent or ongoing litigation, but also in the broader attorney-client relationship outside the litigation context. Therefore, the court held that the attorney's notes and memoranda prepared from the employee statements, and the executive summary to the school board were protected by the attorney-client privilege and were not subject to disclosure.

The court also held that the work-product doctrine applied to protect the attorney's work from discovery. The work-product doctrine is designed to: "(1) protect an attorney's thought processes and mental impressions against disclosures; and (2) limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts." The court stated that the, "work product protection applies to attorney-led investigations when the documents at issue 'can fairly be said to have been prepared or obtained because of the prospect of litigation.'" The court held that the law firm's witness-interview notes and memoranda were prepared with an "eye toward" pending litigation and qualified for work-product protection.

Lessons Learned:

1. Last year, the Ohio Supreme Court in *State ex rel. Toledo Blade v. Toledo-Lucas County Port Authority* held that a report prepared by an attorney retained by a public body to investigate

employee misconduct was protected by the attorney-client privilege from disclosure pursuant to the Public Records Act. *Sandra T.E.* arguably takes the next step forward to also preclude from civil discovery any notes and summaries of witness interviews prepared by a school board attorney retained to investigate misconduct and provide legal advice. While this case is not binding on Ohio courts, it nonetheless supports a persuasive legal argument that notes and summaries of witness interviews prepared by a school board's attorney are protected by the attorney-client privilege and work product doctrine from discovery in a civil lawsuit.

2. School boards faced with a pending investigation into allegations of harassment, discrimination, bullying, abuse, neglect or other misconduct should carefully consider whether to retain legal counsel to conduct the investigation. As the above cases reflect, a properly-retained law firm that is competent to conduct these types of investigations provides not only legal expertise to guide the school board's response, but also confidentiality from public disclosure during the pendency of the investigation and possibly during the course of civil litigation. The attorneys at Dinsmore & Shohl have conducted numerous internal investigations similar to those described in this article. Please call if you have questions or require assistance on such matters.

Court rules the residential address, home telephone number and personal email of ODE licensees are not public record

The Franklin County Court of Common Pleas recently issued a decision on the Ohio Education Association's (OEA) request for a permanent injunction preventing the Ohio Department of Education (ODE) from releasing or publishing certain information concerning individuals licensed by ODE. Therein, the court held that the residential address, home telephone number, and personal email address of ODE's licensees are not "records" and are thus not required to be disclosed under the Public Records Act ("PRA").

In this case, OEA sought to permanently enjoin ODE from producing the above-referenced documents in response to a public records request. OEA claimed that: (1) the harm done by the release of the residential addresses, home telephone numbers, and personal email addresses of ODE's licensees is irreparable, (2) the public interest would be served by granting the injunction because doing so protects the privacy interest of those whose personal information would be disclosed, (3) no evidence was presented of any harm to ODE or anyone else, (4) R.C. 1347.05(G) prohibits the release of any personal information that does not constitute a public record, and (5) the residential address, home telephone number, and personal email address of individuals licensed by ODE are not "public records" and are therefore not required to be released by the PRA.

In granting the injunction, the court rejected ODE's assertion that the records in question are "records" that it is required to disclose under the PRA. ODE contended that since the General Assembly had not enacted an exception to the PRA to exempt licensee's personal information, such records must be produced under the PRA. The court disagreed, noting that the failure to enact an exception for this personal information could have been the result of the General Assembly's belief that residential addresses, home telephone numbers, and personal email addresses were not within the scope of the disclosure requirement. Therefore, there was no need for an exempt them from disclosure under the PRA.

The court reasoned that the Ohio Supreme Court in *State ex rel. Dispatch Printing Co. v. Johnson* (2005) had decided a substantially similar issue when it held that "state-employee home addresses are generally not "records" under R.C. 149.011(G) and are thus subject to disclosure under R.C. 149.43, the Public Records Act." The court found that licensees of ODE and state employees were equivalent for purposes of determining whether their personal information would be considered "records". The residential address, home telephone number, and personal email address of ODE licensees and state employees are used for the

same general purposes, and employees of both entities have similar privacy interests relating to that personal information.

The court concluded by noting that there was no reason to suspect that the burden to ODE of redacting this personal information from a licensee's record is any more burdensome than redacting the same personal information from a state employee's record, which is already required.

Lessons learned from this case:

Unless overturned by a higher court, it appears that a licensed school employee's home address, telephone number and personal email address are not subject to disclosure under the PRA. A school board may legally deny a request for such information, and should redact this information from public records that otherwise are to be produced in response to a public records request.

Upcoming Statutory Deadlines in Ohio

June 30

Last day of the 2009-2010 school year. R.C. 3313.62.