

Chalkboard



An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold

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Due Process Protections for Support Employees

by Staci L. Roberds

Support employees of Oklahoma school districts who meet specific statutory requirements are entitled to certain due process protections prior to suspension, demotion, termination, or non-reemployment for cause. In order to receive due process protections, including notice and a hearing before a school district's board of education, a support employee must meet the following requirements: (i) employment with a school district for more than one year; (ii) employment on a full-time basis (full-time status is determined by the standard period of labor which is customarily understood to constitute full-time employment for the type of services performed by the employee); (iii) employment for a minimum of 172 days; and (iv) employment

for services that are necessary for the efficient and satisfactory functioning of a school district and cannot include services that are performed by professional educators or licensed teachers. The statutory definition of a support employee specifically excludes adult education instructors or adult coordinators employed by technology center school districts.

Oklahoma law also requires that each school district's board of education adopt a policy designating the causes and procedures utilized by the school district for the suspension, demotion, termination, or non-reemployment of a support employee. A copy of the school district's board policy must be provided to the support employee.

SAVE THE DATE:

2018 Spring School Law Conference
When: Wednesday, February 21, 2018
Where: Metro Tech, OKC

In light of these statutory requirements affording certain support employees due process protections, a school district should pay close attention to the language included in a support employee's contract. A support employee contract should set forth with specificity the number of days the support employee will work. Such an explanation in the contract could become important under certain circumstances for determining whether an employee is entitled to due process protections, e.g., if a school district has a 4 day school week, the support employee may not meet the statutory minimum of 172 days of employment and would not be entitled to due process protections prior to suspension, demotion, termination, or nonreemployment.

Moreover, a school district should have an established practice for providing a copy of the school district's board policy to support employees. Upon hiring a support employee, a school district should provide the support employee with the school district's board policy outlining the causes and procedures for the suspension, demotion, termination, or nonreemployment of support employees and require the employee to sign an acknowledgement that they received the policy. The school district should retain the employee's acknowledgment in its records. For example, a school district could include the policy in the employee handbook, provide a copy of the handbook to the employee

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when hired, and then require the employee to sign an acknowledgment that they received the handbook.

If a school district has any questions about support employee contracts, needs assistance with a support employee policy, or needs any other guidance with regard to support employee issues, the school district should consult its attorney.

Copyright Law and Recordings of Student Performances

by Adam S. Breipohl

When students perform in school plays, band concerts, or talent shows, school employees or parents often wish to make recordings of the performances and make them available to others, whether by giving away/selling physical copies or posting the video on YouTube. However, these activities carry risk of violating copyright law by infringing on the rights reserved to the owners of the works being performed. School districts must use caution to ensure their actions in this area do not create legal risk for themselves.

Copyright law provides for different rules for recordings of "dramatic works" such as plays or musicals, and "nondramatic musical works" such as popular music

compositions. Of these, the rule for dramatic works is more straightforward: a license from the copyright holder is required for all recordings of a performance a dramatic work subject to copyright and to distribute copies of such recordings. School districts may be able to reach an agreement with the publisher of the work regarding recordings of the performance at the same time as they obtain permission to perform the work, but there is no set fee for the license or any requirement for the owner to grant the license at all.

The rules for performances involving nondramatic musical works are more complicated in that they depend on what kind of recording is made and how it is used. First, there is one clear "safe harbor" for recording musical performances: school employees may create an audio recording of a musical performance by students without obtaining a license if (1) the recording is made for evaluation or rehearsal purposes (e.g. for the band director to go over with students to critique the performance), (2) only one copy of that recording is created/retained, and (3) that copy remains in the custody of the school district or teacher.

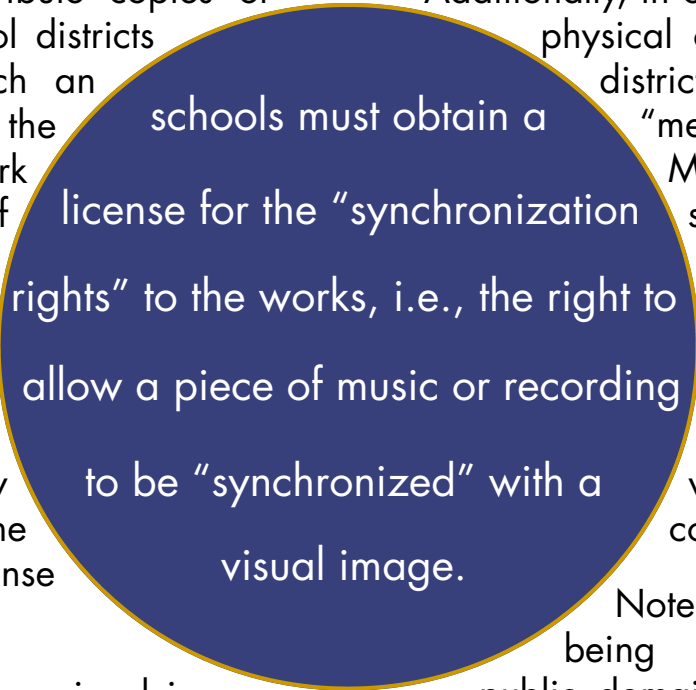
In order to distribute a video recording of a performance of nondramatic musical works, whether on physical copies or electronically, schools must obtain a license for the "synchronization rights" to the works, *i.e.*, the right to allow a piece of

music or recording to be "synchronized" with a visual image. As with dramatic works, this requires a license agreement with the rights holder detailing how the school district can use the work.

Additionally, in order to distribute or sell physical copies of a recording, districts must obtain a "mechanical license." Mechanical licenses are subject to a set royalty rate, and a company called the Harry Fox Agency handles mechanical licenses for the vast majority of well-known musical compositions.

Note that when the work being performed is in the public domain, the above rules do not apply, so the work can be freely used without obtaining a license. Works created before 1922 are typically in the public domain, but this should be verified before the work is performed.

Finally, members of the audience at school performances are subject to the same rules regarding recording and reproduction of copyrighted materials as school districts. As a practical matter, schools have a limited degree of control over the actions of audience members, but to head off any argument that the school district was somehow complicit in copyright infringement, school districts should consider including a disclaimer in programs stating that the school district does not condone or authorize the recording of the performance or distribution of such recordings and giving a similar verbal warning before the



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performance starts.

This is a relatively complicated and counterintuitive area of the law, and school districts must be careful to avoid inadvertent copyright infringement. School districts with concerns regarding the recording of school performances should consider contacting their legal counsel.

**Adam Breipohl is available to speak at your school district to provide training and guidance regarding compliance with copyright law. He can be reached at adamb@rflaw.com.*

Important Reminders for Long-Term Suspensions of Special Education Students

by Cheryl A. Dixon

When a school district contemplates changing a student's current educational placement for more than 10 consecutive school days because of a violation of the code of student conduct, it must first determine if the triggering misconduct was a manifestation of the student's disability. Under the IDEA, the behavior is a manifestation of the student's disability: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (ii) if the conduct in question was the direct result of the school district's failure to implement the IEP.

In circumstances where the student's IEP Team concludes that the student's behavior was related to his disability, the school district must, if it has not already done so, conduct a functional behavioral assessment (FBA) and implement a

behavior intervention plan (BIP) for the student; or, if a BIP had already been developed, review the BIP and modify it, as necessary, to address the behavior. If the student's conduct was due to a failure to implement his IEP, the school district must take immediate steps to remedy those deficiencies. In either event, the student must also be returned to the placement from which he was removed, unless the parent and school district agree to a change of placement as part of the modified BIP.

If the student's behavior is determined not to be a manifestation of his disability, or a failure to implement the IEP, the student may be disciplined in the same manner and duration as non-disabled students. However, a student whose placement is being changed for more than 10 consecutive school days must continue to receive educational services, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. The school district may provide the educational services in an interim alternative educational setting determined appropriate by the student's IEP Team.

It is important to remember that under the IDEA, a student who has not yet been found eligible for special education and related services but who has engaged in behavior that violated a school district's code of student conduct may assert any of the protections provided by the IDEA if the school district had knowledge that the student was a child with a disability before the behavior that precipitated a disciplinary removal occurred. Knowledge of a disability is presumed where: (1) the parent of the

student expressed concern in writing to the school district's supervisory or administrative personnel, or a teacher of the student, that the student is in need of special education and related services, (2) the parent of the student requested the student be evaluated for special education, or (3) the teacher of the student, or other district personnel, expressed specific concerns about a pattern of behavior demonstrated by the student directly to the district's director of special education or to other supervisory personnel. If one of these conditions is met, a school district must conduct a manifestation determination in accordance with the IDEA.

Remember, school district personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability if the student, (i) carries or possess a weapon at school, on school premises, or to a school function, (ii) knowingly possesses or uses

illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function, or (iii) inflicts serious bodily injury upon another person while at school, on school premises, or at a school function. A manifestation determination is still required if the change of placement is greater than 10 consecutive school days, even if the offense is for one of these three things and although the a finding of manifestation will not prevent the change of placement. Additionally, the requirements concerning conducting a FBA and implementing/modifying a BIP still apply.

You may wish to contact to your school district's attorney before making a suspension decision on these grounds, especially when it involves a "weapon" and "serious bodily injury," as these two terms have specific definitions.

If you have any questions related to discipline of special education students, please contact your school district's attorney.

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Chalkboard is a Rosenstien, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstien, 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.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstien, 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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