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SCHOLARS IN EDUCATION LAW

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GCSSA Legal Update 2024

April 23, 2024

ESCNEO

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Today's Agenda

Agenda:

- Social Media, the Supreme Court and the Coming Storm
- Responding to Public Records Requests
- Ohio's "AI Toolkit" – A Closer Look
- Roundtable Q & A

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Social Media, the Supreme Court and the Coming Storm: *Sharpening Our Response Ability*

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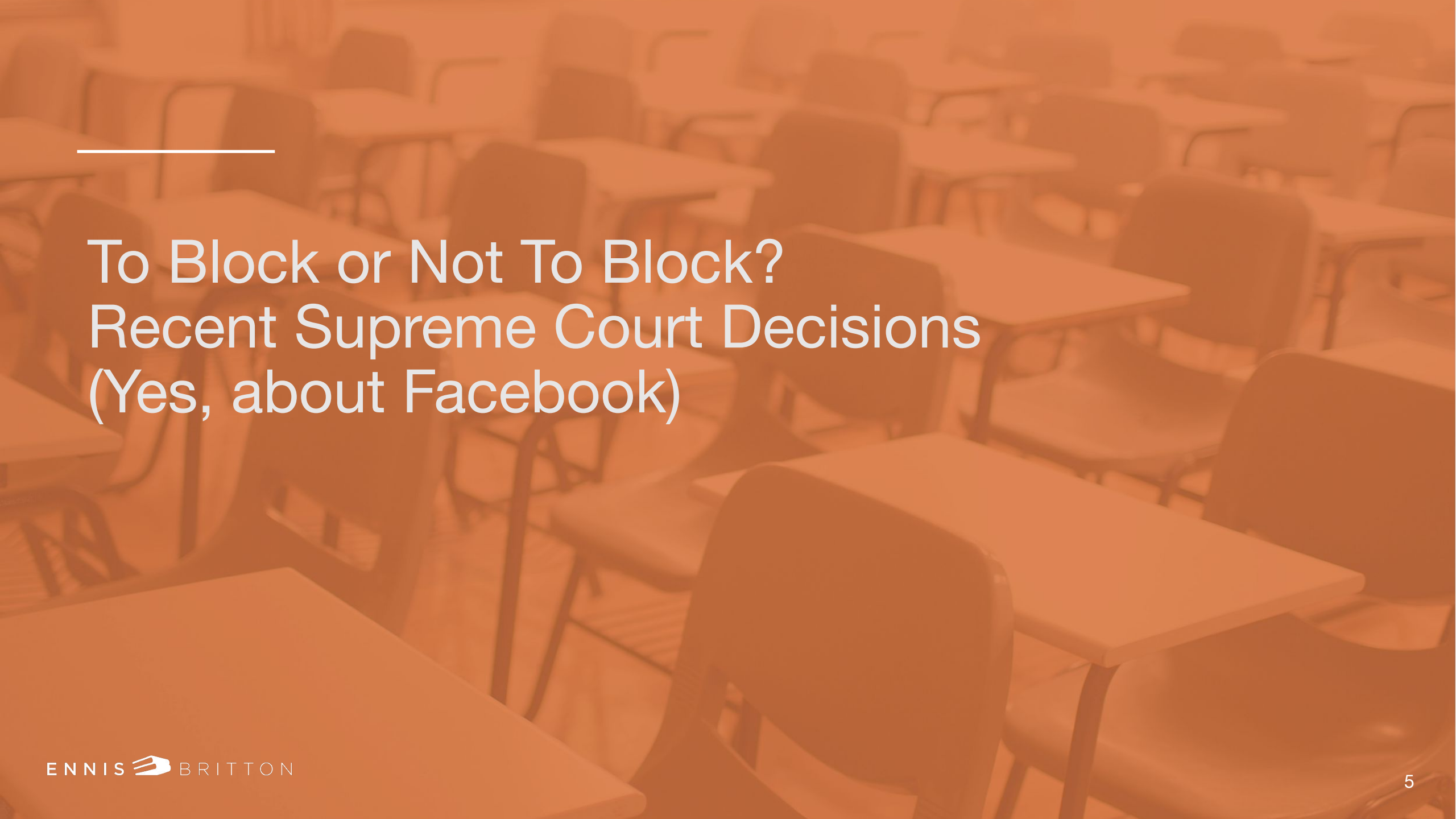


To Block or Not To Block? Recent Supreme Court Decisions (Yes, about Facebook)

The First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Short and Sweet!

To Block or Not to Block: Recent Supreme Court Decisions

- Cases: *Lindke v. Freed* and *O'Connor-Ratcliff v. Garnier*
  - The Supreme Court ruled on Friday, March 15th, on a pair of cases involving local officials from California and Michigan.
  - The holding was a unanimous decision by the Supreme Court.
    - The court ultimately sent both cases back down to the Circuit courts to apply the new test.

- **Holding**: Public Officials who post about topics relating to their work on personal social media accounts might be acting on behalf of the government and therefore be subject to the First Amendment.

  - Liability for violating the First Amendment is possible if they block their critics on those accounts, but only when the officials have the power to speak on behalf of the state and are actually exercising that power.

To Block or Not to Block: Recent Supreme Court Decisions

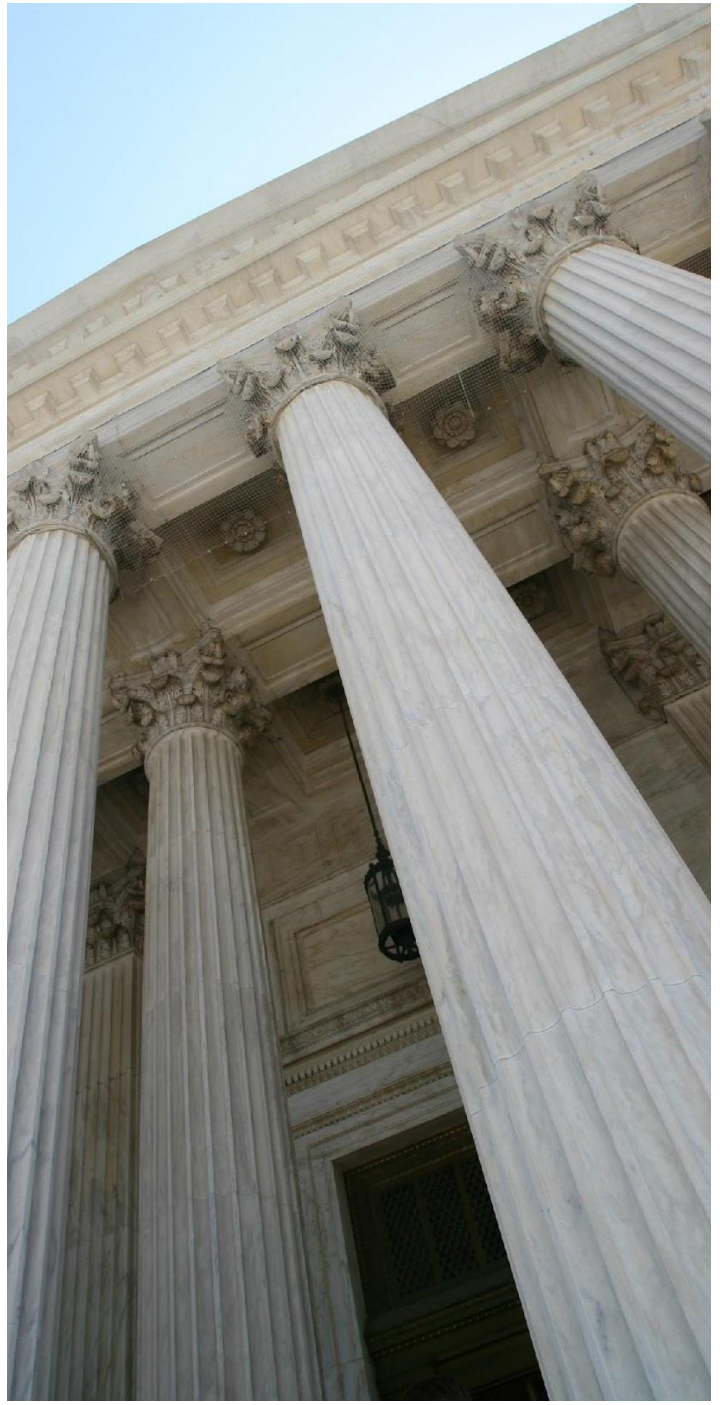
Facts:

- ***Ratcliff v. Garnier***:
  - The 9th Circuit originally ruled that two board members violated the First Amendment when they blocked parents from their personal Facebook and X (formerly known as Twitter) accounts.
  - The accounts were used to provide information about the Board and its work and were originally created during their election campaigns.

- ***Lindke v. Freed***:
  - The 6th Circuit determined that because a city manager maintained a personal Facebook page rather than as a part of his job, he did not violate the First Amendment when he blocked a city resident.
  - The account was created while the city manager was in college, and frequently talked about his rules as a “father, husband, and city manager” (as well as the exploits of racoons getting into his trash).

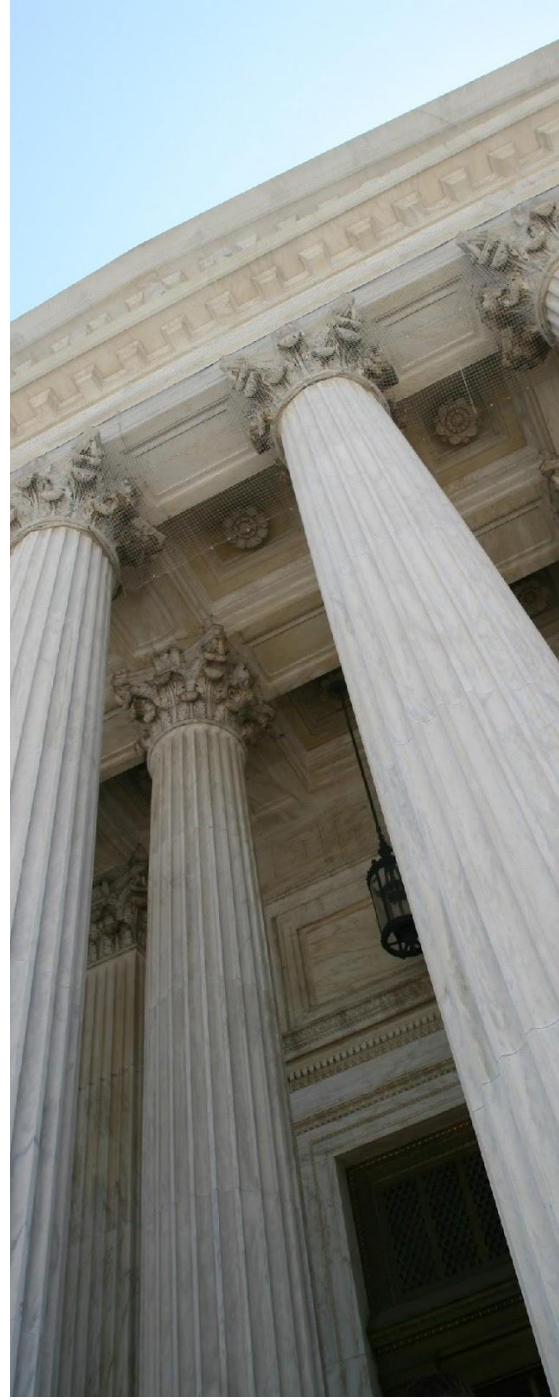
To Block or Not to Block: Recent Supreme Court Decisions

- **Analysis:**
    - The Court stated that “state officials have private lives and their own constitutional rights.”
    - However, the Court also cautioned that “a public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.”
        - The court gave a specific example of this stating that when officials use a personal page to solicit official comments, or access to government information, such as a livestream of a city council meeting, those may be deemed an official post.



To Block or Not to Block: Recent Supreme Court Decisions

- **Analysis cont'd:**
  - Ultimately, the Court concluded by creating this new test: **a government's official social media posts can be attributed to the government only if the official had the authority to speak on behalf of the government and was exercising that power when they created the post.**
  - The Court noted that in some cases, the analysis will be "fact-specific"
    - If a social media page involves both personal and official posts a court will have to look at the page's content and function.
  - Court also noted that the "nature of the technology matters" in reference to the difference between blocking a constituent altogether versus deleting a comment.
    - Digital version of "narrowly tailored" restrictions in the real world?



To Block or Not to Block: Recent Supreme Court Decisions

What does this mean for you?

Board of Education members and other public employees can assist by making matters clear to the community and courts through:

1. Consider single-use social media (only an official page and only a personal page). The Court highlighted the concern with “mixed-use” social media.

2. Clearly designate social media pages as personal or official.

3. Include a disclaimer (e.g., “the views expressed are strictly my own”) to reinforce that posts are personal.

4. Review of policies and consider/revisit who is responsible for the official messaging of the board of education.

5. Enforce employment rules regarding officials and employees making “official” statements on social media.

Moving Targets: Understanding Employee Free Speech Rights in the Age of Social Media

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Let's Start with Teachers

When regulating speech of teachers performing job duties the power of the employer is significant

- Courts recognize a significant distinction between the academic freedom of university professors versus that of K-12 teachers.

- At least at the K-12 level, it is generally understood that schools do not so much "regulate" on-the-job teacher speech as they "hire" it.

    - Various court cases can be used to define the nature and scope of the control that school employers exercise over teacher speech while performing duties.

UNDERSTANDING THE SCHOOL BOARD'S INTERESTS

- The district has an important interest in its employees' conduct that could interfere with their mission to provide a healthy environment for student learning.

- This interest encompasses holding teachers to a higher moral standard.

- Teachers are role models subject to a code of professional responsibility and schools have a legitimate interest in preventing inappropriate behavior both inside and outside of the classroom.

Understanding Public Employee Free Speech Rights

Employee speech may be protected if:

1. Speech is a **matter of public concern** (if that's the case, public employees are entitled to certain protections); and

2. IF the speech relates to a matter of public concern, whether **the employee's interest in speaking on those matters outweighs the interest of the employer in promoting the efficiency of its operations or services**.

- Therefore, a teacher's speech on social media or in a newspaper advocating for defeat of a proposed tax levy is "protected" speech (*Pickering*).
- However, speech not involving a matter of public concern, and instead involving a matter of personal interest, is subject to the least amount of protection (*Connick).*

Understanding Employee Rights

What about statements made pursuant to official duties?

- If so, the First Amendment does not apply because public employees are not speaking as citizens but instead are making statements pursuant to their official duties.
    - We can discipline employees when they are speaking on behalf of the employer

Understanding Employee Rights

- Factors courts consider to determine the extent of interference with operations:

1. Did the speech interfere with the employee's performance?
2. Did it create disharmony among co-workers?
3. Did it impact an immediate supervisor's authority over the employee?
4. Did it result in a loss of confidence or destroy the relationship of loyalty and trust?

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Understanding Employee Interests

As private citizens, public employees retain a First Amendment interest in expressing themselves in a variety of ways:

- Yard signs or clothing
- Through conversation
- Letters to the editor or other publications
- **Posts on social media**

Employee Dress

- Governmental employers can enforce dress codes.
  - Requiring that staff dress in a professional manner or wear business-casual clothing should eliminate most tee-shirts and hats with messages
- Cannot discriminate based on content.
- Can prohibit employees from wearing or displaying **campaign** material in school.
  - MAGA hat v. Medicare for All button
- Court decisions exist that permit teachers to wear pins with political messages provided it does not interfere with classroom performance and is not an attempt to indoctrinate students.
- Court decisions also hold that employers can prohibit the promotion of political candidates in class.

RECENT "BLM" FACEMASK LAWSUIT: Fuller v. Warren County ESC (2022)

- **Judge found**:
  - Speech was a matter of public concern.
  - Employees were speaking as private citizens.
  - Disruption was not substantial and did not outweigh employee's right to speak.

- The Court held that the District did not carry their burden of demonstrating that the challenged policy was necessary to the efficient operation of the school so as to outweigh the employees' interests in commenting upon matters of public concern.

- *"Therefore, it is likely that the policy banning employees from wearing any clothes or accessories with controversial social or political messages is an unconstitutional infringement on the First Amendment rights of Plaintiffs."*

Off Campus Activities

- Employees can attend anti-war rallies, etc., or other protests on their own time.
  - However, this is not absolute: *Doggrell v. City of Anniston*
    - Police officer fired after giving a speech at a conference for an organization identified as a racist "hate group"
    - Department received many complaints about the officer's involvement in this group
    - Court upheld termination – department's interest in maintaining order, loyalty, morale and harmony outweighed the First Amendment right
- Employees can post articles on social media favorable to certain political candidates, including school board members. (So can unions).
- In many situations, employees can write letters to the editor that are critical of board of education decisions (but there are limits).
  - The distinction between matters of public interest versus personal matters…matters!

Online Speech

In re O'Brien

- Teacher made two comments on Facebook stating:
  - "I'm not a teacher-I'm a warden for future criminals!"
  - "They had a scared straight program in school-why couldn't I bring first graders?"
- Posts lead to complaints by other teachers and ultimately protests and news camera crews outside the school.
- Case went before an Administrative Law Judge who found that comments were not protected by the First Amendment and upheld her removal.
- Court of Appeals upheld termination - speech was not on a matter of public concern.

Online Speech

- In the *Rubino* case, a teacher posted on Facebook: “I’m thinking the beach sounds like a wonderful idea for my 5th graders. I HATE THEIR GUTS! They are all the devil’s spawn!”
- (This was after a student drowned on a field trip to the beach!)
- On appeal, the judge held the teacher’s speech was not protected by the First Amendment.
- However, **the judge overturned the termination**:
    - The court looked to teacher’s 15-year career without any other incident
    - Comments were “repulsive” but were not a pattern of conduct and seem to be an isolated incident of intemperance.
    - The teacher restricted access to her Facebook page so only adults and friends and no students could see her posts
- Takeaway:
    - Teacher’s use of privacy setting along with a showing of remorse for a one-time lack of judgment could lead a court to overturn a teacher termination.

Social Media and Student's Free Speech Rights

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Opening Thought: Proceed with Both Purpose and Caution

"*There are more than 90,000 public school principals in this country and more than 13,000 separate school districts. The overwhelming majority of school administrators, teachers, and coaches are men and women who are deeply dedicated to the best interests of their students, but it is predictable that there will be occasions when some will get carried away, as did the school officials in the case at hand.* ***If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory***."

Justice Alito's closing remarks in his concurring opinion in *Mahanoy*

Saving *Tinker*

In its first real foray into off-campus online student speech, the Court reminded us of well-established circumstances where that expression may, in fact, require regulation:

- Serious or severe **bullying or harassment** targeting particular individuals;
- **Threats** aimed at teachers or other students;
- The failure to follow rules concerning lessons, the writing of papers, the **use of computers**, or participation in other online school activities; or
- **Breaches of school security** devices, including material maintained within school computers.

Saving *Tinker*

The majority decision then recognized three “features of off-campus speech” that “often” determine that it should **not** be regulated by schools

- **We’re Not Your Daddy:** Off-campus speech will “normally fall within the zone of parental, rather than school-related responsibility” (i.e. not *in loco parentis*)
- **We’re Not the Mall Police:** Schools cannot regulate student speech 24/7, especially political or religious speech outside of school
- **School is Cool:** Schools have an interest in protecting unpopular student expression as “nurseries of democracy”

Saving *Tinker*

Remember:

- In this case, the student's speech was "pure speech" (i.e. not fighting words or obscenities) that was merely criticism of the team, coaches, and the school
- The speech was off-campus, outside of school hours
- The speech did not identify or target any individuals
- She used a personal device with a private audience
- It caused no significant disruption

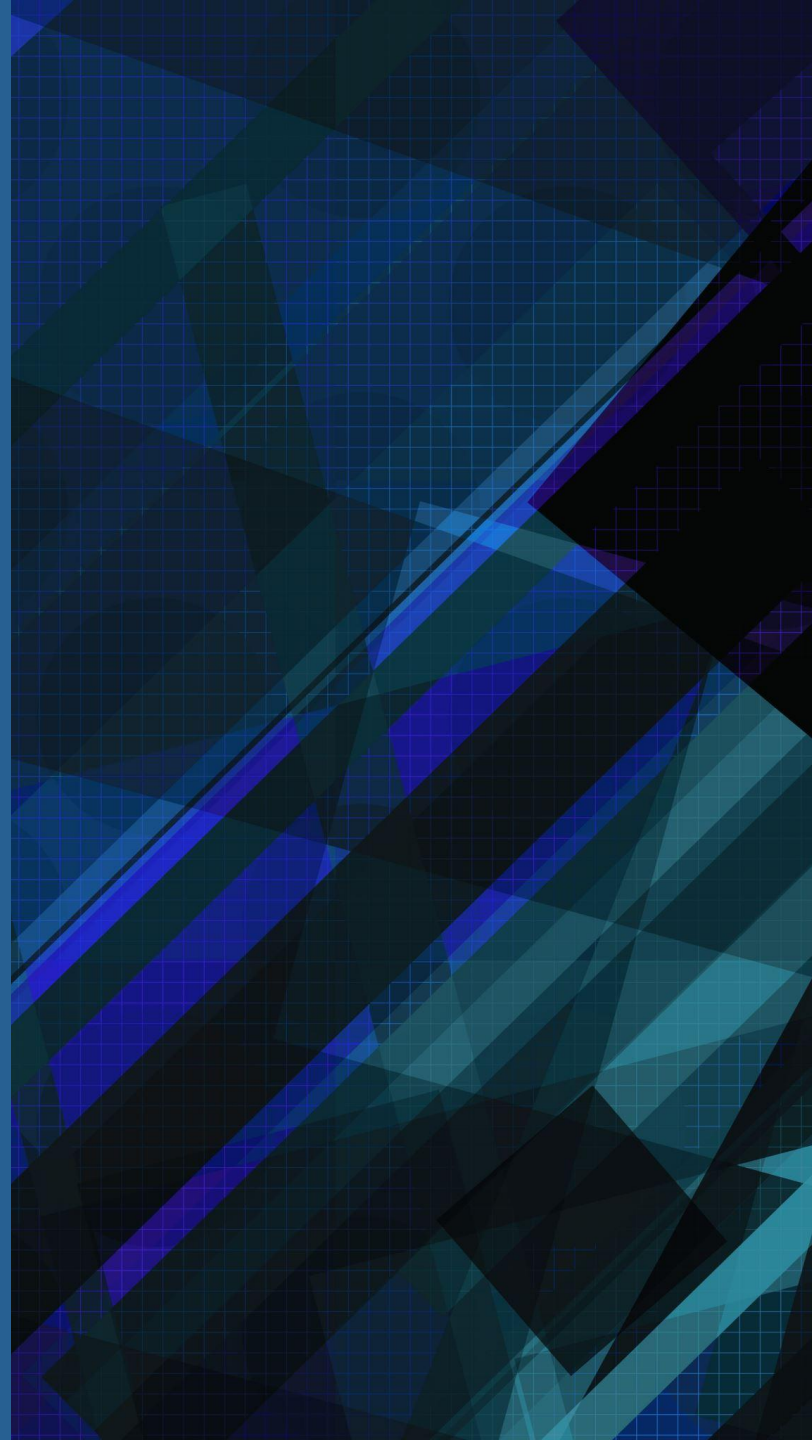
In short, this was a crummy case if you wanted the Court to clarify the issues!

What We Learned – And Didn't

- While the high court took *Tinker* off a ventilator relative to off-campus student expression, it openly left "**for future cases to decide**" how far schools can and should go in regulating this kind of speech. Those cases are starting to fill in the gaps.

- Defining when speech is truly "off campus" and whether there has been or will be a substantial disruption of the educational environment remains an elusive task.

- Student expression on social media is here to stay and not only are districts responding to it on a regular basis as we speak – it is only a matter of time before you become the target of First Amendment litigation (if it hasn't happened already).



Cases after *Mahanoy*

C1.G v. Siegfried, 38 F.4th 1270 (10th Cir. 2022)

- The 10th Circuit Court was one of the first courts to use the *Mahanoy* case decided by the U.S. Supreme Court in 2021. *Mahanoy* dealt with a cheerleader's vulgar messages on social media, where the U.S. Supreme Court essentially found that schools may not discipline off-campus student speech when the speech does not constitute a true threat, fighting words or obscenity.
- In this case, the student posted a picture in Snapchat with a caption "**Me and the boys bout [sic] to exterminate the Jews**."
- The post was removed after 2 hours, and the student apologized. Other students took screenshots of the snap and provided them to the police and the school.
- The image spread among the high school community and the school expelled the student for 1 year for violating a policy regulating "behavior on or off school property which is detrimental to the welfare, safety or morals of other students or school personnel."

Cases after *Mahanoy*

C1.G v. Siegfried

- The 10th Circuit Court stated that this case was similar to *Mahanoy* because the speech happened outside of school hours and off campus, did not identify the school or target any member of the school with vulgar or abusive language, and was transmitted to a private circle of Snapchat friends.

- The School attempted to show that there was a reasonable expectation of substantial disruption due to the multiple emails regarding the post, the circulation in the Jewish community, and that the post frightened a family who had a child in a class with the posting student. The Court stated that the school needed more--- **"Impact" does not necessarily equal substantial disruption."**

- The Court also provided that the posting did not involve weapons, a specific threat or speech directed toward the school or students. It did not find the speech to constitute harassment, and while it was hateful in nature, it was "not regulable in context."

Cases after *Mahanoy*

Chen v. Albany School District (9th Circuit, December 27, 2022)

- Unlike in *Siegfired*, the students in this case went the extra mile with their "private" off-campus social media posts.
- Between November 2016 and March 2017, one of the two students in this litigation used his Instagram account to make a number of cruelly insulting posts about various students at his school. These ranged from immature posts making fun of a student's braces, glasses, or weight to much more disturbing posts that targeted vicious invective with racist and violent themes against specific Black classmates.
- For example, in early February 2017, that student uploaded a photograph in which a Black member of the girls' basketball team was standing next to the team coach, who was also Black, and drew nooses around both their necks and added the caption "twinning is winning."
- In another post, he combined (1) a screen shot of a particular Black student's Instagram post in which she stated "I wanna go back to the old way" with (2) the statement "Do you really tho?", accompanied by a historical drawing that appears to depict a slave master paddling a naked Black man who is strung up by rope around his hands.

Cases after *Mahanoy*

Chen v. Albany School District

What about substantial disruption or predicting the likelihood of substantial disruption?

- The principal stated that "a lot of students were upset by what they had heard about the account and wanted to talk about it in class, which disrupted [the teachers'] plans for the class."
- On March 20, the student who had been targeted in the post containing a drawing of a slave being abused left school early because she "was too upset to return to class." She also reported being afraid to go to one of her classes because the students in that class included one who had favorably commented on a post that included a photograph of a hooded Klansman.
- Another Black student stated that she missed multiple days of school after learning that a post made fun of her "Afro" hair style and her physical appearance, and her parents eventually withdrew her from AHS.
- Other students targeted by the posts reported that they felt "devastated," "scared," and "bullied," and that their grades suffered. According to one administrator, **"[t]he AHS school counselors and mental health staff were inundated with students needing help to handle their feelings of anger, sadness, betrayal and frustration about the racist posts and comments in the Instagram account**."

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What Say You?

- Did the school's regulatory interests remain significant in these off-campus circumstances?
- Was the disruption substantial….enough?
- Were these more than merely unpopular ideas?
- Did these students get saved by the Angry Cheerleader, i.e. do they avoid making the "list" set forth by the Supreme Court?

What the Court Said

Chen v. Albany School District

- **Summary judgment affirmed for all defendants!**
- The central question here was whether the clearly off-campus nature of the speech placed it outside of the school's authority to regulate or to discipline. Although *Tinker* involved "only a school's ability to regulate students' on-campus speech," the 9th Circuit previously held that students' "off-campus speech is not necessarily beyond the reach of a school district's regulatory authority." *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 706 (9th Cir. 2019).
- The *McNeil* case, which predated *Mahanoy*, devised a three-factor test for "determining, based on the totality of the circumstances, whether off-campus speech bears a sufficient nexus to the school" to allow regulation by a school district.
- This test is flexible and fact-specific, but the relevant considerations will include (1) **the degree and likelihood of harm to the school caused or augured by the speech**, (2) **whether it was reasonably foreseeable that the speech would reach and impact the school**, and (3) **the relation between the content and context of the speech and the school.**

What the Court Said

Chen v. Albany School District

Was it reasonably foreseeable that the speech would reach and impact the school?

*"Given the ease with which electronic communications may be copied or shown to other persons, it was **plainly foreseeable** that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole."*

What the Court Said

Chen v. Albany School District

Was the degree and/or likelihood of harm "substantial?"

- Once the privacy of the account was breached, and knowledge of the posts rapidly (and predictably) spread, the "degree and likelihood of harm to the school caused or augured by the speech" was significant.
- In response to the students' argument that the race-based nature of the harassment here somehow immunized them from the school's authority, the court strongly disagreed:

"Indeed, a failure by the school to respond to Epple's harassment might have exposed it to potential liability on the theory that it had "failed to respond adequately" to a "racially hostile environment" of which it had become aware."

What the Court Said

Chen v. Albany School District

Was there a sufficient "nexus" to regulate First Amendment expression?

- "Students such as Epple remain free to express offensive and other unpopular viewpoints, but that **does not include a license to disseminate severely harassing invective targeted at particular classmates** in a manner that is readily and foreseeably transmissible to those students."
- "Epple again emphasizes that he did not ever intend for the targets of his posts to ever see them. But having constructed, so to speak, **a ticking bomb of vicious targeted abuse that could be readily detonated by anyone following the account**, Epple can hardly be surprised that his school did not look the other way when that shrapnel began to hit its targets at the school. And, as we have explained, recognizing an authority in school administrators to respond to the sort of harassment at issue here presents no risk that they will thereby be able to "punish students engaged in protected political speech in the comfort of their own homes."
- "Epple's actions had a **sufficient nexus** to AHS, and his discipline fits comfortably within *Tinker's* framework and does not threaten the "marketplace of ideas" at AHS."

Closer to Home

Kutchinski v. Freeland Community School District

(US Dist. Ct. ED Michigan, August 4, 2022)

- Here, the Instagram account specifically targeted three teachers and another student. The Instagram account so realistically impersonated the targeted teacher that he was concerned people would think it was his account. It contained real pictures of him, his wife and children, and two other teachers as well as other students.
- The Instagram account made it look like the teacher was having a sexual affair with another teacher and threatening to kill yet another. The account even went so far as to tag the other teacher's actual Instagram accounts in the posts referencing them. It also tagged a workout club, in which FCSD students worked out with one of the teachers.
- "In short, the Instagram account and its content **appeared legitimate to an outside viewer** because it contained so much of Mr. Schmidt's personal identifiable information and real pictures of Mr. Schmidt, Mr. Schmidt's family, Mrs. Howson, Mr. Anderson, and other Freeland High School students."

What the Court Said

Kutchinski v. Freeland Community School District

- This legitimate-looking account was still active on Monday morning when school began. Students approached the teachers to ask about it, and students were gossiping about it when they should have been doing schoolwork.
- The targeted teachers were so distressed that it impacted their ability to teach, and, by lunchtime, the situation at the high school had escalated such that student-creator's friends advised him to delete the account. The student testified that he deleted the account because he "did not want anyone to get hurt[.]"
- Based upon the reaction of the students and teachers to the highly targeted nature of the account, it was reasonable for the principal to forecast a substantial disruption under *Tinker*.
- **The Instagram account "posed a substantial risk that [Freeland High School] would be further diverted from their core educational responsibilities by the need to dissipate . . . confusion" surrounding the account.**

WAIT, THERE'S MORE – THE 6TH CIRCUIT WEIGHS IN!

- The Parents appealed to the 6th Circuit which looked at whether the student could be disciplined for the Instagram postings (1st Amendment) and whether the school rules upon which he was suspended were unconstitutionally vague (14th Amendment).
- After determining that *Mahanoy* "guides our analysis," the 6th Circuit first tackled the question of whether the student was responsible for the subject speech, since he (only) created the fake Instagram account and made one innocuous post. Citing the *Chen* case and others, the court concluded that "when a student causes, contributes to, or affirmatively participates in harmful speech, the student bears responsibility for the harmful speech."
- As to the critical question of "disruption," the court – in affirming – found that the school "reasonably forecasted that a fake Instagram account that impersonated a Freeland teacher and directed sexual and violent posts at three Freeland teachers and a student would substantially disrupt normal proceedings.
- As to the "vagueness" claim, the court found that the handbook's reference to "gross misbehavior," was satisfied when actions constitute flagrant or glaring improper conduct. "The conduct at issue fits the bill."
- Affirmed!

Kutchinski v. Freeland Cmty. Sch. Dist. Case No. 22-1748 (6th Cir., June 2, 2023)

What Have We Learned?

- If it doesn't fit into one of the categories carved out by the Supreme Court, regulating off-campus speech by students is risky business.
- Recall, those categories are:
  - Serious or severe bullying or harassment targeting particular individuals;
  - Threats aimed at teachers or other students;
  - The failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; or
  - Breaches of school security devices, including material maintained within school computers.
- To discipline under other than these circumstances, you will need to take *Tinker* off of life-support and be prepared to demonstrate that the speech actually caused a substantial disruption of the educational environment or could reasonably be forecast to do so.
- Good luck!

What Can We Do?

1. **Issue identification**: is critical for administrators and boards, particularly at the point of impact. District leaders need to up their First Amendment game, i.e., was it "true threat" speech? Was the speech truly "off" campus? Is the student expression political, disrespectful, offensive? If so, has there actually been a substantial disruption? If not, can such disruption be predicted? Where is the nexus? Consider:
   - the degree and likelihood of harm to the school caused by the speech,
   - whether it was reasonably foreseeable that the speech would reach and impact the school, and
   - the relation between the content and context of the speech and the school.

2. **Just the facts**: Remain vigilant in obtaining **all** the facts; avoid a rush to judgment and "alternative" facts. In the age of social media madness, emotions can run high. Accountability is hard work. Do it anyway.

What Can We Do?

4. **Due process (still) matters**: When dealing with the First Amendment, don't forget the Fourteenth. Although less constrained than criminal law, student disciplinary procedures must be followed carefully to protect the constitutional rights of students. Measure discipline in proportion to the offense.
5. ***Tinker* lives**: ….but just barely when the speech is off campus. Remember that although First Amendment rights are under siege on many fronts, it has been here before and survived with great resilience….it has "legs."
6. **Proceed with caution**: As such, off-campus, online student speech that is merely critical and/or related to matters of public concern remains largely untouchable.
7. **But, stay on your toes**: Carefully drill down on off-campus social media posts that glorify or evoke images of school violence.

What Can We Do?

7. **Find the balance**: between a safe and appropriate school environment in these turbulent times versus the rights of students to free expression and try not to "overreact in favor of either."

8. **Access a more robust epidural layer**: i.e., grow thicker skin – disrespect and/or humiliation alone are not going to cut it. Get over it. In attempting to regulate or bar speech, schools must show that their action "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker.*

9. **Reinforce the value and importance of "cybercitizenship"** – parents, the community and the schools all have a role to play in catching up with technology.

What Can We Do?

10. **<u>Regularly review and update relevant policies, as well as student and athletic codes of conduct</u>** – let's get specific and let students know exactly what the boundaries are:
    A. Include all the stakeholders in this process: board members, administrators, teachers, counsel, parents, students. One size does not fit all communities.
    B. Clearly state that with respect to extracurricular activities, participation is a privilege and NOT a right. (Don't forget ORC 3313.664!)
    C. Emphasize the fact that student athletes and those involved in extracurricular activities are acting as ambassadors and representatives of their schools and teams. Tell them clearly what you expect!
    D. Engage the Ohio High School Athletic Association to support our effort to adopt and implement meaningful boundaries for expressive out of school conduct for student athletes.

What Can We Do?

E. **Use clear and concise language** in policies and handbooks/codes of conduct to avoid challenges to being "vague and/or overbroad." Consider examples of forbidden speech (including, but not limited to…). The closer this looks like a waiver of rights, the more likely that enforcement will be upheld.

F. **For extracurricular participation**, clearly state that the good citizen (cybercitizen) provisions are all encompassing, i.e. in-season, out of season, on campus, off campus, etc. Again, state your expectations specifically.

G. **Make sure that whatever due process you determine to offer student athletes/extracurricular participants is what you want** – remember that Ohio law allows you to make the call without review or appeal.

What Can We Do?

H. **Communicate policies**, including handbook parameters, to all faculty and staff – professional development in this area is needed to assure that policies are consistently applied.

I. **Inform the stakeholders**, particularly students and parents, by routinely communicating policies, handbooks, and activity expectations.

J. **Rinse and repeat** – there is no way to keep up with technology and social media without regular reviews of these policies and handbooks.

Responding to Records Requests


Call

Public Records Act ORC 149.43

“Public office”

School boards = public offices

“Record”

Substance over form

Format (electronic or hard copy) does not affect whether something is a record.

Records must *actually exist* at the time of the request.

Definition: A public record –

- Is kept by a public office or a person responsible for public records.
- Is “any document, device or item, regardless of physical form or characteristic” that:
- Is “created, received by, or coming under the jurisdiction of a public office;”
- Serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office; and
- Does not fit nicely into an exception created by the Public Records Act.

Obligations Concerning Records

- Maintain public records, subject to records retention schedule.
- Organize in a manner that meets its duty to respond to public records requests.
- Keep a copy of its public records retention schedule at a location readily available to the public.

Public's Right to Inspect Records

- Upon request by any person, all public records responsive to the request shall be promptly prepared and made available for inspection to the requester at all reasonable times during regular business hours.
- Upon request by any person, a public office or person responsible for public records shall make copies of the requested public record available to the requester at cost and within a reasonable period of time.

Penalties for Noncompliance

- Court of Claims Expedited Process
- Mandamus
- If violation found, requester is entitled to an award of all court costs, attorney fees, and statutory damages

Which of the Following Can be Public Records?

- Emails in District Email
- Emails in Personal Email
- Text Messages
- Snapchat posts
- Voicemail Messages
- Twitter Posts
- Post-it Notes
- Facebook posts
- Website posts

Not a Public Record

- If a document does not meet the definition of a "record," it does not need to be disclosed.
- Ohio Supreme Court case examples:
  - Emails with racial slurs –because they were circulated only to a few co-workers, did not document department policy or procedures, and were not used to conduct departmental business.
    – *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*
  - Home addresses of public employees that were not subject to a residency requirement – because the addresses did not document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office.
    – *State ex rel. Dispatch Printing Co. v. Johnson*

Not a Public Record

- Junk mail/spam
- Personal calendars
- Employee home addresses, phone numbers
- Medical information in personnel files
- Personal notes made for personal use and not shared with others
- Criminal background checks
- Child abuse reports

- Medical or counseling records
- Trial preparation records
- Records the release of which is prohibited by state or federal law
- Attorney-client privilege
- Trade secrets
- Social Security numbers
- Infrastructure and security records

Not a Public Record

- If a record is not "kept" by a public office, it does not need to be disclosed.
- **Ohio Supreme Court case example:**
  - **Superintendent evaluations** created by individual board members which were submitted to compile the final evaluation – because they were not documents "kept" by a public office
  - When no law or policy requires a public office to retain certain materials, and neither the public office nor its agents keep the materials, those materials are not public records subject to disclosure.
    – *State ex rel. Johnson v. Oberlin City School District Bd. of Educ.*

Finding Calm in the Storm

Repeated requests	Overbroad requests	That one community member	Disgruntled former employee	Newspapers
Controversial issues	Lawyers seeking gold	Crusaders	Profit making companies	Data farmers
Charter schools	Anonymous	Unions	Unhappy Parents	State Auditor

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First Things First

- Know your records retention schedule.
  - Is it available on your website?
  - Is it readily available for you to attach to an email?
  - Paper copy for someone who is there in person?
- Consider a landing page on your website listing who is in charge of public records, how to submit a request, link to your records retention schedule, etc.
  - Consider a sample form either paper copy or even electronically through your website for people to utilize to request records. It doesn't need to be fancy.

Tracking the Request

Request comes in:

- Log it into your tracker if you have one.
- Respond acknowledging the request.
- Do an initial review. Stop sending the requests immediately along to those possibly with the records. Review for specificity, if a record, etc.
- If for employee records, consider whether you notify the employee.
- If for electronic database records, does that output exist in your systems?
  - There is no duty to create a new record to respond to a public records request.
  - However, the case law on electronic databases holds that if a computer program is used that can perform a search and produce the compilation or summary requested, the output exists as a record and should be disclosed.
  - A record does not exist when computer system must be reprogrammed to produce the requested and need not be disclosed.

Dealing with Uncertainty

- Stop guessing at what the requester is looking for. If you do not know and cannot readily and easily ascertain, ask the requester for clarification. It is *their job* to identify the records with specificity and clarity.
  - Ambiguous – request lacks clarity needed to ascertain what the requester is seeking or wording is vague or subject to interpretation.
  - Overly broad – request is so inclusive that the school district is unable to identify records sought, i.e. complete duplication of all records dealing with a particular topic, all e-mails containing particular names or words.

What is An Ambiguous or Overly Broad Request?

- *State ex rel. Dillery v. Icsman* - request for all records "containing any reference whatsoever" to the requester was overly broad;
- *Gupta v. City of Cleveland* - requests for entire categories of records, such as 'complaints,' 'reports of safety violations,' 'communications,' and 'emails'" with no time specification or for multiple years overly broad;
- *State ex rel. Bristow v. Baxter* - requests for every incoming and outgoing email sent and received by certain public officials and their employees for one-month periods overbroad because it seeks "a complete duplication of the respondents' email files, albeit in one-month increments"
- Compare: *State ex rel. Kesterson v. Kent State Univ.* - Request for all communications between specified individuals regarding certain subject during specified period of time not overbroad

State ex rel. Ames v. Portage Cty. Bd. of Commrs., Slip Opinion No. 2023-Ohio-3382

DEWINE, J., concurring in judgment only in part and dissenting in part.

{¶ 47} "Boom. Gotcha." Today, the majority makes public-records requests a gotcha game. And it does so without any basis in law.

{¶ 48} Brian Ames asked for copies of some meeting minutes of the board of the Portage County Solid Waste Management District. A clerk emailed Ames the minutes the next day, inviting him to let her know if he needed anything else. But a one-page exhibit to the minutes was not included with the clerk's email, apparently because the exhibit hadn't been attached to the official minutes approved by the board. Rather than pick up the phone and ask for the missing exhibit, Ames filed a lawsuit within hours of receiving the clerk's response.

{¶ 49} The majority blesses Ames's conduct, reversing the court of appeals' determination that Ames was not entitled to statutory damages under Ohio's Public Records Act, R.C. 149.43. I would not. Nothing in the Public Records Act allows for damages in this situation. And the majority's decision has the perverse effect of encouraging parties to rush to the courthouse any time a page is inadvertently left out of a public-records response, instead of simply letting the public office know that it made a mistake. So, I dissent from that portion of the majority's judgment.

Scenarios

We would like all e-mails regarding the purchases of toilet paper for Wanda Maximoff's office. Is she using the same toilet paper as the students or is she purchasing the fancy multi-ply toilet paper and wasting taxpayer money. Also, does she keep a bathroom log? If so, we would like a copy. We don't need to know if it's a 1 or 2, just how many times a day she's going ON THE CLOCK.

Response: Denied. There are no records responsive to your request.

Any and all incoming and outgoing communication between Board member and Marvel residents accusing Tony Stark of unethical conduct for his/her actions surrounding the vacancy board seat. The requested time frame is XX through XX. The content/body of the communication may contain one or all of the keywords “Board member,” “Board member,” or “Name”.

Specifically, I am requesting copies of all emails, text messages, Facebook messages, and/or incoming phone logs. I believe the accusation may have been made outside of the District email account so my request includes a wider scope. Being that Board member often says in board meetings s/he is getting messages during meetings s/he has established his/her phone is used for public school business and therefore communication on his/her phone regarding board business should be included in a public records request.

Response: Fulfilled.

But…. How?.

Please provide attendance totals for each week of the number of students who attended the LifeWise Academy program for all school years that LifeWise Academy operated a program in the school district. If the LifeWise program did not operate during a specific timeframe then do not provide data for that timeframe. I would like aggregate data only. No personal identifiable information. I am approving any reasonable costs to print, transfer or copy data as needed. Please contact me if special arrangements are needed to receive the data. If you have any other questions, please contact me.

Response: Denied.

Reasons?

1. Stadium Funding: Could you please provide details regarding the source(s) of funding for the high school stadium? Specifically, I am interested in knowing whether the funding comes from district funds, bond measures, grants, or any other sources. Additionally, if there are any ongoing funding mechanisms or special levies related to the stadium, please provide relevant information. ….

4. Cost Breakdown: I request a breakdown of the estimated annual costs for maintaining the high school stadium. This could include itemized expenses such as utilities, landscaping, janitorial services, security, and any other associated costs. Obtaining a clear understanding of the financial commitment to maintaining the stadium will help evaluate the long-term feasibility of the project.

5. Financial Accountability: Lastly, I would like to inquire about the reporting and oversight mechanisms in place to ensure financial accountability for the high school stadium. Are there regular audits or reviews conducted to monitor the expenditures and financial management of the stadium? Understanding the checks and balances implemented will confirm that public funds are being utilized responsibly.

Response:
Denied.

Only seeking information but….

Copy of any other file maintained by any other employee of the School District, including but not limited to Principal's file, Human Resources file and/or any other such file in which any information relating to Sue Stone has been placed, also including any electronic files, and a copy of any reports to any other governmental agency (i.e. social services, prosecutor's office, police departments, and the Ohio Department of Education) regarding any of the allegations set forth in the letter to Sue Stone.

Response: Fulfilled

Redactions? Reasons Need to Cited.

.

In accordance with ORC 149.43, I'd like to submit the following request for public records on behalf of the Freedom Foundation. Specifically, I am seeking the following information for each Marvel Schools employee currently employed in the bargaining unit represented by MEA.

First, middle last name

Date of birth

Job title

Job classification code

Work email address

Hire date

Worksite address

It is my preference to receive any responsive documents electronically in Excel/CSV spreadsheet format.

Please let me know if you have any questions or would like me to clarify any aspect of this request.

Fulfilled.

Partially Denied?

Exist?

Negotiate Obligation?

I would like to submit an information request for the evaluation documentation and submitted bid responses associated with District for RFP DW20XX District Student Data Warehouse and Dashboard Solution issued on X/X/20XX.

I understand that these are challenging and unique times, and that it may not be possible to meet the standard timelines associated with Open Records requests. I request, however, that an email response is sent to confirm that the request has been received and an estimated time frame that the district will need to fulfill it.

Response: Fulfilled.

But what about the bids sent said they were the company's confidential work product?

This is a public records request for invoices submitted to District by the Xavier law firm and Hulk law firm for the month of January 2022 to present.

Response: Consult your legal counsel.

Will be provided BUT will be subject to redactions with cited reasons for the redactions.

Ohio’s “AI Toolkit” – A Closer Look

Definitions

“New AI” - Generative AI

- Generates content based on prompts.
- Uses a combination of machine learning and deep-learning algorithms to come up with somewhat new content.
- Undergoes a series of dataset feeding, analyzing, and outputting results.
- Learns from available data and generates new data from its knowledge.

What are the popular AI writing generators?

ChatGPT

Claude

Google Gemini (Formerly Bard)

ClickUp

Jasper

Grok

Consider the following…

We may look on our time as the moment civilization was transformed as it was by fire, agriculture and electricity. *60 Minutes' Scott Pelley, April 16, 2023*

"The world will be richer, work less, and have more." *Bill Gates, January 16, 2024*

Consider the following…

"Despite its capabilities, GPT-4 has similar limitations as earlier GPT models. Most importantly, it still is not fully reliable (it 'hallucinates' facts and makes reasoning errors). Great care should be taken when using language model outputs, particularly in high-stakes contexts, with the exact protocol (such as human review, grounding with additional context, or avoiding high-stakes uses altogether) matching the needs of a specific use-case.

~ Peters, 2023

Consider the following…

"As a non-lawyer, I have not kept up with emerging trends (and related risks) in legal technology and did not realize Google Bard was a generative text service that, like Chat-GPT, could show citations and descriptions that looked real but actually were not. Instead, I understood it to be a super-charged search engine and had repeatedly used it in other contexts to (successfully) find accurate information online."

~ Michael Cohen, 2023

Consider the following…

Coming soon to a school district near you:

- Deep Fakes
- Collective Bargaining

Key Points: Federal Executive Order on the Responsible Use of AI

- White House Executive Order can be found here: https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

- By October 30, 2024, Secretary of Education must develop resources, policies, and guidance regarding AI in education

- **Calls for "AI toolkit" for education leaders including**
  - Appropriate human review of AI decisions
  - Design AI systems to enhance trust and safety and align with privacy requirements in the education context
  - Develop “education-specific guardrails”

AI Toolkit: Guidance and Resources to Advance AI Readiness in Ohio's Schools

- This toolkit was developed by InnovateOhio to help Ohio's schools prepare students for the rise of artificial intelligence (AI) technologies.
- It provides guidance and resources for school administrators, teachers, and parents to responsibly integrate AI into education.
- https://innovateohio.gov/aitoolkit/ai-toolkit

The Need for the AI Toolkit

- AI is rapidly spreading into many areas of our lives, including education.
- This brings both benefits and risks - AI can make learning more personalized, but it also raises concerns about privacy, fairness, and human decision-making.
- Schools are adopting AI unevenly, with some embracing it and others unsure how to proceed. We need a clear plan to ensure AI is used safely and effectively.

The 5-Step Policy Development Process

1. Understand the landscape: Assess the AI technologies available, relevant regulations, and your school's resources.
    - Example: Identify AI-powered grading tools and how privacy laws apply to using them.
2. Identify core values: Clarify the key priorities that guide your school's mission and initiatives.
    - Example: Your school values individualized learning and preventing discrimination.
3. Derive AI principles: Translate those values into guiding principles for adopting and using AI.
    - Example: Principle - AI tools must be evaluated for bias to ensure fair and equitable access.
4. Develop policies: Create actionable policies to enforce the principles, based on measurable evidence.
    - Example: Policy - AI grading tools can only be used if they demonstrate no demographic bias in scoring.
5. Implement and adapt: Put the policies into practice, monitor their effectiveness, and update as needed.
    - Example: Provide training to teachers on using the AI grading tool, then survey students on their experiences.

Resources for Policymakers

- The toolkit guides policymakers through each step, pointing to helpful resources like AI landscape analyses and policy development frameworks.
- Example resource: The NIST AI Risk Management Framework provides a structured approach to governing AI.

Resources for Teachers

- Teachers can access materials to understand AI basics, integrate it safely in the classroom, and educate students.
- Example resource: The ISTE guide offers classroom strategies and lesson ideas for teaching about AI.

Resources for Parents

- Parents can learn about AI's capabilities and risks to partner with schools in preparing students.
- Example resource: A template student agreement helps families commit to responsible AI use.

InnovateOhio AI Toolkit Conclusion

- The AI Toolkit equips all education stakeholders with the knowledge and tools to make AI a beneficial part of learning.
- By following the policy development process and utilizing the resources, schools can responsibly integrate AI and ensure students are ready for the future.

Roundtable Q&A

Additional Resources

Next Stop! Chat From the Bus Stop

May 14: Routing Nightmares: Avoid the Potholes. We will discuss statutory requirements and deadlines and the practical problems of routing. How does payment in lieu of transportation and a driver shortage fit into this conversation? Register at ennisbritton.com

LRP National Institute

May 5-8 Pam Leist, “Can You Keep a Secret? Navigating Confidentiality Under IDEA” and Jeremy Neff, “Successfully Mapping the Exit from IDEA Services” and “An Ounce of Prevention: COVID Lessons Learned for Future Disruptions” (School Attorneys Conference) Register at www.lrpinstitute.com

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