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News For School and Municipal Clients

Government Websites as Government Speech

Most school districts and municipalities now operate Internet websites for the purpose of providing another source of information for the public about their activities, in addition to such traditional sources of information as newsletters. Disputes over third party access to such websites for private speech are beginning to be addressed by state and federal courts around the country. Although limited in number, the emerging caselaw provides an early glimpse into how the courts may view government websites in terms of their use by government officials to convey governmental messages. Such cases also discuss the legal considerations that may arise when government websites are linked to other websites, or when the government posts information in such a manner that may open up the website as a forum for private speech.

School districts and municipalities are generally free to communicate their governmental messages on their websites without any obligation to make the website available to others for private speech. When government officials make statements and convey information on government websites, they are not required to contradict themselves by including a counter, or opposing, statement urged by a private person. For example, if a school district posts an announcement about an upcoming event they are sponsoring at which a panel will discuss the challenges of discrimination

experienced by members of various minority groups, a school district is generally not obligated to post an announcement on its website, or provide a hyperlink to, a private group announcing their own event that is scheduled to present a contrary view.

At the same time, most government officials are aware that when government resources are “opened” for use by private persons for expressive activity, such as the use of facility space for meetings by citizen groups or private organizations, the governmental entity may not deny groups or individuals access to government resources merely because it disagrees with the group’s message or viewpoint. In this regard, under the First Amendment of the U.S. Constitution, government officials may generally not grant or deny access to a “forum” based upon the viewpoint of persons or groups, which are engaging in similar activities or addressing similar topics.

Within this legal context, a federal appellate court recently addressed a challenge by a citizen group to a New Hampshire town’s denial of access to its website, where the group requested the right to place a hyperlink to the group’s website on the government website. The private citizen group was concerned with excessive spending by the local school district and town, and advocated reduced spending.

The group sued the school district and town claiming violations of its First Amendment free speech rights. In particular, the citizen group alleged that the town had added a link on its website to a website describing an event called “Speak Up, Epping!” (SUE), while refusing to add a link to its website, Epping Residents for Principled Government (ERPG). The SUE event was part of a state-wide program sponsored by the University of New Hampshire for a day-long discussion at the Epping Middle-High School intended to foster community spirit and civic discourse.

The court concluded that the town had not violated the private group’s free speech rights. First, the court noted that the hyperlink to SUE was a link from one government website to another government-sponsored website, and not to a private website. Second, the court found that the hyperlink was to a town-sponsored, nonpartisan event. By contrast to the approved hyperlink, the private group’s website contained partisan political speech, a category of speech to which the town had historically declined to provide hyperlinks regardless of the viewpoint expressed.

The court reasoned that the town had created a website with the purpose of conveying information about itself to its citizens. It noted with approval that the town had relied on a website policy that limited hyperlinks on the town website to those for governmental agencies or events and

programs that are coordinated and/or sponsored by the town. The policy did not allow links that were political or advocated for certain candidates. Additionally, the town board determined what materials, including hyperlinks, would be placed on the website. Under these facts, the court concluded that the hyperlink to SUE was government speech and, as such, the town had not created a public forum that required it to open up its website to private speech.

Caution is in order as school districts and municipalities develop government websites as a source of information for the public about their activities. The law on government websites as a type of government property that is used to convey government speech is in its infancy. Decisions about adding hyperlinks on government websites to other websites require officials to analyze carefully the purpose of the link and the source of the website to which a hyperlink will be provided. Similarly, caution is also required when considering posting information on a government website that is related to a third party. Government officials are advised to adopt a policy and procedure related to the selection and approval of third party information and hyperlinks placed on government websites, if the inclusion of such information or hyperlinks is contemplated. It is advisable to seek the advice of legal counsel for assistance with such a policy in order to limit exposure to liability for a violation of free speech rights.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

Michael J. Julka (608) 286-7238	Frank C. Sutherland (608) 286-7243	Carrie M. Benedon (608) 286-7208
William L. Fahey (608) 286-7234	Joanne Harmon Curry (608) 286-7248	Todd J. Hepler (608) 286-7160
David E. Rohrer (608) 286-7249	Shana R. Lewis (608) 286-7202	Nicole J. Thibodeau (608) 286-7157
	Richard F. Verstegen (608) 286-7233	

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