Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2014 Issue 7

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How Serious is "Serious"?

by Cheryl A. Dixon

Recently I received a call from a school district client in regard to an eight year old, first grade, special education student who had purposely and forcefully hit his teacher in the head with a fire extinguisher. The teacher had an obvious knot on her head, and she immediately sought medical treatment but returned to work the same day. In determining the discipline for the student, consideration was given to whether the IDEA's 45 school day removal was appropriate.

The IDEA provides that 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 student's behavior is determined to be a manifestation of the student's disability, if the student "has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function." The IDEA defines "serious bodily injury" as bodily injury that involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Neither states nor local educational agencies may modify this definition.

Hearing officer decisions in cases involving disciplinary removals of students for inflicting serious bodily injury have consistently concluded that most student assaults of another student, teacher, or administrator will not be "serious" enough to apply this disciplinary removal. To demonstrate how serious the bodily injury must be, a hearing officer held that a broken nose does not fit within the IDEA's narrow definition of serious bodily injury. In another case, the hearing officer concluded that a school district employee who suffered discomfort, disorientation, and pain that was rated at "seven" on a scale of

one to ten, and who was given no pain medication at the hospital and was back to normal the next day, did not suffer extreme pain within the meaning of the statutory definition. Additional decisions show that experiencing no bruising or bleeding, merely suffering redness and swelling, and not missing work or missing only minimal time from work, typically leads to the conclusion that the pain experienced was not "serious."

In sum, serious bodily injury means **serious** and such a determination is very fact intensive. Based on the facts in this case, do you think the school district utilized the "serious bodily injury" removal? If you have any question regarding appropriate discipline of a student, please contact your school's attorney.

Exempt/Nonexempt Status and Overtime

by Staci L. Roberds

An employee classified as exempt under the Fair Labor Standards Act ("FLSA") is not entitled to overtime pay, while a nonexempt employee is entitled to overtime. A school district has employees in positions that are exempt (e.g., a teacher) and positions that are nonexempt (e.g., a custodian). Although a rare occurrence, a situation could arise when a school district has an employee who performs two positions, one exempt and one nonexempt. For example, an employee may teach during the school day and then work as a custodian for the district in the evening and/or at night. Because the custodian position is nonexempt and subject to overtime, the district would need to insure that the "primary duty" of the employee remained his/her performance of the exempt position as a teacher, or the FLSA's exemption for the payment of overtime to the employee could be lost.

The Department of Labor has issued regulations to assist in determining whether an employee performing two separate and distinct positions, one exempt and one nonexempt, maintains the exemption from the payment of overtime under the FLSA. The regulations provide that an employer should determine the employee's "primary duty." The term "primary duty" refers to the main or most important duty the employee performs for the employer. In making this determination, the regulations include factors that may be considered when determining an employee's "primary duty": (i) the relative importance of the exempt duties as compared to the nonexempt duties; (ii) the amount of time spent performing the exempt work; (iii) the freedom from direct supervision; and (iv) the relationship between the employee's salary and wages paid to other employees for the kind of nonexempt work performed by the employee.

One of the most useful factors for determining the employee's "primary duty" is the amount of time the employee spends performing his/her exempt work. Although time is not the sole factor, if an employee spends more than fifty (50) percent of his/her time performing the duties of the exempt position, this will usually satisfy the "primary duty" requirement. Thus, using the teacher/custodian example, if the employee spends more than fifty (50) percent of his/her time performing the duties of the exempt

teaching position, the FLSA exemption from overtime pay would remain.

School districts with employees performing more than one position for the district, one exempt and one nonexempt, should pay close attention to the employee's "primary duty" and the amount of time spent by the employee in each separate position. If a school district has any questions regarding overtime pay of its employees, it should not hesitate to consult with its attorney.

Students Can Be Personally Sued for Injuries in Accidents Involving Driver's Education Vehicles

by Jerry A. Richardson

In an unpublished decision issued earlier this year, the Oklahoma Court of Civil Appeals held that a student driver in a public school district's driver's education class could be held **personally liable** for injuries resulting from the negligent operation of the driver's education vehicle. The Court of Civil Appeals held that a claim against a student driver of a driver's education car is not governed by the Oklahoma Governmental Tort Claims Act ("GTCA") and remanded the case for trial.

Student A and Student B were classmates enrolled in a public school district's summer driver's education class. Student A was driving the car under the direction of the driver's education teacher, who was sitting in the front seat on the passenger's side. Student B was sitting in the back seat. Student A apparently misunderstood an instruction from the teacher and attempted to make a turn off of the highway onto a county road at highway speed. The car left the road, struck a culvert, and came to rest on its side. Student B was injured in the accident.

Over a year after the date of the accident, an attorney representing Student B contacted the school district asserting a claim for Student B's injuries in the accident. The school district's insurance carrier informed Student B's attorney that the one year time limit for filing a notice of tort claim against the school district under the GTCA had expired. Student B then filed a lawsuit against Student A.

The school district's insurance carrier defended Student A in the lawsuit and moved for summary judgment, arguing that Student A was operating the driver's education car under the supervision of the driver's education teacher and was therefore acting for the school district at the time of the accident. The trial court agreed, ruling that the school district was the only party that could be held liable for the accident. Because Student B had not timely served a notice of tort claim against the school district, the trial court granted summary judgment to Student A. Student B appealed.

The Court of Civil Appeals reversed. The court held that in order to be insulated from liability under the GTCA, Student A would have to be an "employee" of the school district under the GTCA. The court ruled that Student A was not an employee of the school district; "she was simply a student in an educational program and had absolutely no authority to act as an employee or agent on behalf of the school." The Court of Civil Appeals remanded the case to the lower court for trial. The Oklahoma Supreme Court declined Student A's request to grant certiorari and review the decision of the

Court of Civil Appeals.

The decision of Court of Civil Appeals is troubling. The GTCA defines "employee" as any person who is authorized to act in behalf of a political subdivision or the state whether that person is acting on a permanent or temporary basis, with or without being compensated or on a full-time or part-time basis. OKLA. STAT. tit. 51, § 152(7).

The undisputed facts left no doubt that Student A was operating the driver's education car **because the school district had authorized her to do so on a temporary basis as part of the driver's education class.** The definition of "employee" makes clear that it is irrelevant that Student A was not being compensated. Indeed, the Oklahoma Attorney General has recognized that the definition of "employee" under the GTCA is broad enough to include "a volunteer working without compensation."

The decision of the Court of Civil Appeals effectively gives injured plaintiffs two bites at the apple in some situations. There is no doubt that Student B would have sued the school district, rather than Student A, if Student B had timely submitted a notice of tort claim. But having missed that deadline, Student B hit upon the expedient of suing the classmate who was operating the driver's education car, thereby getting a second bite at the apple.

The decision of the Court of Civil Appeals was not released for official publication. Under the rules of the Oklahoma Supreme Court, unpublished citations have no precedential value and should not be cited. Yet litigants sometimes rely on unpublished decisions notwithstanding the rules of the Oklahoma Supreme Court. School districts should be aware of this decision, because attorneys who represent injured plaintiffs most certainly are.

Tulsa Office:
525 S. Main, Suite 700
Tulsa, Oklahoma 74103
Phone: 918.585.9211
Fax: 918.583.5617
Toll Free: 800.767.5291

ROSENSTEIN FIST & RINGOLD

Oklahoma City Office:
3030 NW Expressway
Suite 200
Oklahoma City, OK 73112
Phone: 405.521.0202

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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: 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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