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Will You Be My "Friend"? Legal Challenges in the Changing Social Media Landscape

By Heather Broadwater, Caryn Pass and Grace Lee

As the number and popularity of social media tools continue to increase, the task of harnessing the power of social media tools while minimizing potential risks remains a significant challenge for independent schools. Teachers, staff, students, alumni, parents, prospective students and their families, donors, professional peers, and other constituents expect schools to create pathways for connection via social media. Independent schools are working to incorporate social media tools in a way that is consistent with their missions, philosophies, and cultures, and that maintains the standards of safety, privacy, professionalism, and decorum expected by various constituencies. As part of this effort, schools are developing, implementing, revising and reissuing social media and acceptable use policies to guide community members on the use of these tools. Much like social media itself, the social media legal landscape continues to evolve, with state legislatures and a federal agency entering the fray.

Social Media as an Employer-Employee Issue

It may be news to many independent schools that they are within the jurisdiction of the National Labor Relations Board (NLRB), and that the NLRB has issued policy guidance applicable to school social media and acceptable use policies. Despite widespread belief that the NLRB and the law that it enforces, the National Labor Relations Act (NLRA) are relevant only to employers with unions, the NLRA applies to most employees in private-sector workplaces. It does not cover public school employees. The NLRB's authority over religious organizations, including religious schools, has been a matter of dispute. The NLRB currently says that it "will not assert jurisdiction over employees of a religious organization who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools." Whether it can assert jurisdiction over religious organization employees who are not "involved in effectuating the religious purposes of the organization" and how that involvement is defined are at issue in current court cases.

The NLRB is interested in social media policies and employee disciplinary matters related to social media because employees may use social media as a platform for engaging in collective action regarding the terms and conditions of their employment. This type of "concerted activity" is protected by the NLRA, even in non-unionized workplaces. In 2011, the NLRB pursued a high-profile charge against a non-profit that dismissed several employees after they criticized another employee via Facebook in a manner that the employer considered harassment. An administrative law judge agreed with the NLRB that the employees' communications with each other via Facebook, in reaction to a co-worker's criticisms of the manner in which employees performed their jobs, were protected activity, and that the employer violated their rights under the NLRA in firing them.

As it has reviewed and pursued social media cases against employers the NLRB has issued two reports describing these social media cases. The most recent report highlights two main

points: (1) "employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees;" and (2) "an employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees." The NLRB notes that it is interpreting the NLRA as it applies to communication tools that did not exist when the NLRA was written, and that this remains a developing area of the law.

Social Media as a Matter of State Law

Like the NLRB, state governments are formulating policy with potential implications for the use of social media tools by independent schools and their employees.

The State of Missouri directly addressed the question of whether teachers should be interacting with students via social media. Missouri's legislature attracted widespread media attention – and criticism – when it passed a law that appeared to prohibit public school employees from entering "friendships" via Facebook or connections via other social media with their students. After the Missouri State Teachers Association challenged the law, the State replaced the controversial measure with a requirement that all public school districts enact social networking policies by March 2012. While these provisions currently apply only to public schools, they reflect a growing concern about online interactions between students and school employees, and an expectation that school administrators take a more proactive role in considering the possible uses and misuses of social media tools within the school community.

Other states have enacted provisions that may have indirect implications for independent school social media policies. In the wake of tragedies resulting from online and in-person bullying, the vast majority of U.S. states have enacted anti-bullying legislation and/or regulations. In some states, the provisions are mandatory only for public schools. However, they reflect a growing belief that schools have an obligation to protect students from bullying, whether in the physical or digital realm. Even where independent schools are not covered by anti-bullying laws, parents may claim that a failure to protect students from online bullying is a breach of the enrollment agreement or negligence by the school. Anti-bullying measures are relevant to social media policies because of the duties they create for school employees to intervene when they know – or should know – about bullying conduct. School employees who have online friendships with students or who interact with students in online spaces may have access to posts that constitute or reveal bullying. Anti-bullying provisions make it clear that social media policies need to consider not only what social media may reveal about school employees, but also the obligations that may arise based on the information available to school employees via social media.

The Takeaway

Social media is here to stay. It is an attractive tool for employees and other members of the independent school community, and will only grow in its attractiveness and importance to these constituencies. Social media also creates potential legal exposure, which schools must carefully weigh against the pressure to use social media and the possible related benefits. Independent schools that do not have social media policies should be considering the risks and rewards of social media, and how to appropriately balance those factors in light of applicable laws. Independent schools with social media policies should review their policies in the context of evolving law, community expectations, school culture, and school risk tolerance to ensure that these policies continue to appropriately balance the risks and rewards of social media tools with school culture.

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