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## SCHOOL LAW ADVISOR NEWSLETTER

Dear Amber,

Consistent with our mission to continually provide relevant, timely, and important updates improve outcomes for schools and universities, and to protect the education for students and learners, **Miller, Tracy, Braun, Funk & Miller, Ltd.** provides this regular newsletter to schools and educational institutions.

In this Issue...

Illinois Laws

Cases Impacting Schools



Contact Us

### Laws and Recent Cases Impacting Schools

#### Managing Decisions about Joint Purchasing

We have previously provided information about the change in the bidding statute [here](#) (noting the increase in the bidding threshold for most contracts to \$35,000 effective January 1, 2024) and considerations for joint purchasing cooperatives [here](#) (prior to the increase in the threshold amount).

To reiterate those considerations, pursuant to Section 10-20.21 of the School Code, school districts must let for competitive bidding any contract in excess of \$35,000, subject to certain exceptions provided in the statute. However, there is not currently a valid exception which allows for bidding cooperatives to be exempt from these bidding requirements.

Without question, utilizing bidding cooperatives for purchases that are below the threshold is acceptable and has been encouraged by and sponsored by various organizations. However, these organizations also caution that school districts should obtain an opinion from their board attorney to determine whether an exemption from the bidding mandate applies prior to making a purchase from a bidding cooperative in excess of \$35,000. Few of these will meet the requirements of Section 10-20.21.

Article 28A of the School Code also creates the Education Purchasing Program for certain master contracts. At present, there is only one approved contractor under Article 28A, per ISBE's website. Other state "master contracts" are perfectly acceptable for contracts under \$35,000.

#### Continuing Implementation of the Changes in the Bullying Statute

As we discussed previously [here](#), PA 103-47 made changes in the bullying statute effective for the 2023-2024 school year, including changes in the timeline for parental notification requirements (within 24 hours), among other things.

This statute also required ISBE to update and revise its model bullying policy by January 1, 2024, and ISBE has done so. The updated policy, which each school district should review and ensure that their handbooks and policies are consistent, is available [here](#). Please pay careful attention to these changes as your schools update their handbooks ahead of the 2024-2025 school year.

The changes in this statute also clarified (and thereby emphasized) the requirement that the school district's bullying policies be on the school's "**publicly accessible**" website and included in the handbook. Also, as part of the process of reviewing and reevaluating the bullying policy, the School Code requires that the district engage in a policy evaluation process to **assess the outcomes and effectiveness of the policy** that includes, but is not limited to, factors such as the frequency of victimization; student, staff, and family observations of safety at a school; identification of areas of a school where bullying occurs; the types of bullying utilized; and bystander intervention or participation. The information developed as a result of the policy evaluation **must be made available on the website** of the school.

When dealing with allegations of bullying and harassment, these basic legal requirements – such as having the correct policy on the website and in the handbook – are essential. The Department of Education's Office for Civil Rights has reminded schools to ensure that websites and handbooks are **updated promptly** and that outdated policies and procedures are removed and no longer accessible on your website.

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## The Intersection of Public Service, Social Media, and the First Amendment

The Supreme Court recently decided two cases involving the intersection of social media, the First Amendment, and public officials. In those cases, the Court was confronted with whether an individual with a social media account could rightfully delete comments or block users from interacting with the account.

The Court initially heard the case of ***Lindke v. Freed***. In that matter, James Freed created a private Facebook account sometime before 2008. Freed eventually turned the account into a public "page" which permitted anyone to interact on the posts. Freed was appointed city manager of a town and identified himself as such. He continued to use the page, but typically posted only about his personal life. He would also include information related to his work and solicited feedback about what the city was doing.

During COVID-19, Freed's posts would sometimes contain information related to his work. Kevin Lindke began commenting on those posts, voicing his displeasure for what the city was doing and its approach to the pandemic. Freed initially deleted the comments, but eventually blocked Lindke entirely. Lindke sued and argued that his First Amendment rights were violated when Freed blocked him.

The Supreme Court addressed the issue of whether a public official's actions on social media platforms constitute state action under §1983, which provides a cause of action against individuals who deprive others of federal constitutional or statutory rights under the color of state authority.

The Court outlined a two-pronged test to determine whether a public official's social media activity constitutes state action:

1. The official must possess actual authority to speak on behalf of the state on a particular matter.
2. The official must purport to exercise that authority when speaking on social media.

After deciding this matter, the Court addressed the case of ***O'Connor-Ratcliff v. Garnier*** which involved school board trustees deleting comments and blocking users interacting with the trustees' public pages. The Court ruled that this case needed to be re-addressed at the lower levels using the framework outlined above.

District officials should take note that these cases make clear that whether a social media page is personal is only part of the equation. The Court emphasized that the appearance and function of the social media activity are relevant but cannot compensate for a lack of state authority. The official's conduct must be fairly attributable to the state, and there must be a connection between the official's authority and the subject matter of the speech.

Furthermore, the court notes that if the official does not speak in furtherance of their official responsibilities, they are speaking with their own voice, not as a representative of the state. Therefore, whether a social media post is considered official or personal depends on factors such as content, context, and whether state authority is expressly invoked.

Ultimately, any question in this area is very fact specific. Public officials should be wary of their actions on social media, particularly when it comes to deleting and blocking comments. An official can still be liable for blocking and deleting comments when the standards are met.

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## Navigating Name, Image, and Likeness Activity in High School Sports

The landscape of high school sports in Illinois may experience some transformation following the advent of name, image, and likeness (NIL) activity being permitted in high

school sports. NIL activity grants individuals the ability to profit from their own name, image, and likeness, without jeopardizing their amateur athlete status and eligibility. Social media plays a large role in the ability to access and obtain NIL deals. Illinois schools should be aware that IHSA has implemented **by-laws and Policy No. 35** regarding NIL activity.

**"IHSA By-law 3.084** permits a student athlete to earn compensation from the use of that student's name, image, and likeness as "NIL Activity." NIL Activity is subject to the following limitations:

1. The student may not use the IHSA name, logos, or trademarks in association with receiving the compensation or imply that the IHSA approves of the NIL Activity as that term is defined in the By-law;
2. The student may not use the name, logos, mascots, or trademarks of any member school in association with receiving the compensation or imply that any member school approves of the NIL Activity;
3. The student may not use any member school's facilities in association with the NIL Activity;
4. The student may not engage in any NIL Activity during school hours, while traveling to or from any IHSA event, or during an IHSA event including any practice, rehearsal, meeting, game, tournament, or similar event that the Board deems inappropriate or distracting;
5. The student may not engage in any NIL Activity associated with gaming/gambling, alcoholic beverages, tobacco, cannabis, banned or illegal substances, adult entertainment products or services, firearms, or other weapons; or any other product or service that the Board deems inappropriate or distracting; and
6. The student is responsible for determining what, if any effect, the NIL Activity may have on eligibility with the NCAA, NJCAA, and/or NAIA."

**Policy 35.** Because the potential repercussions for violation of the IHSA by-laws could be disqualification of the student from IHSA State Series events, sharing the information regarding IHSA By-Law 3.084 and Policy 35 in athletic handbooks or at athletic orientation events would be a proactive step worth considering. While NIL activity can offer unprecedented opportunities for student-athletes to capitalize on, it also may introduce legal complexities and challenges when student-athletes violate school or sports association rules and face discipline.

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We look forward to serving you and your educational institutions.

Sincerely,

Miller, Tracy, Braun, Funk & Miller, Ltd.

The contents of this newsletter, as well as any and all attached or linked documents, including websites, blogs, handouts, and legal updates, as well as any and all links on these pages should not be construed as legal advice. Individual problems or requests for information should be referred to legal counsel for an opinion based on facts specific to your inquiry.

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