MSBO 2022 Annual Conference

Legal and Ethical Issues in Technology

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Children's Internet Protection Act

If receiving E-rate funding, a school must certify that it is:

- enforcing an internet safety policy; and
- operating a filter on its computers with internet access

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Children's Internet Protection Act

- E-rate fund recipients must operate a filter as a means of a "technology protection measure"
- Filter blocks visual depictions that are obscene, pornographic, or harmful to minors

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Children's Internet Protection Act

"Harmful to minors" generally means any visual depiction that:

- appeals to prurient interest in nudity, sex, or excretion;
- depicts a sex act or lewd exhibition of genitals in patently offensive way; and
- lacks serious literary, artistic, political or scientific value as to minors

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Children's Internet Protection Act

"A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination."

47 USC § 254(h)(1)(B)

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Children's Internet Protection Act

Internet Safety Policy – FCC guidance

- Monitoring of internet activities of minors; and
- Educating minors about appropriate online behavior.
  - The safety and security of minors when using electronic mail, chat rooms, and other forms of direct communication.
  - Unauthorized access, including so-called "hacking," and other unlawful activities by minors.
  - Measures designed to restrict access to material harmful to minors.

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Acceptable Use Policies

- CIPA is a floor not a ceiling for internet safety policies
- Have an AUP that matches board policy on technology
- AUP can include additional rules and notices
- Annual acknowledgement on file

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Acceptable Use Policies

- Set clear guidelines and expectations
- Employees
  - MI Internet Protection Act – MCL 37.271 *et seq*.
    - Excludes school email, school-issued devices
- Students
  - Cyberbullying in board policy – MCL 380.1310b
- First Amendment Issues

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Cyberbullying: "At School"

"*In a classroom, elsewhere on school premises, on a school bus or other school-related vehicle, or at a school-sponsored activity or event whether or not it is held on school premises . . . .*"

MCL 380.1310b(10)(a)

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Cyberbullying: “At School”

*“Includes conduct using a **telecommunications** access device or telecommunications service provider that occurs off school premises **if** the telecommunications access **device or** the telecommunications **service** provider **is owned by or under the control of the school**….”*

MCL 380.1310b(10)(a)

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First Amendment Issues

- Did employee speak as a private citizen or public employee as part of official duties?
- Was speech an issue of public or private concern?
- Balance employee's right to speak on this matter with employer's interest in administrative efficiency

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First Amendment Issues

"[T]he First Amendment does not require a school district to continue to employ a teacher who expresses . . . hostility and disgust against her students."

Munroe v Central Bucks Sch Dist (CA 3, 2015)

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First Amendment Issues

- On-Campus Student Speech
  - A material and substantial disruption of the school's environment; or a reasonably forecasted disruption
- Off-Campus Student Speech
  - Sufficient nexus also required

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Technology Access & Privacy

- Acceptable Use Policy
- Network Policies
- Internet Policies

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BYOD Policy

For students:

- Personal Responsibility, Safekeeping
- Restricted Network Access
- Misuse
  - Cheating, in-class distraction, bullying
- Search and Seizure
  - Limited within Fourth Amendment

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BYOD Policy

For employees:

- Already covered by board policy?
- Technology privacy
- “Employees shall be fully engaged in their job responsibility during work hours.”

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BYSDH?

- Rules for bringing school devices/services home should be in AUP
- Consider separate agreements
- Charging a fee?
  - Likely “no”

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Children's Online Privacy Protection Act (COPPA)

- Requires website operators to protect children's privacy (e.g., marketing restrictions).
- Coverage
  - Commercial websites directed at children under 13 years-old that collect, use, or disclose personal information from children under 13 years-old
- Requires verifiable parental consent

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COPPA *Cont.*

- Schools are generally not commercial website operators
- Applies to schools when using third-party websites or apps with students under 13-years old
  - Schools are acting as intermediaries between students and website operators

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COPPA *Cont.*

FTC Guidance:

- Many school districts contract with third-party website operators to offer online programs solely for the benefit of their students and for the school system – for example, homework help lines, individualized education modules, online research and organizational tools, or web-based testing services. In these cases, the schools may act as the parent's agent and consent to the collection of the student's information on the parent's behalf.

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COPPA *Cont.*

- A school's ability to provide parental consent is limited to the educational context – where an operator collects personal information from students for the use and benefit of the school, ***and for no other commercial purpose***.
- A website operator would still need parental consent if they intend to use student information for their own purposes.

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COPPA *Cont.*

- Look at the contracts with website operators and scrutinize their data collection, use, and sharing policies.
  - Is data used for purposes outside of school use?
  - Is student personal information used in connection with behavioral marketing?
- The FTC recommends that schools have a centralized decision-making process when it comes to student web services and provide an opt-out to parents in some cases.

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Family Educational Rights and Privacy Act (FERPA)

Protects ***personally identifiable information*** contained in students' ***education records*** including:

- Personally identifiable information
  - Direct identifiers (e.g., student names)
  - Indirect identifiers
    - "other information that, alone or in combination, is linked or linkable to a specific student" that would allow someone in the school community "to identify the student with reasonable certainty."

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FERPA *Cont.*

US Department of Education Guidance goes beyond storage of data to address "computer software, mobile applications, and web-based tools provided by a third-party to a school or district that students and/or their parents access via the internet and use as part of a school activity."

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FERPA *Cont.*

- FERPA Exceptions
- Directory Information
  - Information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.
  - Information defined in board policy and student handbooks

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FERPA *Cont.*

- Directory Information
  - School designation of directory information requires an annual notice AND the ability for parents to opt-out.
- US Department of Education Guidance
  - Allows for the disclosure of basic information like name and address, which might be used to create user accounts and individual student profiles in Internet-based educational tools or school systems.

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FERPA *Cont.*

- School Official Exception requires "school officials" to:
  - perform an institutional service or function for which the school would otherwise use its own employees;
  - meet the criteria set forth in the school's annual notification of FERPA rights for being a school official with a legitimate interest in student educational records;
  - be under the ***direct control*** of the school with respect to the maintenance of the student educational records; and
  - use the records only for authorized purposes and refrain from disclosure of personally identifiable information to third-parties.

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FERPA *Cont.*

- Other FERPA Exceptions
  - Studies
    - Develop, validate, or administer predictive tests;
    - Administer student aid programs; or
    - Improve instruction.
  - Audit or Evaluation
    - Audit or evaluate a Federal- or State- supported education program; or
    - Enforce or comply with Federal legal requirements related to the program.

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FERPA Concerns

- Securing student records when teachers are working remotely
  - Resources
  - Expectations
- Remote instruction – what info is saved
- “Directory Information” & clear communication to all involved
- Recording and posting lessons

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Michigan "FERPA"

- Do you know about it?
- Does your board policy reference it?
- Is it incorporated into contracts?
- Do your vendors know about it?

MCL § 380.1136

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Student Privacy in RSC

- FERPA-like state law
  - Schools may not:
    - Sell or otherwise provide PII to a for-profit business entity
    - Exceptions: EMO, standardized testing, educational support services
  - Schools must:
    - Disclose PII to parent/guardian
    - Notify parent/guardian of disclosures

MCL § 380.1136

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Licensing/ Service Agreements

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Internet-Based Educational Service Providers

- Email
- Google Apps for Education
- TalentEd Perform
- Infinite Campus
- PowerSchool
- CareerCruising
- School Messenger
- Infinite Visions
- Skyword
- Drop Box
- Word Press

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Privacy-Related Terms of Service

- Definition of Data
- Data De-Identification
- Marketing and Advertising
- Modification of Terms and Services
- Data Collection
- Data Use

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Privacy-Related Terms of Service

- Data Mining
- Data Sharing
- Data Transfer or Destruction
- Rights and License in and to Data
- Access
- Security Controls

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Tips for Service Agreements

- Be mindful of every instance student information is given to a third-party
- Have a centralized approval process in place
- Can the information be shared?
- Review board policies related to FERPA
- Beware of “click-wrap agreements”

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Tips for Service Agreements

- Get it in writing
- Read the writing
- Does it comply with the law and board policy?
- Get it authorized by the Board
- Limitation of Liability
- Electronic security

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Board Policy

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Board Policies to Consider

- Data Breach Response
- Social Security Numbers
- District Technology and Acceptable Use

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More Board Policies…

- Intellectual Property
- Social Media
- Use or Disposal of District Property

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Other Issues

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ADA & Webpage Accessibility

- United State Department of Justice has recently been re-announcing compliance requirements as recently as March 2022 highlighting settlements with large companies
- State and local government entities are subject to ADA website accessibility requirements
- https://beta.ada.gov/web-guidance/

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Eavesdropping

- *Fisher v Perron*, Docket No 21-1184 (CA6, 2022)
  - Reaffirms Michigan's one-party consent rule related to recording conversations
  - Federal court interpreting state law so it is not binding on State courts
  - Use CAUTION anytime activities at school or at meetings are recorded

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Data Breaches – Guidance from the Family Policy Compliance Office

- FPCO has indicated that failure to take reasonable steps to protect education records could be a violation of FERPA
- FPCO has announced a 9-step response plan for schools to use in the event student education records are inadvertently disclosed or subject to a data breach. *Letter to Lacey*, 114 LRP 30849 (March 12, 2014)
- There is also Michigan law and maybe Federal law

  . . .

  - MCL 445.72

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Guidance from the FPCO

1. Report the incident to law enforcement
2. Determine specific information that was compromised
3. Take steps to retrieve data and prevent further disclosures
4. Identify affected records and students
5. Determine how the incident occurred, including which school officials had control of and responsibility for the compromised information

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Guidance from the FPCO

6. Determine if school policies were breached
7. Determine whether a lack of monitoring or oversight occurred.
8. Conduct a risk assessment and identify measures to prevent future breaches
9. Notify students of the website maintained by the US Department of Education describing steps to take if they suspect they are the victim of identity theft

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MI Data Breach Notification Act

- Amends Identity Theft Protection Act
- Applies to computerized personal information
  - Name of MI resident linked to one or more of:
    - Social Security Number
    - Driver's license number or state ID number
    - Financial account information

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MI Data Breach Notification Act

- Notification duties triggered by a “security breach” or “breach of the security of a database”
  - Unauthorized access of personal information data
  - Employees and contractors may access data within scope of employment

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Notification Duties

- A person or agency that *owns or licenses* data subject to breach and *discovers or receives notice* of a breach, must notify each Michigan resident whose personal information was compromised
  - Unless the person or agency determines that the breach is not likely to cause identity theft or other substantial loss
- Notice must be given without reasonable delay
  - Notice may be in various forms: mail is the only absolute safe harbor

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Notification Duties (cont.)

- Specific contents required in notice of data breach
  - Describe breach in general terms
  - Describe type of exposed personal information
  - Describe what school has done to protect data from further security breaches
  - Include phone number for additional assistance
  - Remind recipients of need to remain vigilant for incidents of fraud and identity theft

MCL 445.72

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Other Issues

- Other state laws will likely apply if non-Michigan residents affected
- Once personal information is removed from database, all such data must be destroyed
- Penalties
  - $250 civil penalty for each failure to provide notice or each record not destroyed
  - $750,000 for multiple violations arising out of the same security breach

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Social Media & Electronic Communications

- Review board policies
- School officials should be aware of potential First Amendment concerns related to student expression on social media

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Freedom of Information Act

- Electronic communications = evolving area
- Tension exists between pro-disclosure policy of FOIA and the ubiquitous use of email in lieu of conversations
- Complicated by dual purpose (public/private) devices and BYOD

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Freedom of Information Act

- Use of private email or text messaging in the performance of district business likely = "public record"
- Use of district-provided email or cell phone for private communications
- Some case law but still some gray areas
- Best practice is to use only district-provided email in the performance of district business

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E-Discovery

- Litigation holds are intended to preserve evidence in litigation proceedings and will likely arise whenever a legal claim may arise
- Have a procedure in place that places an administrator in charge of implementing a litigation hold and ensuring continued compliance

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  - Is the use in the classroom?
  - Is it related to curriculum?
  - Check licenses

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