Policy & Legal News

HELPING SCHOOL DISTRICTS TRANSLATE LAW INTO ACTION

Navigating the New Title IX Landscape: A Guide for Educators and Administrators

PLUS:

Update: Key First Amendment Test of Personal Social Media

Jurassic Parliament: Cheat Sheet – Language Tips for Meeting Management

Legal Updates

...AND MORE

WSSDA

AUGUST 2024

WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

Policy Classifications

ESSENTIAL

- Policy is required by state or federal law; or
- A specific program requires a policy in order to receive special funding.

ENCOURAGED

- While not required by law, policy is intended to reflect the spirit of existing state or federal law thus inuring districts to potential litigation;
- While not required by law, policy has potential to benefit the health, safety, and/or welfare of students, employees, directors, and/or the local community.

DISCRETIONARY

- Policy addresses an action likely deemed important by the board; or
- Policy would likely be deemed appropriate due to special circumstances of the board; or
- Policy communicates district philosophy that a board may want to promote to employees and/or the community.

Editor's Note

The great Aikido master, Morihei Ueshiba (1883-1969), is quoted as saying, "The world will continue to change dramatically, but fighting and war can destroy us utterly. What we need now are techniques of harmony, not those of contention. The Art of Peace is required, not the Art of War."

As we move towards a new school year, we find ourselves contending not just with the traditional challenges of "readin', 'ritin' and 'rithmatic," but with some fundamentally new ways of considering and interacting with those who will be taught the "3 R's"—our Washington state K-12 students. If my inbox is any indication, good people can have differing views, often felt quite strongly. And that's good. I'll take the fire of passion over the wet rag of apathy any day. Passion drives engagement and informs change.

As I write this, I have been your newest WSSDA director of policy and legal services for about a month (including some holidays!), and my overarching impression is one of amazement at the amount of work and care that all of you, our Washington state school board members, take on. It's not just mandatory things, either. What I have seen is your drive to do the right thing for our kids. Your desire to take on challenges in the name of better education, better understanding and a better future for all of them, and for that, I'm grateful. Your passion energizes me to get up to speed quickly and be of service to assist you in meeting the needs of your districts.

This quarter's *Policy & Legal News* is slim, but packed with information about what's happening legally in Washington education. In particular, see Kelli Schmidt's informative article that helps to clarify the changes to Title IX law **(p.3)**, and the meeting management "cheat sheet" **(p.14)** for new, or even not so new, board members as we all gear up for another school term.

Have a great summer and polish up those apples. It's almost time for school!

Christine B. Geary, J.D.
Editor

Policy & Legal News

HELPING SCHOOL DISTRICTS TRANSLATE LAW INTO ACTION

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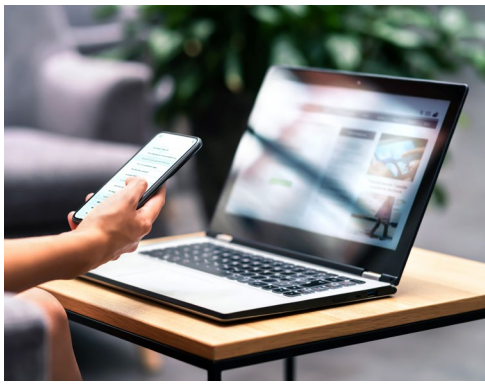

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★ UPDATES TO MODEL POLICY

WSSDA has developed, revised, or retired the following model policies and procedures. Subscribers can find marked-up and clean versions of these documents (as applicable) in their subscriber portal on the WSSDA website by visiting wssda.org/login

ESSENTIAL

2410/2410P – High School Graduation Requirements
3205/3205P1/P2 – Sex-Based Discrimination Prohibited
3211P – Gender-Inclusive Schools
3246/3246P – Restraint, Isolation, and Other Uses of Reasonable Force
3432 – Emergencies
4130/**NEW** 4130P – Title I Parent and Family Engagement
NEW 5011/5011P – Sex Discrimination and Sex-Based Harassment of District Staff Prohibited
6220/6220P – Bid or Request for Proposal Requirements

ENCOURAGED

NEW 3206/3206P – Pregnant and Parenting Students
NEW 5012/5012P – Parental, Family, or Marital Status, and Pregnancy or Related Conditions of Staff

DISCRETIONARY

6690 – Contracting for Transportation Services

WSSDA

AUGUST 2024

WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION

Navigating the New Title IX Landscape: A Guide for Educators and Administrators

By Kelli Schmidt, J.D., AWI-CH (she/her)
Attorney/Investigator – Advance Law Office PLLC

On April 19, 2024, the U.S. Department of Education (the Department) released its Final Rule under Title IX of the Education Amendments of 1972, the federal law that prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance.[1] Barring any federal injunction that affects Washington state,[2] the new Title IX regulation (referred to below as the 2024 Regulation) becomes effective and enforceable on August 1, 2024,[3] and applies only to sex discrimination that allegedly occurred on or after August 1, 2024.

The 2024 Regulation is not retroactive, which means districts must still comply with the 2020 Regulation for any reports of incidents that occurred prior to August 1, 2024. Thus, districts will need to maintain two different Title IX regulatory schemes, side-by-side, in perpetuity, which will require skilled Title IX Compliance officers and additional resources to manage compliance effectively. Additionally, the new regulation requires all employees to complete annual training and expand the training required. Districts will also need to undertake efforts to both provide and track completion of these trainings. Additionally, robust training on new areas of the regulation is required and will need to be offered to the various employees carrying out roles in the complaint resolution process. OSPI is currently working on training for district use and issued Guidance Bulletin No. 046-24 that outlined immediate actions necessary to implement the new requirements.[4]

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[1] The Department's press release and related information can be found here: https://www.ed.gov/news/press-releases/us-department-education-releases-final-title-ix-regulations-providing-vital-protections-against-sex-discrimination The full text of the Final Rule and its extensive preamble are available here: https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf

[2] Washington state is not currently under any injunction, and Washington's attorney general has joined on an amicus brief supporting the 2024 Regulations. However, in 26 states, individuals, school boards, and others filed lawsuits in various federal courts over the 2024 Regulations' changes. The Department is enjoined from enforcing the 2024 Regulations in several other states, and at some specific K-12 schools and colleges in Washington. Additionally, a federal judge presiding over a Texas case filed by Carroll Independent School District will be briefed on July 18, 2024 about whether he should issue a national injunction.

[3] The Department's rulemaking process is still ongoing for a Title IX regulation related to athletics.

[4] BULLETIN NO. 046-24 LEGAL AFFAIRS, Re: Guidance on the New Title IX Rules and Responding to Sex-Based Discrimination, in Washington K–12 Schools , Issued on July 5, 2024.

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Expanded Scope of Sex-Based Discrimination and Grievance Processes

One of the most significant shifts is that the 2024 Regulation requires that districts' grievance procedures address not only sex-based harassment but all forms of sex-based discrimination. Additionally, the 2024 Regulation explains that "Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[5] The 2024 Regulation also harkens back to the Department's pre-2020 standards and states that Title IX requires that recipients address all sex-based harassment in their programs and activities, even when some conduct alleged to be contributing to a hostile environment occurs outside of its program or activities.

MODEL POLICY & PROCEDURE
3205/3205P1/P2
Sex-Based Discrimination Prohibited

MODEL POLICY & PROCEDURE
3206/3206P
Pregnant and Parenting Students NEW

MODEL PROCEDURE
3211P
Gender Inclusive School

MODEL POLICY & PROCEDURE
5011/5011P
Sex Discrimination and Sex-Based Harassment of District Staff Prohibited NEW

MODEL POLICY & PROCEDURE
5012/5012P
Parent Family Marital Status and Pregnancy NEW

New Definitions of Sexual Harassment

The 2024 Regulation directly incorporates relevant statutory language and updates the statutory references to the definition of "sex-based harassment."[6] In addition to "quid pro quo harassment," the regulation explicitly covers "hostile environment harassment," which is now defined as "unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive, and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." Although the 2024 Regulation did not make any substantive changes to the content of the definitions of sexual assault, dating violence, domestic violence, and stalking from the 2020 Regulation, it incorporated them directly into the regulations rather than using cross-references to other acts.

Limitations on Complainants and More Latitude in the Grievance Process

The 2024 Regulation also narrows down who can file a complaint and identifies stricter parameters for when the Title IX coordinator can initiate a complaint.[7]

However, the 2024 Regulation builds on the previous regulations that were in place from August 14, 2020, to July 31, 2024 (the 2020 Regulation) but provide some increased flexibility for how districts respond to complaints. For example, the 2024 Regulation permits but does not require the use of the "single investigator model," where the investigator can also be the decision-maker. This may be welcome news for small districts that struggled to train and fill all three of these roles, but it is not without drawbacks due to the expanded scope of Title IX. So, districts will need to determine whether they want to use that model or retain the current one. The 2024 Regulation did away with "informal" and "formal" complaints, which provides greater latitude for informal resolution. Instead, it refers to "reports," which have notice requirements, and "complaints," which require grievance responses. Under the final regulations, schools are still required to offer

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[5] 34 C.F.R. § 106.10
[6] 34 C.F.R. § 106.2.
[7] 34 C.F.R. 106.44(f)(1)(v)

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supportive measures as appropriate, but there is a new requirement that an impartial review be made available if a party requests modifications or changes. Retaliation is also still prohibited, but the 2024 Regulation clarifies that retaliation can occur peer-to-peer. The 2024 Regulation also did away with the requirement for 10-day review periods for evidence and investigation reports, although they did retain a requirement that parties be provided a summary of relevant and permissible evidence and, upon request, an opportunity to review the evidence.

Protections for Pregnancy and Related Conditions

The 2024 Regulation also has new requirements that students be provided reasonable modifications for pregnancy and related conditions, lactation spaces, and students who disclose pregnancy to any employee must be referred to the Title IX coordinator for information about pregnancy-related rights. The 2024 Regulation also has pregnancy provisions for employees, as do two other Federal laws: the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (PUMP) Act.

The Work Ahead

As a result of these changes at the federal level, school boards and superintendents will need to make changes to their sex-based discrimination policies and grievance procedures and develop new policies and procedures for addressing pregnancy and related conditions.

For the past three months, WSSDA has been working on model policies and procedures that address the new 2024 Requirements, align them with other federal and state legal requirements, ensure student and staff support, and promote trauma-informed practices. WSSDA will rename and revise several model policies and superintendent procedures. The "Sexual Harassment Prohibited" students and staff policies (Policies 3205 and 5011) are being re-written as "Sex-Based Discrimination Prohibited" policies. To separate the grievance process from other expanded requirements relating to operations and implementation, WSSDA created two new model procedures for implementing those policies: 3205P.1, a grievance procedure for sex-based discrimination complaints, and 3205P.2, an operational procedure. The operational procedure addresses the Title IX coordinator's duties, staff roles and responsibilities, notice, training, monitoring barriers, policy review, and recordkeeping.

WSSDA is also developing new model policies and procedures to address the 2024 Regulation's requirements related to pregnancy, pregnancy-related conditions, and marital status requirements for students and staff (Policy 3206/3206P and 5012/5012P). Note that the grievances process is addressed in 3205P.1.

Additionally, WSSDA revised the Gender-Inclusive Schools 3211P to clarify that complaints of sex-based discrimination or harassment based on gender identity or expression should be brought under 3205P.1.

In the meantime, boards and staff need to prepare for some significant shifts in how sex-based discrimination reports and complaints are handled. Due to expanded definitions and the clarification of the process required for all sex-based discrimination complaints, your Title IX coordinators may be fielding more reports and complaints, and they have increased duties for recordkeeping and monitoring. They and other staff will also need more training, knowledge, and expertise than ever in providing support to students, staff, and the district. You will also have to develop some new roles on your Title IX team, including requests for modifications or reversals of supportive measures.

OTHER UPDATES

2410/2410P

High School Graduation Requirements
Classification: **ESSENTIAL**

WSSDA revised this model policy and procedure based on RCW 28A.600.310 enacted by ESSB 5670. Further revisions were made to reflect HB 1146 - 2023-24 - Notifying high school students and their families about available dual credit programs and any available financial assistance. This legislation requires public high schools to notify students and their parents about available dual credit programs and any financial assistance available to reduce the cost of these programs.

The legal references have been updated based on HB 1146 and HB 2110 - Reorganizing statutory requirements governing high school graduation. WSSDA also removed language that is now outdated.

3246/3246P

Restraint, Isolation, and Other Uses of Reasonable Force
Classification: **ESSENTIAL**

WSSDA has revised this policy and procedure to reflect the repeal of RCW 70.96B.010 and WAC 392-400-235.

3432

Emergencies
Classification: **ESSENTIAL**

WSSDA has revised this model policy based on RCW 28A.320.125(2)(i). Additionally, the requirement for multiple objective criteria and multiple pathways remains both in statute and in regulation.

4130/NEW 4130P

Title I, Parental Involvement
Category: **ESSENTIAL**

WSSDA has revised this policy and provided a new procedure to reflect recently updated Title I, Part A law to better support disadvantaged students. These changes aim to enhance educational equity by providing additional resources and support to schools with high percentages of low-income students

6220/6220P

Bid or Request for Proposal Requirements
Classification: **ESSENTIAL**

WSSDA has revised this policy and procedure for two reasons. The first is to incorporate changes to bid laws pertaining to small works rosters based on the changes in SSB 5268 Public Works Procurement—Various Provisions. The policy updates the statutory references for small works rosters, while the procedure updates the procedures for using small works rosters to bring them into alignment with the new laws.

The second update to the policy pertains to the Interlocal Cooperation Act, allowing districts to utilize other governmental entities' bids. The language in the policy has been revised to reflect the language in the statutes authorizing interlocal agreements for procurement, as well as best practices as identified by the State Auditor's Office.

6690

Contracting for Transportation Services
Classification: **DISCRETIONARY**

WSSDA has revised this model policy to reflect ESHB 1248 – Pupil Transportation Service Contracts – Employee Benefits.

UPDATE

Key First Amendment Test of Personal Social Media

The U.S. Supreme Court (subsequently referred to as the Court) recently decided *Lindke v. Freed*. The case changes Washington law regarding government social media liability and has important implications for local government officials and their agency employers.

Lindke addressed whether a public official violates the First Amendment by deleting or blocking public responses to job-related comments the official posts to their personal social media account. *Lindke* holds that public officials are only liable for social media First Amendment violations when the official:

1. has actual government speaking authority on the involved social media topic; and
2. uses that actual speaking authority in the involved social media exchange.

Lindke overturns the Ninth Circuit Court of Appeals *Garnier v. O'Connor-Ratcliff* decision (vacated and remanded by the Court due to Lindke), which was previously Washington's leading case on this topic.

Unlike the *Lindke* ruling, *Garnier* had held that public officials are liable for violating commentor's First Amendment rights if the official's social media activity created even an appearance of government speaking authority. *Lindke*'s ruling now requiring actual speaking authority before an official can be found liable provides clear guardrails for both public officials and local governments.

A Background of the Problem

Local governments and officials, including school directors, frequently use social media to disseminate information and to respond to public concerns or requests. Given social media's popularity and effectiveness, this is unlikely to change and will likely only continue and increase.

However, a school director's social media use also creates legal issues because the school district itself likely has social media, which might have created a public forum impacting public First Amendment rights. Public officials who delete or block public comments on government-hosted social media platforms limit the public's access to this forum and, accordingly, may be liable for a First Amendment violation through "state action" under federal law (42 U.S.C. §1983). Since many agencies cover their officials' job-related liabilities, an official's liability can become the agency's liability.

School districts that own and control their social media platforms can navigate these legal issues more easily. Things get tougher when public officials discuss job-

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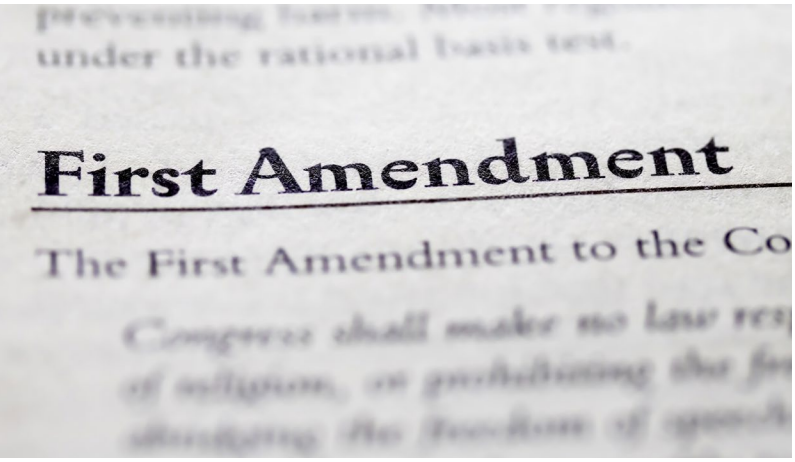
related matters on their personal social media sources, as it gets harder to tell when the official is speaking and acting officially (and subject to First Amendment liability) and when the official is free from such liability by speaking and acting personally. The obvious question becomes: When is an official's personal social media use "job-related," creating this potential First Amendment liability?

Lindke answers this question and changes previous Washington law in the process.



The Lindke Case

The *Lindke* case involved Port Huron (MI) City Manager James Freed using his personal (but publicly open) Facebook account to post both personal and job-related comments about the COVID-19 pandemic. Freed's personal posts related to changes in family activities during the pandemic, while his job-related posts described his city's hiring freeze and included a city press release. Port Huron resident Kevin Lindke responded to Freed's account posts, complaining about the city's overall pandemic response and criticizing specific actions of city leaders during the pandemic. Freed deleted Lindke's comments and later blocked Lindke from commenting altogether.

Lindke sued Freed in federal court, claiming that Freed's social media blocking violated Lindke's First Amendment rights through state action under 42 U.S.C. §1983. The Court held that a public official's social media activity is state action under 42 U.S.C. §1983 only if the official meets both of these two requirements:

1. **The official had the government's actual speaking authority on the specific social media topic involved.** Whether an official has this actual government speaking authority is fact-specific and can't be determined by an official's government employee status alone. Instead, an official's government speaking authority depends on the specific responsibilities that an agency has entrusted the official to perform.
2. **The official used their actual government speaking authority in the involved social media activity.** An official with actual government speaking authority uses it when they use social media to speak in their official capacity or to further their official or legal responsibilities.

Officials and agencies cannot be found liable for First Amendment violations for social media use falling outside of this actual and used authority. The Court also noted that social media accounts labeled "personal" are entitled to "heavy presumptions" that posts to the account are personal and not attributable to the government. Likewise, an official's social media communications that merely repeat or share already publicly available information are more likely personal than official.

How Lindke Changes Washington Law

Before *Lindke*, the Ninth Circuit Court of Appeals *Garnier* case regulated Washington in the question of public official First Amendment liability for social media use.

Garnier involved two school district trustees using Facebook and Twitter (i.e., X) accounts to communicate with constituents about district issues. The trustees blocked unfavorable comments posted to the accounts by two district parents. The parents sued, arguing that the trustees' comment blocks were state actions infringing their First Amendment rights and triggering 42 U.S.C. §1983 liability.

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In contrast to *Lindke*, the *Garnier* court decided the case by focusing on what the trustees' social media accounts portrayed to the public and how the public reacted to the portrayal. Public officials are only liable for social media First Amendment violations if their social media use is sufficiently and legally connected to their job. *Garnier* found this legal connection if the officials' social media activity made the public think that the government authorized it. *Lindke* finds this connection only when the government has, in fact, authorized the official's social media activity.

Takeaways

Lindke's focus on a public official's actual authority in determining social media liability under 42 U.S.C §1983 presents a few takeaways. Local governments should:

- create and designate social media accounts for public officials;
- establish clear parameters on an official's speaking authority; and
- adopt rules to "mark" statements by officials.

Create and clearly designate social media accounts for use by officials

As stated above, the legal pitfalls related to social media use become most prominent when officials use personal accounts for official purposes. *Lindke*'s heavy presumption that social media statements posted to a personal account indicates that clear designations of account ownership can help navigate questions of government liability for social media activity.

Lindke also noted that the potential for an official's liability increases when the official fails to confine personal posts in a clearly designated personal social media account. Ensuring that officials have a clear path for "authorized" speaking lessens the temptation of mixing personal and official speech.

Establish clear parameters for an official's speaking authority

As *Lindke* noted, an official is only liable for censoring social media posts that are connected to the official's authority. An official's authority can be established through formal enactments like ordinances, governing body and department head policies, or from prior practices that create a "permanent and well-settled" recognition of the official's authority to speak on particular agency matters.

Adopt rules to "mark" statements of officials

In further refining the requirement that officials act pursuant to their speaking authority to be liable, *Lindke* noted that statements "marking" the parameters of an official's social media activity (such as: "This is the personal page of…" or "The views expressed are my own") give the benefit of clear context to meet the heavy presumption in favor of personal statements and against liability. Rules for officials to help them navigate communications can greatly assist in this area.

A note about public records — *Lindke* does not change the Washington Supreme Court's interpretation of the Public Records Act and the application of the "scope of employment" test to determine whether activity on a personal social media account rises to the level of being a public record. For more on this topic, see the MRSC blog: New Ruling Finds Facebook Posts Can Be a Public Record.

Many school directors, both in Washington and across the nation, use social media to engage with their constituents. Using social media this way certainly has its benefits. It is timely, readily available, and sometimes your community has come to expect these types of communications. However, social media seems to thrive on contentious, highly charged stimuli, which greatly complicates its use. Responding to social media commentators always requires care, and sometimes takes precision. Perhaps even more

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important than how to respond is understanding how and when personal social media accounts can blur into official accounts, which carry limitations that personal accounts do not. Now, the U.S. Supreme Court has taken up this timely and consequential legal issue.

On October 31, 2023, the U.S. Supreme Court held oral argument for *O'Connor-Ratcliff v. Garnier* to consider [1] whether two school board members in California engaged in "state action" when they blocked individuals from their personal Facebook and Twitter accounts. The board members had used those accounts to communicate with the public about their role as board members and district-related matters.

School Board Members' Use of Social Media

The case involves two school board members from the Poway Unified School District School Board in California. [2] During their campaigns for election, both Michelle O'Connor-Ratcliff and T.J. Zane [3] created public Facebook accounts that they used for campaigning. After being elected, both school board members converted their Facebook accounts into platforms for information about their school board service and school district matters and business. O'Connor-Ratcliff also converted her Twitter account to focus on school board/school district matters.

On their respective platforms, both individuals identified themselves as school board members and posted about items such as upcoming board meetings, status reports about an interim superintendent search, and video clips of student musical performances. Those are all examples of using social media to convey information about the school board and school district.

On her Facebook page, O'Connor-Ratcliff described herself as a "government official." Posts included photos of visits to a district elementary school with verbiage such as, "Hanging with Principal Halsey & the Canyon View Coyotes on this hot, hot morning. Excited about your students' new flexible seating rollout." On his Facebook page, Zane referred to the page as his "official" site "to promote public and political information." His Facebook page stated, "My interests include being accessible and accountable; retaining quality teachers; increasing transparency in decision making; preserving local standards for education; and ensuring our children's campus safety." In addition to routine school district matters, Zane also posted about school lockdowns after the district received threats, an active shooter incident near one Poway district school, and an ongoing brush fire that forced the evacuation of another school.

Notably, there are no facts suggesting that the school district was involved in the creation or operation of either O'Connor-Ratcliff or Zane's social media accounts. Rather, the district had no control over the pages. Additionally, neither O'Connor-Ratcliff nor Zane's social media pages included certain language and disclosures that were found on district-sponsored social media pages, as required by district policy.

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[1] The official issue before the U.S. Supreme Court is whether a public official engages in state action subject to the First Amendment by blocking an individual from the official's personal social media account, when the official uses the account to feature their job and communicate about job-related matters with the public, but does not do so pursuant to any governmental authority or duty.
[2] The Poway School District is a large 35,000-student district, located north of San Diego California.
[3] Zane's term expired in 2022. O'Connor-Ratcliff was re-elected to another four-year term in 2022.

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Comments on the Board Members' Social Media Pages

Christopher and Kimberly Garnier are the parents of three students who were attending Poway schools. Both the Garniers had attended the Poway School District and took an active interest in its affairs, including attending school board meetings. In court testimony, Christopher Garnier said he and his wife were frustrated by time limits on public comments at school board meetings and by the lack of response to their emails.

In their social media posts, both O'Connor-Ratcliff and Zane solicited feedback from constituents and responded to individuals who left comments or reactions. The Garniers began posting comments to the board members' social media entries. According to the Garniers, they expressed concerns about alleged incidents of racist bullying in the school district and mismanagement of financial matters.

The facts do not suggest that the Garniers' comments used inappropriate language. However, the Garniers posted repetitious comments to the school board members' posts and tweets. For example, Christopher Garnier made the same comment on 42 different posts by O'Connor-Ratcliff and the same reply on 226 of her tweets. The board members described the comments as disruptive to other constituents. O'Connor-Ratcliff blocked both Garniers from her Facebook page and Christopher Garnier from her Twitter page. Zane blocked both Garniers from his Facebook page. There are no facts to suggest that the school board prevented the Garniers from speaking during public comment period at school board meetings.

Lawsuit Commences

The Garniers sued O'Connor-Ratcliff and Zane in federal district court, arguing that by blocking their comments on social media, the school board members violated their First Amendment rights to free speech and to petition the government. On summary judgement, the district court ruled for the Gardiners. The court concluded that the board members engaged in state action when they blocked the Garniers, the social media pages were "tools of governance," and that the interactive commenting features constituted a public forum.

On appeal in 2022, the Ninth Circuit Court of Appeals unanimously affirmed the district court. The Ninth Circuit held that under the facts of the case, the board members acted "under color of law" when they blocked the Garniers. The Ninth Circuit stated, "both through appearance and content, the [board members] held their social media pages out to be official channels of communication with the public about the work of the" Poway School District.

Earlier this year, the U.S. Supreme Court granted O'Connor-Ratcliff and Zane's petition for a writ of certiorari, meaning that the U.S. Supreme Court would consider this case. As noted above, oral argument just occurred.

Related Cases

Legal issues surrounding public officials' use of social media have arisen from city halls and local school boards to the White House. As you might recall, when Donald Trump was president, he was sued over blocking several people from his personal Twitter account in 2017. The U.S. Court of Appeals for the Second Circuit held that Trump's use of his personal Twitter account while in office was "governmental"

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rather than "personal" and that his effort to block individuals was government action. However, while the U.S. Supreme Court was considering whether to grant review, Trump lost his re-election, and the high Court dismissed the case as moot while vacating the Second Circuit decision.

Another comparable case is *Lindke v. Freed*, for which the U.S. Supreme just heard oral argument. This case involves the city manager of Port Huron, Michigan, who used his longtime personal Facebook account to discuss city business, including the city's response to the COVID-19 pandemic. In Lindke v. Freed, the city manager blocked a frequent critic who had posted critical comments about the city's pandemic policies, and the lower courts held that the city manager's Facebook page was not state action. However, the lower court used a different test for determining state action, which is discussed more below.

Other cases involving a school board's blocking of social media include Scarborough v. Frederick County School Board, in which the federal district court held that the Frederick County school district engaged in viewpoint discrimination when it deleted comments and blocked a critic of its COVID-19 protocols and facemask policy. You'll note, however, that in the *Scarborough v Frederick County School Board* case, the social media accounts were in fact official school district accounts, not the personal accounts of school board members.

Amicus Briefs

As you might imagine, what and on what basis the U.S. Supreme Court holds in O'Connor-Ratcliff v. Garnier has collected significant interest on both sides. The basis for the U.S. Supreme Court's holding will likely set forth the legal test going forward to determine whether a public official's social media activity constitutes state action. Unsurprisingly, the different sides disagree on what that test should be.

Writing in support of the Garniers, the American Civil Liberties Union (ACLU) filed an amicus brief, identifying the core issue as how to distinguish between a government official's private-capacity use of social media, which is entitled to First Amendment protections, and their public-capacity use of these tools, which is subject to First Amendment prohibitions. The ACLU argued that the Ninth Circuit used the appropriate test for distinguishing between a public official's private and state actions. The test that was used is (1) whether the official was engaged in official duties and (2) whether a reasonable observer would think the official was cloaked in the authority of his office with respect to the action at issue.

In contrast, an amicus brief filed by several groups representing local government[4] argues that the state-action test used at the lower court was impracticable and potentially harmful. The local government amicus argued that the better test to use is based on a public official's governmental authority to engage in social media activity (the "authority test"). The authority test recognizes three ways in which the government could authorize the operation of a social media account: (1) the government itself owns the social media account;

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[4] The Local Government Legal Center (LGLC), National Association of Counties (NACO), National League of Cities (NLC), and International Municipal Lawyers Association (IMLA)

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(2) the government expressly authorizes a public official to create the social media account by law, regulation, or policy; or (3) the government allows a public official to utilize government resources to operate the social media account.

The California School Boards Association (CSBA) also filed an amicus brief, which similarly argued that the test used by the Ninth Circuit was unclear, unworkable, and created an undue burden on school boards and their lay board members. However, the CSBA amicus brief argued that the better test to use is the "state official" test, which was used in Lindke v. Freed. This test states that the only time a public official's social media activity is "fairly attributable" to the state is when that public official operates a social media account either (1) pursuant to their actual or apparent duties or (2) using their state authority. This second factor means that the actor could not have behaved as they did without the authority of their office. The CSBA amicus brief argued that this state-official test is superior because it focuses on the bright lines of an actor's official duties and use of government resources, rather than the appearance or purpose of social media pages.

Importantly, the CSBA amicus brief also pointed out that the lower court's decision disregarded the laws limiting an individual board member's authority. The brief noted that no law gives a school board member authority to take official action in his/her individual capacity. Rather, school board governance is deliberately collective. Thus, the Ninth Circuit's test creates considerable confusion.

Now We Wait

The U.S. Supreme Court's decision will come sometime next summer. Meanwhile, there are several points to ponder while we wait. How should board members moderate disruptive posts on their personal social media pages? Are incumbent school board members more limited than their challengers in their use of personal social media? If so, isn't that an infringement on the board members' individual liberties? If this case stands, won't that prompt increased litigation? This last question is easy to answer – yes.

Jurassic Parliament
Mastering meetings using Robert's Rules

CHEAT SHEET

LANGUAGE TIPS FOR MEETING MANAGEMENT

SITUATION	CHAIR CAN SAY
Call to order	*This meeting of the [name of organization] is called to order.*
Unanimous consent	*Without objection... If there is no objection...*
To begin discussion	*It has been moved and seconded that... Is there any discussion?*
If there is no second	*Since there is no second, the motion will not be considered.*
To end discussion	*Is there any further discussion?* or *Are you ready to vote?*
Process Point of Order	1. Member says, *"Point of Order."* 2. Chair says, "*State your point.*" 3. Member explains issue. 4. Chair says, "*The point is well taken,*" or "*The point is not well taken.*"
When someone says "Point of Order" but can't explain what they mean	*What rule has been broken?*
Process Point of Information	1. Member says, "*Point of Information.*" 2. Chair replies, "*State your question.*" 3. Member states question. 4. Chair can respond three ways: ▸ Respond yourself. ▸ Ask someone else to respond. ▸ Say, "*We'll get back to you later.*"
When "Point of Information" is misused to give information	*What information does the member need in order to decide how to vote?*
If someone is dominating the meeting	*No one may speak a second time until everyone who wishes to do so has spoken once. Does anyone else wish to speak on this topic?*
When comments are not germane (relevant)	*Members will kindly keep their remarks strictly to the topic under discussion.*
If people are whispering	*Members will kindly refrain from sidebar conversations.*
Adjourning the meeting	*There being no further business, this meeting is adjourned.*

- Strive to be firm, fair and friendly.
- Use the "third person" to keep things neutral and lessen conflict.
- Give up on the word *but*. Always say *and*.
- Say *kindly*, not *please*, which sounds like pleading.
- Say *very well* and move on.
- Beware of "negativity bias." No frowning, no sarcasm, no eye-rolling.
- Keep an emotional connection with the members by emphasizing what we have in common.

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Policy & Legal News

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VISION
All Washington School Directors effectively govern to ensure each and every student has what they need to be successful within our state's public education system.

MISSION
WSSDA builds leaders by empowering its members with tools, knowledge and skills to govern with excellence and advocate for public education.

BELIEFS
WSSDA believes:

- Public education is the foundation to the creation of our citizenry, and locally elected school boards are the foundation to the success of public education.
- High-functioning, locally elected school boards are essential to create the foundation for successfully impacting the learning, development and achievement of each and every student.
- Ethical, effective and knowledgeable school directors are essential for quality public schools.
- Focusing on and addressing educational equity is paramount to assure the achievement of each and every student.
- Public school directors are best served trough an innovative, responsive, and flexible organization that provides exceptional leadership, professional learning, and services in governance, policy, and advocacy.

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