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School Law Review

October 2012

Must the School Campus be Open for Campaigning?

By Alan Mullins

The next school board election will occur on April 9, 2013 and candidates may start circulating nomination petitions beginning September 25, 2012. Election activities have already started and if the next election is anything like those in recent history, that activity will set new standards for intensity. The question often arises as to whether school districts must allow candidates to circulate their nomination papers or distribute their campaign materials on school district property.

Despite the frequency of government elections, there are few court decisions on point to guide school districts. A few principles, however, are clear. First, school district property is to be used for the education of students and is therefore generally a non-public forum for First Amendment speech purposes. If desired, property owned by school districts need not be made available to candidates for election activities. The fact that school district property is not used for just education activities, but is open to everyone for a limited purpose, such as attending a football game or band concert, does not give candidates the right to use that property for their own limited purposes such as campaigning. Where a district wishes to permit such activity, though, it may do so.

Second, for a school district to transform its non-public forum into a public forum entitling candidates to campaign at will on district property, it must intentionally do so through a policy or practice. The district does not expand its forum through inaction. Furthermore, by opening a non-public forum for a limited discourse on a particular subject, such as a town hall meeting to gather feedback from the community, a school district does not create an open forum for other subjects. Even if a non-public forum is transformed to an open public forum, the ability to restrict speech is not lost forever. The school district can take action to make its property a non-public forum again.

Third, school districts are not limited to an all-or-nothing approach to speech regulation. Districts can limit access to their property for free speech purposes by distinguishing amongst the type of the speech. A district might decide to permit all forms of commercial speech (e.g., advertisements) and prohibit all forms of issue speech (e.g., campaigning). It is paramount, however, that districts not differentiate access to property, facilities, etc. based on viewpoint. For instance, supporters of a tax rate referendum cannot be allowed to distribute material at a football game while opponents are denied that opportunity. Representatives of all sides of the issue, or viewpoints, must be permitted equal access if access is permitted to any.

Often school district facilities are used to host candidate forums. Just because the district allows the candidates to attend the forum, however, does not require the school district to open its property for all election activities. For example, the school district can still prohibit the candidates from distributing campaign materials on school district property outside of the forum.

School districts have wide discretion to regulate speech-related activities on their property, provided such regulation is reasonable and not targeted at a particular speech viewpoint. Distinguishing between classes of speech and speech viewpoints, however, is a challenging task, and the penalties for impermissibly regulating free speech, including campaign-related speech, are significant. Do not hesitate to contact an attorney at Scariano, Himes and Petrarca for assistance in this area.

In This Issue

Regulating Employee Use of Social Media: Where is the line?

By Jaqueline M. Litra

The ever-increasing role of social media has resulted in numerous issues regarding regulation of employee use of social media and discipline of employees for conduct and/or content on social networking websites. It is important for school districts and administrators to understand the boundaries related to social networking use by employees.

School districts cannot prohibit employees from using social networking websites. However, school districts can regulate on-campus use of social networking by requiring that employees only use their personal technology and social media for personal purposes during non-work hours and duty-free time. In addition, school districts may limit employee use of school district computers, email and network to school business. School districts can also restrict employee access to school district technology to appropriate times and places. Furthermore, school districts can require employees to use district-provided or supported methods of communication in communicating with students and parents whenever possible.

School district computers, email and electronic networks are school district property, and employees have no right to privacy with regard to their use of those technologies. School districts have the right to monitor use of their computers, email and electronic networks. School districts can also investigate an employee's off campus use of social networking websites provided the social networking content is publicly available, as discussed in the next article.

School districts should avoid prohibiting specific employee conduct via social networking websites. Instead, school district policies should focus on requiring employees to maintain appropriate behavior. School districts can discipline employees for inappropriate speech and/or conduct on social networking websites when the online activity has a nexus to the educational program, the district, students, and/or the employee's ability to perform his/her job functions. School districts should notify employees of the district's expectations with regard to appropriate employee conduct and content on social media websites.

Speech related to private concerns (as opposed to public concern - any matter of political, social, or other concern to the community), is not constitutionally protected, but employees do have the right to free speech on matters of public concern. Employees cannot be disciplined for engaging in First Amendment protected speech or concerted activity via social networking. For example, if a teacher complains about working conditions, she may not be disciplined for merely engaging in such concerted activity.

Accordingly, social networking speech by employees using social media must be analyzed on a case by case basis to determine whether the school district can legally discipline an employee for his/her speech. When discipline issues arise related to conduct by employees on social media websites, school districts should contact their attorney at Scariano, Himes and Petrarca, Chtd. to review all of the relevant legal issues prior to moving forward with any discipline.

Don't Even Ask: Social Networking Passwords are Off Limits

By Jaqueline M. Litra

The Illinois Legislature amended the *Illinois Right to Privacy in the Workplace Act* to prohibit employers from requesting or requiring any employee or prospective employee to provide any password or other related account information in order to gain access to a profile or account on a social networking website (e.g., Facebook, LinkedIn, Twitter, etc.). The Act also prohibits employers from demanding access in any manner to an employee's or prospective employee's social networking account or profile. Accordingly, administrators are prohibited from demanding that an employee or prospective employee navigate the content of his/her social media presence while the administrator observes.

The Act does not include conduct-based exceptions to this prohibition. Even if an employee has engaged in inappropriate conduct related to his/her employment via social networking, a school district is still prohibited from demanding access to the employee's social networking account. However, the amendment to the Act does not restrict a school district's ability to utilize the customary electronic methods of investigating employee misconduct.

Employees often leave an electronic trail related to inappropriate behaviors. School districts may continue to obtain and use publicly available information from social networking sites, information gathered by monitoring employee use of the school district network and email, and information available on school district computers and other equipment. School district acceptable use policies should clearly establish that employees have no expectation of privacy in this regard.

The Act also does not prohibit employers from researching prospective employees by reviewing publicly available social media content. However, school districts should be cautious when investigating prospective employees through social networking because they could discover information that cannot be considered during the hiring process in accordance with anti-discrimination laws, such as sexual orientation or disability.

If you have any questions regarding what information may be used in investigating prospective employees or current employee misconduct, or if your school district does not have an up-to-date acceptable use policy, please contact your attorney at Scariano, Himes and Petrarca, Chtd.

How Should School Districts Honor Their "Heroes"?

By Adam Dauksas

In July, Penn State University removed the now-infamous statue of its former football coach, Joe Paterno, in the wake of revelations detailing his involvement in concealing allegations of child sexual abuse. Paterno's 900-pound bronze bust was erected in 2001, at a time when he was revered by most – if not all – of the Penn State community. In fact, he had just set the record for most Division I college football coaching victories right before the statue was erected.

The incidents at Penn State and the removal of Paterno's statue renew an important question for educational officials of all levels: how should school "heroes" be honored in the first place?

There are always going to be those exceptional teachers, administrators, coaches, and other school leaders that rightfully deserve their community's respect and admiration. Unfortunately, as Paterno's case so dramatically illustrates, the unexpected can happen while the individual is still living or post mortem that changes how that individual is perceived. If a school "hero's" reputation is tainted in some way, more often than not their former employer's actions will also come under scrutiny from the local media and community.

Thus, erecting a permanent monument, honorarium or memoriam in recognition of an individual, as Penn State did, can leave a school exposed to future embarrassment and loss of its own reputation in the event that its "hero" was actually anything but one. Accordingly, there are some basic steps that an educational institution can take to help avoid the type of public relations nightmare that Paterno's statue eventually caused for Penn State.

For starters, if an individual has contributed so significantly to school affairs that lasting recognition is no doubt warranted, begin by naming a less permanent form of award or event after them and be mindful when using taxpayer resources for those purposes. For example, name a trophy or a tournament after a legendary coach, not the entire gym floor. Or, put up a plaque outside of the school's auditorium to honor an outstanding music teacher, rather than carve their name into the lobby's wall.

But, if a board of education does decide that building or naming a permanent structure after an individual is appropriate, consider waiting until after that person's death so as to avoid the possibility – however remote it may be – of having to make an awkward and expensive change at some point. While sobering facts regarding one's life can be uncovered even after death, by delaying the construction of a permanent monument until after the last breath passes, the risk of regret is considerably less.

Scariano, Himes and Petrarca Welcomes New Attorneys

Scariano, Himes and Petrarca is proud to announce the addition of three new attorneys to the Firm.

Julie Lewis joins the Firm as an associate, bringing 15 years of school law experience to the practice. Ms. Lewis' experience includes representing school districts and municipalities in Illinois and Georgia and serving as a senior staff attorney for the National School Boards Association. She also previously served as a legislative specialist for the American Association of School Administrators.

Greg Mitchell joins the Firm of counsel. Mr. Mitchell brings over 20 years of public sector law experience, having represented local municipalities in various aspects of employment law. In 2000, Mr. Mitchell opened the Law Office of Gregory T. Mitchell, P.C. Mr. Mitchell also serves on the Zoning Board of Appeals and Planning Commission for the Village of Flossmoor and is a member of the Board of Directors of the Prairie State College Foundation.

After several years of working with the Firm of counsel, Dan Field joins Scariano, Himes and Petrarca as an associate. For more than 30 years, Mr. Field has worked in the public sector, having served as a Special Assistant State's Attorney for the County of Lake, where among other responsibilities, he defended the County, the Sheriff and various elected and appointed officials/employees in state and federal court. Mr. Field has also served as special counsel for various municipalities, school boards, fire protection and sanitary districts in Lake County.

To learn more about these talented attorneys, please visit www.ed-lawyer.com.

Amendments to the Regulations Governing the Illinois Student Records Act

By Jack Murphy

Effective January 24, 2012, Part 375 of the Illinois Administrative Code regarding student records (the "Amended Rules") was amended to revise the definition of "permanent" and "temporary" student record and to make other significant changes to the rules implementing the *Illinois School Student Records Act* ("ISSRA") as detailed below.

Changes Affecting Permanent and Temporary Student Records

The Amended Rules add definitions for the terms "Health Record," "Health Related Information" and "Special Education Records" as those terms pertain to student records. Health Records are limited to the medical documentation necessary for enrollment and are permanent records. Health Related Information and Special Education Records include all the remaining health related documents accumulated by a school district and are temporary records. These changes make clear that special education records are temporary records, thus permitting a school district to now destroy most health related documents after five years. 23 Ill. Admin. Code § 375.10

Additionally, two categories of video and/or electronic recordings are excluded from the definition of student records:

- Video or electronic recordings created and maintained by law enforcement professionals working in the school or for security or safety reasons or purposes, provided the information was created at least in part for security or safety reasons or purposes, and
- Electronic recordings made on school buses.

23 Ill. Admin. Code § 375.10

Notification to Students and Parents by Email

The Amended Rules now allow a school district to notify students and parents of their rights under the Act by email. 23 Ill. Admin. Code § 375.30.

Clarification as to What Constitutes a "Court Order"

ISSRA allows student records to be disclosed in certain circumstance by "court order." 105 ILCS 10/4(f) and 10/6(a)(5). To minimize confusion as to what constitutes a court order, the Amended Rules provide that a court order "is a document signed by a judge. A subpoena signed by a court clerk, an attorney or an administrative agency official shall not be considered a court order unless signed by a judge." 23 Ill. Admin. Code § 375.40.

Removal of Parent Notification When Parent is Named in Court Order

In the past, when a school district received a court order to release student records, parents were give written notice and an opportunity to inspect and copy the records and to challenge the contents of the records. 105 ILCS 10/6(a)(5). Now, when parents are named in a court order, they are considered to have received the required written notice of their opportunity to inspect, copy and challenge the contents of the records, thus eliminating the notification obligations of the school district. The school district must wait five days before responding to the court order to allow the parents the opportunity to review, inspect and challenge the records. 23 Ill. Admin. Code § 375.70.

Clarification as to Maintenance of Abuse and Neglect Reports

The Amended Rules provide that the only report from the Department of Children and Family Services that should be placed in a student's temporary record is a final report issued pursuant to Section 8.6 of the Abused and Neglected Child Reporting Act. No other DCFS reports should be placed in any student record. 23 Ill. Admin. Code § 375.40.

Clarification as to What Constitutes an "Emergency Release of Information"

In the past, a school district could release student information without parental consent in "an emergency." The Amended Rules provide guidance as to what is an emergency warranting the release of student information. The Amended Rules provide that records may be released in connection with an articulable and significant threat to the health or safety of a student or other individuals. Formerly, parents were to be notified "as soon as possible" when student records were released in an emergency situation. Under the Amended Rules, parents are to be notified "no later than the next school day. 23 Ill. Admin. Code § 375.60.

Transmission of Records for Transfer Students

The Amended Rules clarify that a school district must send a certified copy of a student's record to a transferring school. 23 Ill. Admin. Code § 375.75(c).

Time for Calculating "Dropout" Rate

Before the rules were amended, a student was included in a school's dropout rate if a school did not receive a request for a student's record within 150 days of the student leaving school. Under the Amended Rules, a student will be counted in the dropout rate if the school district has not received a request for a student's record by July 31 following the school year in which the student left school. 23 Ill. Admin. Code § 375.75(e).

Unpaid Tuition Affecting Transfer of Student Records

The Amended Rules provide that if a student has unpaid fines, fees or tuition and is transferring to another public school, the school may elect to transfer the unofficial student record in lieu of the student's official transcript. 23 Ill. Admin. Code § 375.75(i).

Amendments to Regulations - *Continued on page 5*

Amendments to the Regulations Governing the Illinois Student Records Act (continued)

Changes to "Directory Information"

Email addresses and telephone numbers of parents may now be designated as Directory Information. 23 Ill. Admin. Code § 375.80(a)(1).

Other information that may be designated as Directory Information includes "photographs, videos, or digital images used for information or news-related purposes (whether by media outlet or by school) of a student participating in school or school-sponsored activities, organizations, and athletics that have appeared in school publications, such as yearbooks, newspapers, or sporting or fine arts programs." Exceptions state that photographs highlighting individual faces shall not be used for commercial purposes without parental consent and that school security videos shall not be designated as directory information. 23 Ill. Admin. Code § 375.80(a).

Before the rules were amended, a school district was required to notify parents, prior to the release of directory information, specific details about the information to be released. Now, a school district need only provide parents annual notice of the information that is considered directory information and of the procedures to be used by parents to request that specific information not be released. 23 Ill. Admin. Code § 375.80(c).

School District Busing Obligations

By A. Lynn Himes and Law Clerk Emily Taub

The sight of yellow school buses driving through the neighborhood signals the start of another school year. This article outlines key transportation topics affecting school districts, including highlights of a recent Appellate Court decision concerning the limitations of a school district's obligation to bus private school students.

School Districts' Obligation to Bus Students

- Under the *Illinois School Code*, a school district that is a community consolidated, community unit district, consolidated high school district, or combined school district that includes any district previously required to provide free transportation, must provide free transportation for students who live 1.5 miles or more from the school attended, unless adequate public transportation is available.

- All other school districts have no duty to provide free transportation for students, but may choose to provide free transportation for students, regardless of the students' proximity to the school, or can charge students for the cost of this transportation.

- Schools may provide free transportation for students who live within 1.5 miles of school when there are vehicle or train crossings that constitute a serious safety hazard to students. What constitutes a serious safety hazard is determined by the school board in accordance with the Illinois Department of Transportation's guidelines, which can be found at http://www.dot.il.gov/busing.pdf.

- School districts are not required to provide transportation to and from extracurricular activities or summer school, but if districts do provide such transportation, they may charge students for this cost.

Busing Nonpublic School Students

- The *School Code* requires that school districts that provide transportation for their own students at no cost must provide transportation, without cost, for children who: 1) attend nonpublic schools; 2) reside at least 1.5 miles from the school attended; and 3) reside along the public school's regular school bus route. Nonpublic schools include religious schools.

- If a school district provides transportation to students that live within 1.5 miles of school, it must provide transportation on the same basis to nonpublic school students.

- Additionally, there is no duty to transport nonpublic school students outside of the district; they only need to be transported along the regular public bus route.

- In a recent case, the Illinois Appellate Court held that public school districts are not required to provide transportation for nonpublic school students on days when the public school is closed but the nonpublic school is in session. The court reasoned that transportation is to be provided to nonpublic school students only on the same basis as it is provided to public school students and that the transportation of nonpublic school students is not to increase the school district's cost or interfere with its convenience and safety.

Transportation for Students with Disabilities

- Under the *Individuals with Disabilities Education Act*, if transportation services must be provided to students with disabilities in order for them to participate in special education, then the school district is required to provide such transportation for free.

- If a student, because of a disability, attends a class or school in another school district, the school district in which the student resides must pay for the student's transportation to the other school district, and such cost may be reimbursed by the state.

- School districts are required to provide summer school transportation for special education students.

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