Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2014 Issue 3

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Addressing Parental Refusal to Participate in IEP Meetings

by Cheryl A. Dixon

If your district has been faced with the dilemma of being unable to get parent participation at an IEP meeting for a student, you have probably asked, "What do we do?" While a district cannot compel the attendance of parents in the same way it can demand attendance of its own personnel or contractors, the district must invite parents and strongly encourage them to attend. But if the district is unable to convince the parents to attend, the district may conduct an IEP meeting in the parents' absence.

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Although there is no specific timeline, districts must notify parents of the IEP meeting early enough to ensure that parents have an opportunity to attend. Accordingly, districts must make substantial efforts to secure parent attendance at the IEP meeting. Relevant authority has established that "substantial efforts" means at least three separate attempts. Generally, courts will look to the reasonableness of the district's attempts in order to determine compliance, and some courts have determined parent participation in the IEP process to be more important than complying with other procedural safeguards – such as meeting the annual IEP date deadline.

The IDEA requires districts to schedule IEP team meetings, "at a mutually agreed time and place." A district is not generally required to schedule an IEP meeting on an evening or weekend to suit a parent's schedule. But according to the Office of Spe-

cial Education Programs, there could be extenuating circumstances when a district should meet such a request. Although the preferred method for parent participation is a face-to-face meeting, the IDEA contemplates participation by other means including conference or video calls. Districts should not rely solely on the availability of these alternatives, however, and must make substantial efforts to schedule the IEP meeting at a mutually agreeable time and place.

Districts are required to keep a record of their attempts to arrange a mutually convenient meeting and the attempts to convince parents to attend. This record should include detailed logs of telephone calls made or attempted and the results of those calls, copies of correspondence sent to parents and any responses received, and detailed records of visits made to the parents' home or places of employment and the results of those visits. Even when parents fail or refuse to cooperate, the school district is not relieved of its obligation to provide FAPE to IDEA-eligible students. Thus, the IDEA permits districts to conduct IEP meetings without parental participation only after substantial attempts to convince the parents to attend.

Employee Speech and First Amendment Protection

by Staci L. Roberds

Similar to other public employers, school districts may face situations where employees engage in speech that is not required by their duties but involves the district. If asked about their speech, employees are likely to assert it is protected by the First Amendment. For example, an employee may argue that he/she spoke out on a particular matter as a concerned citizen, and in response to that speech, the school district or an administrator retaliated against the employee with adverse employment action. Thus, it is important for school districts to understand what constitutes protected speech under the First Amendment.

whether an employee's speech relates to a matter of public concern or a matter of personal interest.

A school district has the task of balancing its employees' rights to speak out as concerned citizens with its interest in minimizing disruption and maintaining an efficient workplace for its employees coupled with an appropriate learning environment for students.

Although several factors weigh on the analysis, the threshold determination of whether speech is constitutionally protected is whether an employee's speech relates to a matter of public concern or a matter of personal interest. If speech relates to a matter of public concern, it may be subject to First Amendment protection. Speech on a matter of public concern is characterized

as speech that is of interest to the community for social, political, or other reasons. For example, if the intent behind an employee's speech is to expose "potential wrongdoing or breach of public trust" or to disclose "corruption, impropriety, or other malfeasance" on the part of the school district, the speech may touch on a matter of public concern.

However, courts have indicated that speech by a public employee on "everyday employment disputes" and/or grievances between employee and employer that are "internal in scope and personal in nature" do not involve matters of public concern. For example, courts have determined that speech by a public employee involving grievances and disputes on only matters of "internal departmental affairs" or in response to discipline received by the employee is not protected under the First Amendment. Moreover, speech regarding a public employee's dissatisfaction with a supervisor's performance and/or management style is not a matter of public concern.

A school district cannot hold a private entity harmless for the district's actions.

These distinctions are important for a school district to consider when faced with issues of employee speech. Although they seem somewhat clear and straightforward, in reality they are not. This is especially the case if the speech occurs when the employee is off duty or involves the use of social media. It is therefore imperative that a school district facing an issue regarding employee speech contact its attorney before taking any action against the employee.

Indemnification Clauses

by Kelsey K. Bardwell

School Districts are often presented with agreements from various parties that include indemnification, or hold harmless, clauses. While it is generally desirable for districts to be indemnified by the other parties, it is important for districts to understand that a district cannot agree to indemnify other parties for events which may or may not happen in the future, especially in a future fiscal year.

A school district cannot hold a private entity harmless for the district's actions. The Oklahoma Attorney General has stated that the decision to bring suit is one that should be made only "after a cause of action has arisen" and the particular facts of the events have been studied by the political body having authority to make the decision of whether or not to pay a claim asserted against the district.

A later Attorney General Opinion reinforced this by stating that an

indemnification clause violates the constitutional requirement that funding decisions be made only on a fiscal-year-by-fiscal year basis. The Attorney General noted that an indemnification clause "would be for an indefinite term and uncertain in amount," which could result in obligations not permitted by the Oklahoma Constitution.

Indemnification clauses, according to the Attorney General, violate Article 10, Section 17 of the Constitution, which bars a political subdivision from lending its credit to any corporation or individual, and that they would obligate the district to assume liability which the Legislature has not intended a political subdivision to assume.

The Governmental Tort Claims Act exempts a district from certain liabilities, and specifically excludes such acts for which a district can be liable. Districts should not enter into agreements which provide that the school district will indemnify another party. If you would like additional information on this subject, please contact your school district's attorney.

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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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