

Chalkboard



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

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Important Reminders for Long-Term Suspensions of Special Education Students

by Cheryl A. Dixon

Because a school district may not suspend a student with a disability for more than 10 consecutive school days for conduct that is related to the student's disability, a school district contemplating suspending a student with a disability for more than 10 days 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 or a failure to implement his IEP, the school district must either conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment prior to the behavior

that resulted in the change of placement occurred, 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. 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 who has been removed 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

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educational services in an interim alternative educational setting determined appropriate by the student's IEP Team.

Under the IDEA, a long-term suspension requires the school district to provide written notice to parents. Also, once the decision has been made to make a change in a student's placement, the school district must notify the parents of that decision and provide them with notice of the procedural safeguards.

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. 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.

OSHA's Hazard Communication Program—What School Districts Need to Know

by Staci L. Roberds

Employers who use hazardous chemicals in their workplaces are required under the Hazard Communication Standard ("HCS") of the Occupational Safety and Health Administration ("OSHA") to develop, implement, and maintain a hazard communication program ("HazCom"). In 2012, the HCS was revised, primarily including modifications related to how chemical manufacturers and importers classify hazards and prepare the required labels and safety data sheets. The revision included an effective completion date of June 1, 2016, by which time employers are required to update their alternative workplace labeling and hazard communication program, including providing employee training.

Employers who use hazardous chemicals . . . are required . . . to develop, implement, and maintain a hazard communication program ("HazCom").

Under the HCS, a HazCom program must be in written form and address labels on containers of hazardous chemicals, safety data sheets for hazardous chemicals, and the training of employees on these issues. The following steps should assist school districts with developing, implementing, and maintaining an effective HazCom program.

Review the Standard

The HCS is found in the Code of Federal Regulations at 29 C.F.R. § 1910.1200. It applies to any hazardous chemical present in the workplace if an employee may be exposed under "normal conditions of use and

foreseeable emergencies.” Several of the provisions are inapplicable to school districts because they address employers that produce or import chemicals. School districts must focus on only those portions of the standard addressing the establishment of a written workplace program and the manner such information is communicated to employees.

The primary portions of the HCS applying to employers who use chemicals in their workplaces are found in paragraphs: (e) written hazard communication program; (f) labels and other forms of warning; (g) safety data sheets; and (h) employee information and training. The HCS also includes paragraphs (b) scope and application and (c) definitions, which should be referenced when interpreting paragraphs (e)-(h). The HCS does not include rigid requirements; instead, it is a performance-oriented standard providing an employer with flexibility to adapt its program to the needs of the workplace.

Assign Staff to Be Responsible for the HazCom Program

In order for a program to be implemented and followed effectively, a school district must assign an employee or employees to coordinate compliance with the requirements for the district’s HazCom program. These employees may need initial training to become familiar with their responsibilities under the HCS, and then should be in the position to share their knowledge with other district employees. Thus, there is a need for staff involvement on two fronts – initially to implement the program and on a continuing basis to ensure compliance with the standard.

Prepare a Written HazCom Program

Once a school district has identified staff to oversee the development and implementation of the district’s HazCom program, the district

must develop a written plan specifically explaining how it plans to address hazard communication within the district. The written program must include how the school district plans to meet the requirements for labels and other forms of warning, safety data sheets, and employee information and training. The written program also requires that school districts maintain a list of hazardous chemicals known to be present in the workplace. These specific requirements are discussed in further detail below:

Label Containers

The primary concern for compliance with this portion of the HazCom program is for school districts to ensure that every purchased container of hazardous chemicals is labeled. Under the 2012 revisions to the HCS, the chemical manufacturer or importer is required to include on the label: (i) the product identifier; (ii) a signal word; (iii) a hazard statement; (iv) pictogram(s); (v) a precautionary statement; and (vi) the name, address and telephone number of the responsible party. Employers may relabel containers as long as certain conditions are met, but employees must always have access to the complete hazard information.

Maintain Safety Data Sheets

Safety data sheets are technical bulletins prepared by chemical manufacturers and importers who have evaluated the hazards of the chemicals they produce or import. Distributors are required to provide their customers with a copy of the safety data sheet. Employers are required to have a safety data sheet for every hazardous chemical that they use but may rely on the information provided by their supplier. For purposes of the written program, a school district must ensure that someone is obtaining and maintaining the safety data sheets. If a data sheet is not received from a supplier automatically, the employer must request one.

Moreover, safety data sheets must be readily accessible by employees when they are at work, and they must be immediately available to medical personnel during an emergency.

Inform and Train Employees

Employees who may be exposed to hazardous chemicals must be provided information and trained by the school district. Employees must be informed that they may be exposed to hazardous chemicals and provided with information and training which allows them to have a general understanding of the information included on labels and on safety data sheets, how to access them, awareness of the protective measures available in the workplace, how to use or implement such protective measures, and who to contact if a situation occurs. Employees should be trained about any hazardous chemicals in their work area before their initial assignment and when any new hazards are introduced into their working environment. Although the HCS does not require that employers maintain training records for employees, it is recommended that they do so.

Perform a Periodic Review of the HazCom Program

Once a HazCom program is developed and implemented, it is important to develop procedures to maintain the current program and to evaluate its effectiveness. Although not required by the HCS, periodic review of a program is advisable to ensure it remains effective and meets all its objectives. Moreover, periodic review allows for a program to be revised based upon any changed conditions in the workplace.

This article provides only a summary of the requirements for developing and

implementing a HazCom program. School Districts are strongly encouraged to review additional resources on OSHA's website, www.osha.gov/dsg/hazcom, which provide more detailed information about the HCS and its requirements, and include sample written hazard communication plans for employers. Moreover, school districts should specifically review the HCS found in the Code of Federal Regulations, 29 C.F.R. § 1910.1200, which can be accessed electronically at www.ecfr.gov, and if necessary, the 2012 revisions to the HCS, published in the Federal Register, 77 FR 17574, also available electronically at www.federalregister.gov. If questions arise, a school district should contact its attorney.

Teacher Use of Crowdfunding Websites

by Adam S. Breipohl

"Crowdfunding" websites like GoFundMe.com and DonorsChoose.org are popular vehicles for fundraising that allow any user to solicit donations from the public for a wide range of charitable or entrepreneurial campaigns.¹ Teachers are no exception to this trend, with many teachers using these sites to raise funds for school-related causes, including anything from funding a trip to a track meet to the purchase of new furniture or supplies for a classroom.

¹ *How It Works*, DONORSCHOOSE.ORG, <http://www.donorschoose.org/about> (last visited Sep. 29, 2015) ("DonorsChoose.org is an online charity that makes it easy for anyone to help students in need. Public school teachers from every corner of America post classroom project requests on our site, and you can give any amount to the project that most inspires you."); see also *How It Works*, GoFundMe, <https://www.gofundme.com/tour/> (last visited Sep. 29, 2015).

While these campaigns can be effective fundraising tools for teachers, the fact that they are typically not approved or monitored by school boards to ensure compliance with state and federal law can create legal pitfalls for school districts.

For instance, use of crowdfunding sites could violate the Oklahoma statute governing school activity funds, which states that school boards “shall exercise control over all funds and revenues ... from student or other extracurricular activities” and other revenue generating sources including “donations to student clubs or other organizations” and “[o]ther income collected for use by school personnel and other school-related adult functions.” This statute requires the board to deposit these funds in an account for the benefit of the activity in the school activity fund. OKLA. STAT. tit. 70, § 5-129. For any funds that fall under the statute, the board is responsible for approving all school activity fund-raising activities and the purposes for which the funds can be expended. *Id.* If a student organization were to use these sites for activities covered by the statute (for example, if the high school robotics club uses GoFundMe to solicit donations raise money for a computer), the board would have a legal obligation under the statute to pre-approve the fundraising activities and exercise control over the funds raised.

Another possible issue with online fundraising is the risk that private fundraising could lead to violations of Title IX of the United States Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which requires “equal athletic opportunities for members of both sexes.” 34 C.F.R. § 106.41(c)(2)(10). While private fundraising and support for athletic programs are allowed under Title IX, school districts are still ultimately responsible for ensuring that “services, benefits and opportunities in its

athletic program are provided on an equivalent basis to both boys and girls, INCLUDING those services, benefits and opportunities that are provided through the use of ‘outside’ financial assistance such as donations, fund-raising by coaches, and booster clubs.” Jurupa Unified School Dist., O.C.R. File No. 09-01-1222 (Feb. 7, 1995) (emphasis in original). Therefore, school districts must monitor money raised by booster clubs and in some cases might need to use school funds to provide a benefit for girls’ teams if boosters have provided the football team with private money, to avoid a Title IX violation. See *id.* Similarly, if the baseball and football coaches use GoFundMe to raise money for new uniforms but the softball and girls’ soccer coaches do not conduct fundraisers or otherwise secure equivalent benefits for their teams, it could create an obligation for the school district to provide the same opportunity to the girls’ teams (possibly at great expense) in order to comply with Title IX.

While the school activity fund statute and Title IX are two authorities that could affirmatively require oversight over certain crowdfunding activities, there are other concerns that could be raised by use of these sites. Teachers may misuse these sites in a way that creates potential liability for their school district, perhaps to buy equipment that is unsafe and later injures a student, or to buy and distribute religious materials to students in a way that would violate the Establishment Clause.²

² See, e.g. *See, e.g. Lawrence v Grant Parish School Bd.*, 409 So. 2d 1316, (La. App. 1982) (School board was liable for negligence for failure to supervise student in classroom containing a power saw); *Berger v. Rensselaer Central School Corporation*, 982 F.2d 1160, 1164–1171 (7th Cir. 1993) (holding that distribution of Bibles to elementary school students in the classroom and gymnasium violated the Establishment Clause).

Unauthorized online fundraisers may also raise tax issues for donors. While donations to public schools themselves or to 501(c)(3) organizations as a part of a board-approved fundraiser are tax-exempt charitable contributions, money raised by an online fundraiser that does not have board approval or follow established procedures such as those laid out by the School Activity Fund statute could end up in the hands of private individuals or organizations such as booster clubs that are not organized under 28 U.S.C. § 501(c)(3) rather than the school district itself (perhaps unbeknownst to the donors). If that were to occur, because the donations would no longer be tax-exempt charitable contributions, the IRS could assess income tax liability. See INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUB. NO. 526, CHARITABLE CONTRIBUTIONS 2-3 (January 3, 2015), *available at* <https://www.irs.gov/publications/p526/ar02.html>.

Finally, school districts should also be aware that these sites do not pass through all of the funds raised directly to the teacher or school, instead typically reserving a percentage of the funds raised to pay for their own expenses.³

For these reasons, school districts should put in place policies that monitor online fundraising activities by employees or students and direct these campaigns through the same channels as more traditional fundraisers to better ensure compliance with applicable law and avoid any liability that could be created by use of crowdfunding sites.

³ DonorsChoose.org states that a total of 7.2% of expenses are allocated to the site's own fundraising, general and administrative costs. *Transparency*, DONORSCHOOSE.ORG, <http://www.donorschoose.org/about/finance.html> (last visited Sep. 29, 2015).



RFR News

Rosenstein, Fist & Ringold is pleased to announce that Adam S. Breipohl has joined the firm as an associate attorney. Adam is a native of Tulsa, Oklahoma and was admitted to the Oklahoma bar in 2015. He graduated from college at the University of Oklahoma (B.A. in Political Science, 2012, with honors) and law school at the University of Texas School of Law (J.D., with honors, 2015). While in law school, Adam served as an Articles Editor on the Review of Litigation.

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 at msiegfried@rfrlaw.com.



Rosenstein, Fist & Ringold employees joined more than 6,000 people for the 2015 Susan G. Komen Race for the Cure on September 26, 2015.

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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.

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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