Chalkboard

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NIL DEALS IN HIGH SCHOOL. YES, IT'S A THING.

by Nathan R. Floyd and Greg D. Loeffler

Name, Image, and Likeness (NIL) has swept the world of college athletics, but did you know high school students are also getting in on the action? In 2021, the U.S. Supreme Court in *NCAA vs. Alston* held that athletes, both at the collegiate and secondary levels, have the constitutional right to profit of off their name, image, and likeness. 594 U.S. 69 (2021). While NIL is an extremely popular discussion topic at the university level, little guidance exists for the high school athletes also allowed to profit from NIL. High schools need to be prepared for their students to sign NIL deals and understand their role in ensuring their athletes remain eligible.

In response to the *Alston* case, the Oklahoma Legislature passed laws allowing high school athletes to profit from their NIL rights. Under OKLA. STAT. tit. 70, § 820.21, et. seq., high school athletes in Oklahoma are permitted to enter contracts and receive compensation for use of their NIL. The law as it applies to interscholastic athletes is broad, leaving the bulk of regulation of this emerging area to the Oklahoma Secondary School Activities Association (OSSAA).

OSSAA guidelines permit high school athletes enter into NIL deals without jeopardizing their amateur status. High school NIL deals are given wide latitude as long as they meet three basic criteria:

- Compensation is not contingent on athletic performance or achievement.
- Compensation is not offered as an incentive to enroll or remain at the school.
- The compensation is not

provided by the school or an agent of the school.

In addition, athletes using their likeness or image may not appear in their uniform or display any names or marks that identify the school. This includes using school facilities. Of course, athletes cannot endorse through NIL any products that conflict with existing district policies (i.e. cigarettes and alcohol).

Under these rules, keeping NIL deals at a distance is the best way for districts to avoid any appearance that the deal is offered as a "pay for play" incentive or by any agent of the school. It's okay to educate your student athletes and their parents on the OSSAA rules surrounding NIL, but any efforts by the school to connect students with potential sponsors could spell trouble.

The law and practice surrounding NIL is evolving all the time. It is important to stay up to date on the relevant law. For now, though, OSSAA guidelines remain the primary source of regulation in this emerging area.

"Going Viral"

by Abigail Thomas

All educators know that schools are like petri dishes. If one student is sick, all get sick. Yet the flu is not the only virus of concern for schools. The phrase, "you're viral," brings on a new connotation in our current social media infested world.

Unlike private sector employers, public schools may only punish employees for their speech, or otherwise restrict that speech, based on First Amendment doctrine. These limitations include speech made on social media. *Pryor v. School District No. 1*, 99 F.4th 1243 (10th Cir. 2024).

Employees should be most cautious when they are using social media pursuant to their official duties. The First Amendment will not protect them in such instances. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Specifically, when the employee's speech is a component of their work, the public employee will generally have no First Amendment rights protecting that speech. *Id.* As the courts have explained, if social media is used "within the scope of the employee's work tasks that the employer paid to perform," then the staff member is speaking as an employee and the school district may act to limit the speech. *Pryor*, 99 F.4th at 1251.

When determining whether the speech is "official duties"-type speech, courts will typically evaluate the employee's job description, the context and setting of the speech, and whether the speech concerned the subject matter of the employee's job. For example, we can speculate that a high school debate coach would have less constitutional protection when ranting on TikTok about the judges at debate tournaments than when posting disparaging comments about the judges at a gymnastics

meet.

If the employee's speech is *not* made pursuant to their official duties, it may or may not be protected. It depends on the following analysis.

The first step is to determine whether the speech addresses a matter of public concern, making it more eligible for protection. Just because speech on social media can or does "go viral "doesn't automatically make it a matter of public concern. Purely personal disputes and grievances about which the public at large would have little interest are not protected. *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir. 2000). To receive First Amendment protection, the speech must relate to matters "of interest to the current community, whether for social, political or other reasons." *Morris v. City of Colo. Springs*, 666 F.3d 654 (10th Cir. 2011). Extending the hypothetical above, the debate coach's post about the judges at the gymnastics meet is more likely to be protected if the post asserts the judges are systematically biased against gymnasts from the city's poor neighborhoods than if she complains about them falling asleep during her daughter's floor exercise.

"If the employee's speech is not made pursuant to their official duties, it may or may not be protected. "

The next step in the First Amendment analysis involves a balancing test. Courts will weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014) (quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)). If the speech gains enough publicity to cause disharmony and substantial disruption to the school's operation, impact the loyalty and confidence between the community and school district, or impede the employee's duties with the regular operation of the school, then the school may have grounds to act. *Helget v. City of Hays, Kan*. 844 F.3d 1216, 1222 (10th Cir. 2017).

That makes sense. The school has a strong interest in protecting its relationship with its students, parents, and communities. "Going viral" can have serious repercussions on a school's operation, and schools may need to respond by disciplining the employee despite the employee's interest in speaking on matters of public concern. Just imagine

how the balance shifts in our hypothetical if the debate coach's posts about the biased judges include dozens of mean-spirited pictures of the judges with their family members—including children who attend school at the district.

First Amendment matters are highly fact dependent in this balancing test, and with social media, the facts and risks can turn on a dime. We caution you to be thoughtful about your responses. It's vital to think carefully about the various options and the likely consequences of those options. In certain cases, it makes sense to quickly and unequivocally discipline the employee for their speech. In other cases, an aggressive approach may unintentionally exacerbate and prolong disharmony that is not actually severe or could quickly recede on its own.

Freedom of speech is an important and essential right to all private citizens, including school employees. They often have important and informed insight to add to civic discourse and should not fear retaliation for speaking on topics of public concern freely. However, social media is a powerful and unregulated tool whose disruptive effects have not been fully discussed by our judicial system. When questions arise about an educator's speech on social media, school districts should first reach out to legal counsel for advice navigating this complicated First Amendment issue.

Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published through the school year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find Chalkboard to be informative and helpful with the difficult task of operating our educational institutions.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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Nathan was born in Arizona and grew up in Russia, Northwest Oklahoma, and Phoenix. He received Bachelor of Arts degree from Oklahoma Baptist University where he graduated in 2019. He spent one year as a teacher and coach at a small public school in central Oklahoma. Nathan then attended law school at the University of Tulsa College of Law and graduated in 2023. While in law school, he was President of the Board of Advocates and recipient of the Order of the Barristers. Further, Nathan was a recipient of the CALI Award for Excellence in Civil Rights. Nathan was admitted to the Oklahoma Bar and joined the RFR Team as an Associate Attorney in 2023.

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Greg Loeffler was born and raised in Tulsa and Creek County, Oklahoma. He holds a Bachelor of Journalism degree with an emphasis in strategic communication from the University of Missouri. Admitted in 2024, Greg represents the fourth generation of his family to be admitted to the Oklahoma bar. He is a graduate of the University of Tulsa College of Law where he served on the editorial board of the Energy Law Journal. While in law school, Greg clerked for RFR and the University of Tulsa Office of the General Counsel, as well as studied at Worcester College in Oxford, England. Greg joined the RFR team as an Associate Attorney in early 2024.

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