Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2015 Issue 4

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School Districts Must Have Consent Before Making Informational Autocalls to a Cell Phone

by Jerry A. Richardson

Many school districts use automated telephone dialing systems to make calls to parents or students and deliver recorded messages regarding matters such as school closings due to weather and student absences. Some school districts also use this procedure to provide notice of events like parent-teacher conferences, back to school nights, and even upcoming athletic events. Unless the autocall is for an "emergency purpose," sending autocalls to cell phones without first obtaining consent from the call recipient is a violation of federal law that can expose the school district to significant monetary liability.

Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), in 1991 to restrict telemarketing calls and provide consumers the opportunity to place their phone numbers on a national "Do Not Call" registry. The Federal Communications Commission subsequently adopted regulations implementing this law. The regulations provide that "no person or entity" may make autocalls except under the specific circumstances set forth therein. The regulations allow autocalls to be made to **residential** phone lines without consent from the call recipient (1) if the call is made for emergency purposes or (2) if the call is **not** made for commercial purposes. However, autocalls may be made to a **cell phone** without consent only if the call is for an emergency purpose. This means that if a school district makes non-emergency autocalls to cell phones, the school district must have the consent of the caller or the call is a violation of the TCPA.

The TCPA authorizes persons who receive autocalls in violation of the law to bring suit for damages in the amount of $500 for each violation. Thus, if a parent who has not consented to receive autocalls from the school district receives four (4) non-emergency autocalls to his

or her cell phone, that parent can bring suit against the school district for $2,000. The TCPA also allows the damages to be tripled if the court finds that the defendant "willfully or knowingly violated this subsection or the regulations prescribed under this subsection." School districts and their telephone autocall vendors in other parts of the country have been the subject of class action lawsuits seeking hundreds of thousands of dollars for violating the TCPA.

RFR has a prepared consent form that school districts can utilize for parents to sign in order to ensure that the school district does not violate the TCPA. If your school district would like to purchase this form, please contact Michelle at msiegfried@rfrlaw.com.

Is Your District Adequately Reporting Progress on Students' IEP Goals?

by Cheryl A. Dixon

The Individuals with Disabilities Education Act (IDEA) requires that a student's individualized education plan (IEP) include a statement of measurable annual goals that are designed to meet the student's individual needs. Additionally, the IEP must indicate how the student's progress will be measured and when periodic reports will be provided to the student's parents. Some school districts are simply providing a student's grades and/or report card as the method by which they are reporting the student's progress toward IEP goals. If that is your district's practice, you may wish to consider another method of reporting student progress.

School districts must provide parents information sufficient to inform them of the student's progress toward the annual IEP goals.

Although grades may be an appropriate manner by which to track progress toward a student's IEP goal, merely relying on a report card or using grade percentages to report a student's progress on an IEP may be insufficient. School districts must provide parents information sufficient to inform them of the student's progress toward the annual IEP goals. A Montana school district recently faced this issue when a student's parents filed a state department complaint against it. The Montana Education Department (MED) found the district deprived the student of a free appropriate public education when it failed properly to measure and report her educational progress. Important to note, the MED noted that there were no records showing that the district adequately monitored or reported the student's performance and progress. The district argued it sent home samples of the student's schoolwork to the parents that allowed the parents to see the student's progress. The MED held, however, that the student's class work was "already being tracked .... as part of the general education teacher's curriculum" and that the school district should have added provisions to the student's IEP to "track the student's progress or lack of progress ... through testing,

teacher observations, or other means." In the opinion of the MED, something other than what the parents already receive as part of the general education curriculum must be provided in order to inform the parent of the student's progress specifically toward IEP goals. The MED ordered the school district to provide the student with compensatory education and conduct staff training.

If you have any questions about whether your district is properly reporting progress or any other special education issue, please contact your school district's attorney.

Best Practices When Using Criminal Records in Employment Decisions

by Staci L. Roberds

Most employers, including school districts, consider criminal records when making employment decisions. Although Oklahoma statutory law provides requirements for school districts to follow when making certain employment decisions based on criminal background, school districts must also ensure that their employment practices and policies are not unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. An exclusionary practice or policy using criminal records, even if adopted to comply with state law, may violate Title VII if it results in discrimination based on race, color, religion, sex, or national origin and is not job related and consistent with business necessity. The United States Equal Opportunity Commission ("EEOC") has issued enforcement guidance outlining best practices for employers to follow to avoid Title VII liability associated with the use of criminal records in making employment decisions.

Most importantly, the EEOC guidance indicates that employers should avoid blanket policies and practices that exclude any individual from employment if he or she has a criminal record. The EEOC recommends that employers take a more individualized approach when considering prior criminal behavior, including consideration of (1) the nature and gravity of the crime (i.e., consider the nature of the conduct and harm caused and whether the offense resulted in a conviction and was classified as a misdemeanor or a felony), (2) the relation of the criminal conduct to the duties of a particular position, the position's essential functions, and the circumstances under which the position is performed (i.e., establish a link between the specific criminal conduct, potential dangers, and the risks inherent in the particular duties of a position to show an exclusion is job related and consistent with business necessity), and (3) the amount of time that has passed since the offense or conduct occurred. Although an employer should not make an employment decision based solely on an arrest record, it may consider the conduct underlying the arrest when making an employment decision if the conduct makes the individual unfit for the particular position.

The EEOC also recommends that employers engage in an individualized assessment, which involves notifying an individual of the possibility of exclusion

Reminder

If your district is making changes within the administrative team, don't forget to update your Chalkboard and legislation preferences. There is no charge to include as many board members and administrative employees as the district would like. You can get a list of the administrators currently on your district's list or make changes by contacting Michelle (msiegfried@rfrlaw.com).

from employment based on past criminal conduct and providing that individual with the opportunity to demonstrate why the exclusion should not apply, thereby allowing the employer to consider such information provided by the individual in its determination of whether the individual's exclusion is job related and consistent with business necessity. Moreover, the EEOC encourages employers to keep records associated with the development of their policies and procedures for exclusions of individuals based on criminal conduct and to provide the necessary training to pertinent employees on how to implement and apply such policies and procedures. Further, the EEOC suggests that employers limit their questions regarding an individual's criminal record to only those records that are related to the position in question and consistent with business necessity, and it reminds employers that criminal records should be kept confidential and used only for the intended purpose.

In addition to these best practices for employers, school districts should consult the complete EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, which can be found on the EEOC's website, www.eeoc.gov, and includes other information related to the use of criminal records in making employment decisions. If a school district is faced with an issue regarding criminal records, it should not hesitate to contact its attorney with questions.

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

RFR
Rosenstein Fist & Ringold

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

Chalkboard is a Rosenstein, 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 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.

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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