Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2024 Issue 1

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"BUT IT'S *MY* CELL PHONE": PITFALLS WHEN CONDUCTING SCHOOL BUSINESS ON A PERSONAL DEVICE

by Nathan R. Floyd

Personal electronic devices like cell phones, tablets, and laptops allow school officials to quickly and efficiently communicate with their subordinates, supervisors, and parents, especially when out of the office. Post-COVID, it is increasingly common for school employees to use their personal cell phones for school business, but this can present many problems; for example, texts, voicemails, and even pictures that pertain to school business may become subject to a subpoena or Open Records request that cannot be refused. Similarly, an employee having personal communications and/or records on a school-owned device, such as computer, may also be subject to disclosure of the ORA. Such requests might even seek the internet search history of a staff members' computer. This is why it is important to advise school employees to be extremely careful of the communications they conduct on both their personal and work devices.

This may come as a surprise, but the *Oklahoma Open Records Act* defines "record" to encompass <u>all</u> documents sent to or received by a public official regarding a transaction of public business, the expenditure of public funds, or the administration of public property. *See* OKLA. STAT. tit. 51, § 24A.3. The definition clearly encompasses day-to-day school business. Furthermore, under the Act, a "public official" is *any* official or employee of a public body. This means when a personal cell phone is used by a school employee or board member to communicate with another school official about student

misconduct, personnel actions, or even administering the dress code policy, if those "records" were eventually sought via an Open Records request or subpoena, they would have to be disclosed. That could be quite embarrassing for their authors, who may have been overly "candid" than they would otherwise express themselves via school email.

It is common during lawsuits that involve students or school employees for a school district to receive a subpoena for all texts a particular student or school employee. And plaintiffs are increasingly subpoenaing school districts for all electronically stored information ("ESI"). A text message is clearly ESI, so if a school employee sends or receives text messages on their personal device which discuss that student, their behavior, or a particular incident, that school employee will be forced to disclose all relevant text messages.

Moreover, the Arizona Court of Appeals held that a public employee's private cell phone records can be considered public records.

A number of recent court cases across the country illustrate this scenario. The Washington Supreme Court ruled that the personal cell phone of a public employee, if used to conduct public business, is now subject to disclosure under the Washington Public Records Act. *See Nissen v. Pierce Cnty.*, 357 P.3d 45 (Wash. 2015). Moreover, the Arizona Court of Appeals held that a public employee's private cell phone records can be considered public records if the employee used the cell phone for a public purpose. *See Lunney v. State*, 418 P.3d 943 (Ariz. Ct. App. 2017). Furthermore, a Bureau of Special Education Appeal case allowed the plaintiff to request all text messages from and to any employee, consultant, agent and/or contractor of the district, referencing the student, at any point spanning a three-year period. All of these cases demonstrate the increasing trend that a school official's reliance on their personal cell phone to discuss work matters will only increase the chances of their text messages being subject to a subpoena or an open records request.

Furthermore, if an employee uses their personal phone, tablet, or other device for work, and a lawsuit is commenced against the school district, that employee will be expected to preserve all relevant ESI on their device, even if personal in nature, because all information on that device could eventually be subpoenaed. While the school district can challenge the extent to which that private information must be provided, nevertheless, all employees using their phones for work will be expected to preserve ESI on their cell phones once notice of a potential or actual legal claim has been received.

For these reasons, it may be advisable to encourage or require your school district's employee and officials to refrain from using their personal devices to communicate with others about school-related events and business because those electronic messages can be subjected to an Open Records Request, subpoenaed, and may even become exhibits at trial.

If you have questions about how document subpoenas and Open Records requests might affect your school officials, your RFR attorneys are here to advise and assist you in developing best practices and appropriate protocols If you would like assistance in refining your school district's social media practices, your RFR attorneys are here to help. Your RFR attorney can provide advice and guidance to help you craft policies and practices that comply with this and other applicable law.

Social Media Comments

By Greg D. Loeffler

Read **the Comments (or Don't Allow Them)**

Some of the best advice anyone can receive when it comes to social media and the internet is this: "don't read the comments." Rarely does anyone with the luxury of relative anonymity in the comment section have anything constructive to add. But the opposite is true when it comes to school districts operating their official social media channels. In fact, choosing to ignore third-party comments to your district's pages could have very serious (and expensive) legal consequences.

Believe it or not, digital communication is still in its infancy. Vast gaps continue to exist in what people consider appropriate while engaging others on social media. For example, it might make perfect sense to most that the comment section of a Facebook post congratulating the teacher of the year is *not* an appropriate place to report Title IX issues—or advertise an insurance business—or stake a claim in the latest culture war topic.

And yet, it happens . . . often.

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So, what can a district do to ensure its social media channels stay on topic, while simultaneously protecting itself against liability and not trampling on the free speech interests of the public? There are two options:

Turn off comments and replies altogether.

School districts are under no legal obligation to allow third-party comments on their social media pages. Turning off the ability for page visitors to comment may be the easiest way to prevent your district from being placed on legal notice of a claim or serious problem, without its knowledge, or inadvertently becoming a platform for polarizing political debate.

Such a pivot, however, should be memorialized in policy. Oklahoma law requires school districts to adopt a social media policy "to discourage abusive or offensive online behavior." OKLA. STAT. tit. 74, § 840-8.1. The decision to restrict comments and replies, often the source of offensive online behavior, necessarily fits into the requirements of this statute.

Adopt clear "rules of engagement."

If your district chooses to allow comments, it is important to adopt rules clearly defining the circumstances under which a comment or reply will be hidden or deleted. The rules should be carefully crafted not to permit the outright "blocking" of an individual, as that could manifest free speech litigation. That is because recent decisions from the U.S. Supreme Court signal a willingness to view the social media platforms of public schools and even individual public officials as public forums protected by the First Amendment.

The good news is that districts can set content-neutral regulations for comments and hide or delete those in violation without running afoul of the Constitution. For example, a district could implement a rule that it may, in its sole discretion, delete any comments that are significantly off topic.

Additionally, a district could implement a rule prohibiting attempts to conduct official school business via the platform. That rule advises would-be pundits that the comment section is not the appropriate means by which to notify the district of serious and time-sensitive issues like bullying, harassment, threats, etc. Among other reasons, this is true simply because comments are not subject to round-the-clock monitoring. The rule should also provide the appropriate contact information for reporting those concerns.

While not a guarantee, these steps may well prevent a district from being placed on legal notice through a buried comment or reply.

However your district chooses to adopt its social media engagement policy, it must be prominent, conspicuous, and posted on every social media platform operated by the district. This can be accomplished either with a link to your website where the policy lives or by including the full text in a static position on the page.

Please note that RFR's 2024 policy book will contain optional sample policies for both solutions. *But in the meantime, if you have any questions or concerns about your school district's social media engagement, your RFR attorneys are here to help and can provide you with legal advice and practical strategies to address your district's unique needs.*

Nathan R. Floyd

Nathan was born in Arizona and grew up in Russia, Northwest Oklahoma, and Phoenix. He received Bachelor of Arts degree from Oklahoma Baptist University where he graduated in 2019. He spent one year as a teacher and coach at a small public school in central Oklahoma. Nathan then attended law school at the University of Tulsa College of Law and graduated in 2023. While in law school, he was President of the Board of Advocates and recipient of the Order of the Barristers. Further, Nathan was a recipient of the CALI Award for Excellence in Civil Rights. Nathan was admitted to the Oklahoma Bar and joined the RFR Team as an Associate Attorney in 2023.

Greg D. Loeffler

Greg Loeffler was born and raised in Tulsa and Creek County, Oklahoma. He holds a Bachelor of Journalism degree with an emphasis in strategic communication from the University of Missouri. Admitted in 2024, Greg represents the fourth generation of his family to be admitted to the Oklahoma bar. He is a graduate of the University of Tulsa College of Law where he served on the editorial board of the Energy Law Journal. While in law school, Greg clerked for RFR and the University of Tulsa Office of the General Counsel, as well as studied at Worcester College in Oxford, England. Greg joined the RFR team as an Associate Attorney in early 2024.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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