When your district is attacked on social media

By the New York State Association of School Attorneys

Most school board members and school employees have thick skins. They are accustomed to dealing with community criticism from those who disagree with difficult decisions, such as closing a school building, disbanding a sports team or terminating a popular staff member. But in the age of social media, attacks can raise questions about whether or how district officials should respond. Legal issues such as libel may be involved.

While criticism is nothing new, controversies can take on a life of their own as local bloggers express opinions and individuals comment on Facebook, Twitter, Instagram and other social media sites. In the past, issues have played out mostly during the public input segment of board meetings or in articles written by a reporter for the local newspaper. People appeared in person to voice their concerns or were quoted by name. Today, critics can be anonymous. This permits individuals to escape consequences of spreading misinformation, making personal attacks and, at times, telling bald-faced lies.

The appropriate response will always depend upon the circumstances. Often, it is better to not take the bait and dignify an outlandish remark with a response. Consideration should be given to whether the audience is a small circle of like-minded individuals who are not interested in the school's version of events, and the response will only inflame. Occasionally, a remark pertains to a topic which the school has previously put to rest. By resisting the urge to respond you may avoid resurrecting an issue whose time has passed.

But sometimes more is at stake. Should a district ignore seemingly credible but inaccurate statements that could influence an incoming bond vote? How can a school official deal with social media criticism that rises to the level of harassment or contains threats? In such situations, school boards and administrators are wise to consult their school attorney to assess the options.

There is a distinction between attacks on an individual and attacks on an institution. A school district is not a person. It is a governmental entity and cannot be slandered.

The prohibition on defamation claims against municipalities was dramatically expressed in *New York Times v. Sullivan,* in which the U.S. Supreme Court held: "For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.'"

A defamation claim is possible when a false statement is made about a specific individual and there is resulting damage or harm. However, the legal standard for assessing such claims against public officials is much higher than that applied to ordinary citizens, and school board members and superintendents are the former. As noted in *New York Times v. Sullivan*, in order for a public official to bring a defamation case, he or she would have to establish "actual malice," which is acting with knowledge that a statement was false or with reckless disregard as to whether it was false or not. Proof of actual malice must be made with "convincing clarity."

The legal hurdles are significant. Essentially, even if the official can established that the statements are false, he or she would also have to establish the state of mind of the person responsible for the publication. When First Amendment principles of free speech are at stake, courts are reluctant to quiet the speaker. As Justice William Brennan wrote in *Times v. Sullivan*: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. ... (I)t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."

The Supreme Court was clear that criticism of public officials can be protected speech. It referenced "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Individuals have the right to express opinions and opinions are not actionable as slander. If it can be established by the speaker that the remarks would be construed by a reasonable person to be opinion, no lawsuit will lie. Occasionally a public official can establish the level of malice necessary to support a defamation action, but that is the exception rather than the rule.

Even if malice and other elements of a defamation claim are present, there can be something else missing: the identity of the writer. The desire to fight back is made all the more complicated when the author hides behind a pseudonym or screen name to preserve anonymity and there is no readily identifiable author to target in a lawsuit. Media outlets that support blogs are, unless forced, unlikely to reveal the identity of such individuals as doing so is bad for business. Occasionally a court will compel a blog host to reveal the identity of an anonymous blogger, as was the case in *Cohen v. Google* where the New York County Supreme Court ordered Google to disclose the identity of an individual who made disparaging remarks about a female model in order for her to pursue a defamation claim. That, however, should be seen as a rare instance of judicial intervention.

When the author of the remarks is a staff member or student, districts will consider discipline as the method of responding. The First Amendment makes that a slippery slope as well. The Supreme Court famously articulated the legal standard in *Pickering v. Board of Education* after a teacher was fired for writing a letter to a newspaper in which she criticized the superintendent and school board's use of tax dollars. We must "balance the interests of the teacher, 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." If the issue raised via social media is a matter of public concern, imposition of discipline in unlikely. Some inroads have been made into that legal standard to enable employers to pursue discipline against employees when they speak in the course of their official duties, so the employer would be wise to find a fair linkage between the person's expression and the person's official duties.

Student speech is similarly protected. As famously stated by Supreme Court Justice Abe Fortas in *Tinker v. Des Moines*, students "do not shed their constitutional rights to freedom of speech at the schoolhouse gate." In New York, however, the commissioner of education has upheld discipline when the speech was threatening or adversely affected the educational process or school environment.

A school official who is interested in pursuing a defamation claim should know that it is a private right of action and, therefore, not one that can be supported by taxpayer dollars. That means the individual will have to retain counsel on their own. When considering the hurdles that must be overcome to sustain such an action, a cost-benefit analysis would be worthwhile. That is particularly true for the school employee who has the support of and remains employed by the school board, since the ability to prove damages as a result of a false statement is in doubt.

When it comes to statements on the Internet or social media, it's certainly easy to respond in kind. But a school board member or employee who wants to post or respond to a blog attack has much to keep in mind. He or she should not speak on behalf of the board unless authorized to do so. That individual must also avoid disclosure of confidential information obtained in executive session, as an individual who attends executive session is honor-bound to maintain the privacy of information obtained there.

An official response on behalf of the entire board is always a possibility. Seek permission of the board before disclosing any information that is not otherwise public and may have been acquired in an official capacity. The response should be reviewed by the board with an eye towards striking any information that may have been obtained in executive session or other confidential means. Disclosure of something appropriately obtained in executive session may not only expose the district to liability, but could be viewed as a breach of a school officer's fiduciary duty and a basis for someone to seek to have that person removed.

The decision to respond to a blog attack is a complicated one with practical and legal layers to be analyzed. Before responding, weigh the benefits, seek legal advice and consider the consequences. A wise person once said, "If I had a little more time, I would have said less."

Volz

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by Thomas M. Volz of the Law Offices of Thomas M. Volz, PLLC.