

## Public Education in the Digital Age

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## Where are we going today?

- **Technology and Public Relations (Student Privacy Issues)**
- **Technology in the Classroom (Employee Use of Technology)**
- **Technology Off the Clock (Discipline Issues)**
- **Technology and Public Records (Board Member Considerations)**



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**Technology is everywhere...**



**...and the landscape is ever-changing.**

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**How does your district use technology?**



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**How does your district use technology?**

- **Computers/tablets in classrooms**
  - Student info systems
  - Foreign language programs
  - Special ed. programs
  - Remedial or gifted learning programs
  - Productivity apps
  - Teacher dashboards
  - Testing software
  - Research
- **Accounting systems**
- **Transportation & logistics**
- **Security & surveillance**
- **Document storage**
- **Web/social media/e-mail**
  - Public Notices
  - Parent Outreach
  - Student Collaboration
  - Employee Communications
  - Team & Club Communications

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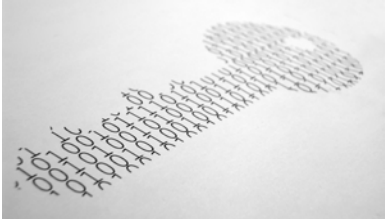
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## Student Privacy



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## Student Records: Governing Statutes

- Student records are confidential under federal and Ohio Law.
- Three key laws apply in Ohio schools:
  - Family Educational Rights and Privacy Act (FERPA)(20 USC § 1232g; 34 CFR § 99)
  - ORC § 3319.321
  - Children’s Online Privacy Protection Act (COPPA)(15 USC §§ 6501 et. seq.)

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## COPPA Requirements

- COPPA applies to students under age 13.
- COPPA requires website operators to:
  - obtain parental consent before collecting student information, and
  - Inform parents of information collected and how it is used.
- Districts can consent on behalf of parents, **if** the information is solely for the use of the school and no other commercial purpose.

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## FERPA Requirements

- FERPA regulates **student education records**. Those are records:
  - maintained by the school district, **and**
  - pertaining to individual students.
- FERPA and Ohio law prohibit the release of **personally identifiable information (PII)** unless:
  - an exception applies, or
  - the district has consent from the parent (or student, if 18+) to release the information.

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## Personally Identifiable Information

- Direct identifiers: Name, SSN, photo
  - Indirect identifiers: parent's names, family's address, personal characteristics
- Bottom line:** Does the information allow someone in the school community who does not have personal knowledge of relevant circumstances to identify a specific student?

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## “Directory Information”

What is included in “directory information” is defined by district policy. It can include:

- |                                   |   |
|-----------------------------------|---|
| • Name, address & telephone       | • Participation in extracurricular activities |
| • E-mail                          | • Weight/height of athletes                   |
| • Date & place of birth           | • Honors and awards                           |
| • Grade level & enrollment status | • Degree awarded                              |
| • Dates of attendance             |   |

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**A caution about photographs...**



Ohio law appears to require written consent to release photographs and images of students.

**Be careful** when releasing photos of students (including on social media!).

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**Annual Notices**

- Districts must provide annual notice to parents and students 18+ of their rights under FERPA.
- Districts must allow parents the opportunity to opt-out of the publication of directory information.
- Districts must inform parents how directory information will be used. If social media is not specified in notice, you cannot post student pictures to social media without consent.

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**A Sticky Situation...**

Word has gotten out that two students got suspended after a fight on a bus and the local media outlet has asked for the surveillance video from your bus. Do you provide it?



The surveillance video may be a student educational record under FERPA!

Work with counsel to respond.

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## Video Surveillance & FERPA

Forum Guide to the Privacy of Student Records, 2006  
U.S. Department of Education, National Center for Education Statistics.

Kept and Maintained by...	Used for discipline?	Education Record?
School District	No	Yes
	Yes	Yes
Schools' Law Enforcement Unit	No	No (law enforcement/ security record)
	Yes	Yes

Even with this guidance, courts are split on school bus videos.

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## It gets complicated quickly...



The football coaches record all their practices.

Someone has made a public records request for the tapes of practice.

Does the district produce it?

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## What about social media?



- Does your district have a social media policy?
- Does someone manage your social media sites?
- Can anyone post and comment?

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## Regulating Social Media Pages

- Consider a disclaimer
  - Purpose of website
  - Moderated online discussion site; not a public forum
  - What posts will be deleted?
    - Examples: vulgar language, content that perpetuates discrimination, content that advocates illegal activity, etc.
  - Comments don't represent opinions of school district or its employees
  - Unsolicited hyperlinks/ads

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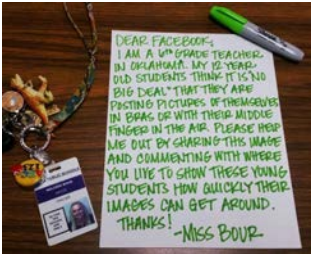
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## Controlling social media is difficult!



In 8 hours, this post from Facebook was shared 108,000 times and reached 33 states and 5 other countries (England, Germany, Spain, Saudi Arabia, and Australia).

The teacher removed the post after 8 hours, but it had hundreds of thousands more shares, and reached all 50 states and dozens of countries in just 1 week.

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**Duke v. Hamil**  
997 F. Supp. 2d 1291 (N.D. Ga. 2014)

“[d]espite his intentions and his quick removal of it, the post illustrates the very gamble individuals take in posting content on the internet and the frequent lack of control one has over further dissemination.”

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**Best Practices:  
Student Privacy &  
Social Media**

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**Best Practices**

- Check annual FERPA notices to make sure social media is included.
- Obtain written consent for publishing photos.
- Consider providing notice to parents about the websites for which the school district has consented to the collection of student information, and the website’s purpose in collecting such information.
- Consider a disclaimer on social media sites.

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## Technology in the Classroom



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## Acceptable Use Policy

Districts should outline the acceptable uses of district-owned technology in an acceptable use policy.

The policy should consider the following items:

- Personal use
- Copyright
- Confidentiality
- Privacy
- Harassment
- Safeguarding of accounts and passwords
- Illegal uses
- Advertising
- Downloading or loading software

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## Copyright

- The Copyright Act protects original works.
- Rights protected:
  - Reproduction
  - Display
  - Adaptation
  - Distribution
  - Performance

Protection is generally for the life of the author plus 70 years, or 95 years, if the creator is a corporate entity.

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## Copyright

- Original works can include:
  - Writings including texts, poetry, short stories, plays
  - Music
  - Artwork, including logo/mascot
  - Lesson plans/curriculum, test questions, testing programs
  - Maps

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## Copyright & Fair Use

- A fair use exception allows a person to use copyrighted work for certain purposes, such as teaching.
- Most (but not all!) educational and nonprofit uses are fair use.
  - Licenses for software may require purchasing additional licenses before installing on multiple devices or allowing multiple users access.

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## Copyright & Fair Use

- Workbooks have special treatment – they are “consumable” and cannot be copied.
- Video and audio performances can be used without permission or royalty if used for face-to-face teaching (but not for non-teaching purposes such as rainy-day recess or parties).
- Beware of pulling internet images – copyright protection may apply!

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### Best Practices: Copyright

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### Best Practices

- Work with your district's policy provider and/or counsel to review your district's policy regarding use of copyrighted works.
- Review training for staff regarding copyrighted works and frequency of training.
- Make sure the school district's newsletters, printed mailings, and social media outlets are not using copyrighted images.

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### Discipline Issues



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## Student Discipline

Students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” (*Tinker v. Des Moines*, 1965)

- *Tinker* outlined some situations that allow school districts to regulate speech at school:
  - Dress codes
  - Aggressive, disruptive actions
  - Certain group demonstrations
- **Key:** Does the speech **materially and substantially interfere** with operations?

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## Student Discipline

The Supreme Court has carved out other exceptions:

- **Lewd, vulgar, and indecent speech on the school campus can be restricted**  
(*Bethel School District No. 403 v. Fraser*, 1986)
- **Speech in school-sponsored publications can be restricted based on “legitimate pedagogical concerns”**  
(*Hazelwood School District v. Kuhlmeir*, 1988)
- **Speech advocating illegal drug use can be restricted at school-sponsored events**  
(*Morse v. Frederick*, 2007)

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## “True Threats”

Constitutional protection does not apply to student expressions that are “true threats.”

Incidents found to be true threats:

- **Icons depicting a bullet to the head with blood spattering, referring to a specific teacher, and sent to 15 other students**  
(*Wisniewsky v. Weedsport Central School District*, 2<sup>nd</sup> Cir. 2007)
- **A journal with writings and drawings of a mass attack on the school that the student brought to school**  
(*Ponce v. Socorro*, 5<sup>th</sup> Cir. 2007)

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### “True Threats”

Constitutional protection does not apply to student expressions that are “true threats.”

Incidents found to be true threats:

- **A journal recording a student’s dream where she shot her teacher during class, when she brought the journal to school and failed to exercise “strict control” over it**  
(Boim v. Fulton County School District, 11<sup>th</sup> Cir. 2007)
- **MySpace page comments outlining detailed plans for a school shooting, where student had access to weapons, and friends were alarmed**  
(Wynar v. Douglas Co. School District, 9<sup>th</sup> Cir. 2013)

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### Disruptions

Courts have also upheld student discipline where social media posts at home caused a disruption or intended to cause a disruption at school:

- **Blog entries from a student encouraging people to contact the principal to “piss her off more”**  
(Doninger v. Niehoff, 2<sup>nd</sup> Cir. 2008)
- **Cyberbullying**  
(Kowalski v. Berkelyey Cty. Schools, 4<sup>th</sup> Cir. 2011)
- **Offensive and racist comments, and sexually explicit and degrading comments directed at certain female classmates**  
(S.J.W. v. Lee’s Summit R-7 School Dist., 8<sup>th</sup> Cir. 2012)

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### Employee Discipline

The First Amendment does not protect school employees when they make statements pursuant to their official duties.  
(Garcetti v. Ceballos, 2006)

Certain speech is never protected: obscenity, defamation, fraud, incitement, true threats, and speech integral to criminal conduct.  
(United States v. Cassidy, D.Md. 2011)

**Caution:** First Amendment may not be the only protection that applies!



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## Employee Discipline

The *Pickering* test:

1. Is the employee speaking about a matter of public concern?
2. Is the employee speaking in his or her capacity as an employee or in a personal capacity?
3. Do, on balance, the needs of the employer to maintain order justify or outweigh the intrusion on free speech?

(*Pickering v. Bd. of Educ.*, 1968)

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## A note on searches

Searches of electronic devices are subject to the same legal search and seizure requirements of a person's physical possessions.

Considerations:

- Is the scope of search justified based on concern?
- Does an employee have a "legitimate expectation of privacy"?
- Effect of school administrator vs. School Resource Officer conducting search

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## A note on searches

The Stored Communications Act of 1986 prohibits accessing electronic communications in electronic storage without authorization.

- Cannot access social media sites by false means
- Employees with public pages or who grant access to private pages to supervisors do so at their own risk.
- Employees who grant co-workers access to private pages do so at their own risk.

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### Don't forget mandatory reporting obligations...

- R.C. § 3319.313: Report to ODE Licensure Office
  - Certain felony offenses
  - Termination or non-renewal proceedings initiated for conduct unbecoming
- R.C. §2151.421: Mandated reporting of child abuse to children services or law enforcement
- Federal law: Report child pornography to the National Center for Missing and Exploited Children CyberTipline

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### Best Practices: Discipline

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### Best Practices

- Consider a disclaimer regarding the use of school electronic systems that indicates employees have no expectation of privacy when using the system.
- Work with counsel to establish search protocols that properly address Fourth Amendment concerns.
- Because the legal landscape changes in this area frequently, engage counsel very early in the process of discipline proceedings that involve off-campus behavior for both students and employees.

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 **Public Records**



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 **Challenges with Electronic Records**



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 **Electronic Records Issues**

- **Original vs. duplicate copies**
- **Location of records can be dispersed across district.**
  - **Individual drives on computers**
  - **Smartphones**
  - **Personal e-mail accounts**
- **Temporary nature (texts and instant messages)**
- **Risk of improper destruction**

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## Public Records Law

- Public records must be made available for inspection.
- Copies of records must be provided if requested.
  - District can require the requester to pay costs of production if the requester asks for hard copies or disks.
- School districts must have a records policy and post it in district buildings.

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## Is it a public record?



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## It's a public record if :

- It is kept by a public office;
- It contains information stored on a **fixed medium**;
- It is created, received, stored or sent under the jurisdiction of the public office; **and**
- It documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

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## Board Records

- The recording of the board meeting is a public record.
  - This is the case even after the written minutes are produced.
  - Follow your district's **records retention schedule** for the recordings.
- Board member home addresses are public record (because they are required to be residents of the district to serve their role).

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## Board Records

- E-mails to and from board members that deal with school business may be public records.
  - This is true even if the e-mail is sent to the board member's private e-mail address!

**Best practice:** board members use a school district e-mail account for board business.

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## Is this a public record?

From: [boardpres@gmail.com](mailto:boardpres@gmail.com)  
 To: [boardveep@yahoo.com](mailto:boardveep@yahoo.com)  
 Re: Touching base

Hey, Veep:

Hope everything went well with your husband's surgery.

Thank goodness that joker we had running for school board didn't win!!!

I think we need a discussion of public records issues at our next board meeting because our school district isn't following proper procedures, but didn't want mention to Mr. Superintendent until I got your thoughts. What do you think?

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## Records Retention

- Every district has a records retention schedule.
  - Groups records into categories
  - Identifies how long to keep records in each category
  - May specify whether to keep paper or electronic copies

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### Examples:

- Student transcripts: **permanently**
- Student medical records: **7 years after student graduates or withdraws**
- Recording of board meetings: **2 years after minutes are approved for the meeting recorded**
- Board meeting minutes: **permanently**

**Note: Your district's schedule may differ!**

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## Best Practices: Electronic Records

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### Best Practices

- Review your public records policies and records retention schedules for inclusion of electronic records.
- Review your training procedures to ensure staff know and are regularly reminded how to store electronic records properly.
- Backup electronic systems regularly and centralize storage for individual machines.
- Provide board members school district e-mail addresses.

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### Questions?



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OSBA's legal hotline  
is available to  
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**855-OSBA-LAW**



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