Avoiding First Amendment problems online

By the New York State Association of School Attorneys

As a public entity, a school district is subject to the Free Speech clause of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech[.]" But in the age of social media, school officials' resolve to respect the free speech rights of community members can be sorely tested. More individuals are engaging in heated discourse online.

Can school districts regulate public comments on their social media pages? And do the same rules apply to individual school board members and school administrators in their "personal" Facebook and Twitter accounts?

While there is little case law involving social media and free speech in a school context, the principles involved have been well-established.

Forums for speech

A school district may create a forum for speech, intentionally or unintentionally. Historically, school districts have created forums for speech when they allowed any community group to use physical facilities during non-school hours.

Now, forums can emerge online. For example, a school district might maintain a Facebook page, Twitter account or blog to disseminate news to parents. If it allows comments, it has created a forum for speech. The decision whether to include a comment section may vary depending on a school district's unique circumstances, and it should be made on a case-by-case basis and in consultation with your school attorney.

In general, a school district's level of "editorial control" on speech and the availability of public access determines whether it can restrict speech without violating anyone's First Amendment rights.

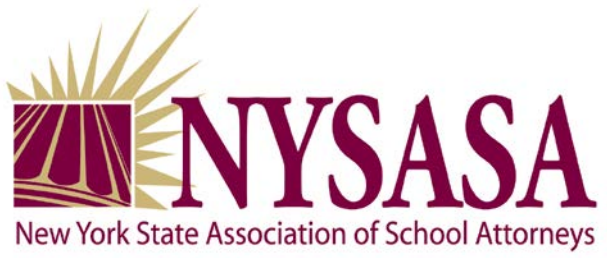
Nonpublic forums

A nonpublic forum is a space where a governmental entity has complete control over the content.

Such "government speech" can take many forms. For example, a case that reached the U.S. Supreme Court involved a city that decided to place privately funded monuments, including one of the Ten Commandments, in a public park. In *Pleasant Grove City, Utah v. Summum* (2009), a church called Summum demanded the city also accept a monument containing Summum's Seven Aphorisms, which include "Nothing rests; everything moves; everything vibrates."

The Supreme Court held the city did not violate the First Amendment rights of Summum by refusing to install its monument because installing permanent monuments is a form of government speech. In other words, these monuments were not subject to free speech restrictions because the city determined which monuments to display, effectively making the monuments the city's own "speech," despite the monuments' private provenance. To rule otherwise, Justice Samuel Alito wrote in the opinion for the court, New York would have been compelled to accept, say, a Statue of Autocracy from the German Empire or Imperial Russia after it accepted the Statue of Liberty from France.

Do the same principles apply to a school district website? The U.S. Court of Appeals for the Second Circuit, which has jurisdiction in New York, has not yet addressed the issue. However, a First Circuit decision has held that a school district's webpage that contained links to third-party websites was a nonpublic forum. In *Sutliffe v. Epping School Dist.* (2009), the First Circuit held that a municipality could deny a citizens' group's request to post a link to the group's website, because the municipality's website consisted of "government speech."



These and other cases indicate that school districts can deny community groups access to forums in which they have total editorial control. Because a school district generally controls the content on its website or in an online newsletter, such forums may be considered "nonpublic," and principles of free speech would generally not apply.

For example, suppose the school district allows a PTA or a booster club to have a column in its newsletter. This could create an open forum, obligating the school district to publish material submitted by other community groups. If the school district maintains complete editorial control over the newsletter, then it would not have to honor such a request.

Limited public forums – social media pages

When a school district creates a public forum for speech, it may do so in a manner that allows it to place some restrictions on the subject matter discussed by individuals. A government entity creates a limited public forum when it opens its facilities "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects," according to the U.S. Supreme Court's ruling in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983).

In such a forum, a school district can control the kinds of content or activities allowed, but it may not engage in viewpoint discrimination. For example, in *Good News Club v. Milford Cent. Sch.* (2001), the Supreme Court determined that a school district impermissibly engaged in viewpoint discrimination when it did not allow members of the public to use its facilities for religious purposes. However, in *Bronx Household of Faith v. Bd. of Educ. of City of New York* (2011), a school district's policy prohibiting the use of its facilities for worship services was allowed, because the policy restricted the types of activities that could occur (i.e., content discrimination), rather than the viewpoint of the individuals conducting the activities.

Neither the U.S. Supreme Court nor the Second Circuit have addressed any cases involving allegations of viewpoint discrimination within the context of a school district's social media accounts. However, a federal case out of Virginia provides guidance on how a school district's social media page may constitute a limited public forum, if it has a reasonable policy restricting content.

In *Davison v. Plowman,* (2018), the Fourth Circuit ruled that the Loudon County Commonwealth's Attorney could delete "off topic posts" and "spam" from its official Facebook page in accordance with a policy that Facebook pages were to be used for "matters of the public interest in [the] [c]ounty." The court held that the Commonwealth's Attorney's social media policy was a content-based restriction, reasonable, and viewpoint-neutral.

However, "blocking" social media users from commenting on official social media pages of elected officials or government employees – as opposed to merely deleting off-topic comments – can constitute impermissible viewpoint discrimination. See, for instance, *Davison v. Randall* (4th Cir. 2019), as amended (Jan. 9, 2019).

Consult legal counsel when considering whether to "block" members of the public.

Private social media accounts of school officials

In certain circumstances, personal social media accounts of school district officials can be limited public forums. Deleting posts or blocking users can, depending on the circumstances, violate the free speech rights of the writers.

The relevant case law involves President Donald Trump's actions to block some of his followers on his longstanding Twitter account (@realDonaldTrump). The key question was whether this was a private or public account.

Ordinarily, the First Amendment "does not regulate purely private speech," the Second Circuit said in *Knight First Amendment Institute at Columbia University v. Trump* (2019). However, the Second Circuit in *Knight* has ruled that government officials using their private accounts for public purposes may subject them to First Amendment restrictions.

The court found the way Trump used his personal Twitter account as a public official transformed the account into a limited public forum. In effect, this made President Trump's personal page similar to that of the government entity's social media page in *Davison v. Plowman*. Therefore, the Second Circuit held that President Trump's act of blocking social media users constituted prohibited viewpoint discrimination.

Knight has direct applicability to school officials in New York State. If a school official uses her social media account to communicate about official school business, she risks turning the private account into a limited public forum. As a result, such a user would need to be careful about "unfriending" or "blocking" social media users – even if she had maintained the account for years prior to obtaining the public position. (See "If Trump can't block people on Twitter, can you?" which appeared in the Dec. 10, 2018 issue of *On Board.*)

Notably, however, a federal district court in Kentucky refused to grant an injunction to individuals whom Gov. Matt Bevin had blocked on Twitter. In *Morgan v. Bevin* (2018), the court concluded that the governor's private social media page was not subject to First Amendment restrictions – even when he communicated "on his own behalf as a public official."

The court held that the speech on these platforms was "government speech." Thus, the governor was free to block social media users on his personal account.

While the *Knight* decision is binding on New York, the opinion in *Morgan v. Bevin* could result in a split between circuit courts. That could lead to a decision by the U.S. Supreme Court.

Because social media has become more prevalent in our society, as well as in school districts' interactions with the public, there are increasing legal ramifications with regard to free speech. Accordingly, school districts must closely monitor this volatile area of the law in order to avoid potentially impermissible action. A wrong move could result in liability and costly legal fees.

If you have any questions involving free speech concerns, we recommend that you contact your school attorney.

Members of the New York State Association of School Attorneys represent school boards and school districts.

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