Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2016 Issue 5

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FCC Issues Ruling Regarding the Use of Robocalls and Automated Text Messages by School Districts

by Staci L. Roberds

On August 4, 2016, the Federal Communications Commission (FCC) released a declaratory ruling, wherein it determined that school districts do not violate the Telephone Consumer Protection Act (TCPA) when making robocalls (calls made with an autodialer or with a prerecorded or artificial voice) or when sending automated text messages to student family wireless phones if the robocalls or text messages fall within the emergency-purpose exception of the TCPA or the student or parent/guardian has provided prior express consent and the call or message is "closely related" to the mission of the school district.

The emergency-purpose exception applies to automated calls or messages sent by a school district that are necessary because of a situation affecting the health and safety of students or faculty. These calls or messages may be made without the prior express consent of the party being called. However, the FCC's ruling encourages school districts to regularly update their emergency call lists to ensure the emergency calls or messages reach the parent/guardian of students and are not received by individuals who have no connection to the school district. Examples of automated calls or messages generated by a school district that would fall under the emergency-purpose exception of the TCPA include those addressing (i) weather closures; (ii) incidents or threats of imminent danger to a school district because of fire, dangerous individuals, or health risks; and (iii) unexcused student absences. The FCC emphasized that the examples are not exhaustive and other types of calls or messages may certainly fall within the emergency-purpose exception if made for health and safety reasons.

The FCC declined to extend the emergency-purpose exception to *all* robocalls or automated text messages sent by school districts. It determined that an informational call or message from a school district does not automatically qualify as an emergency, because

not all robocalls or messages from a school district are made for an emergency purpose. It believed such a finding would leave consumers without a clear means of stopping such calls by revoking consent. However, the FCC concluded non-emergency robocalls or automated text messages are permissible under the TCPA if (i) the called party has provided prior express consent and (ii) the communications from the school district are "closely related to the educational mission of the school or to official school activities." The FCC determined that when the student or parent/guardian has provided the school with a phone number as a contact number, this constitutes prior express consent to school-related communications, unless the person providing the phone number limits consent in some way. Simply put, a non-emergency robocall or automated text message from a school district must be "closely related" to the purpose for which the student or parent/guardian provided the school with the wireless number.

The FCC declined to extend the emergency-purpose exception to *all* robocalls or automated text messages

Examples of non-emergency robocalls or messages include those regarding: (i) an upcoming teacher conference; or (ii) general school activities. The FCC clarified that non-emergency calls lacking "any educational purpose or connection to official school activities" would likely fall outside the scope of consent. For this reason, it encourages school districts to disclose a broad range of potential calls and messages that a student or parent/guardian can expect to receive from the school district.

The FCC's ruling further addresses those situations when a wireless phone number has been reassigned and whether making a robocall or sending an automated message to the reassigned number would result in a violation of the TCPA. Relying on one of its prior rulings, the FCC determined that the caller would have a "one-call opportunity" to remove the number from its call list in situations where the caller lacks actual or constructive knowledge of the reassignment. This again illustrates the importance of a school district routinely updating its call list in order to ensure it has the most current information.

School District officials can review the FCC's ruling of this matter in its entirety on the FCC's website, https://www.fcc.gov. To avoid any potential violation of the TCPA, it is recommended that school districts continue to obtain express consent prior to making any robocalls or sending any automated text messages to student or parent/guardian telephone numbers. If questions remain about the use of robocalls or automated text messages, a school district should not hesitate to contact its attorney for guidance.

FCC Regulations Regarding E-Rate Eligibility and Access to Social Media

by Adam Breipohl

In order to obtain discounted rates on telecommunication and Internet services pursuant to the Federal Communication Commission's (FCC) Schools and Libraries Program, commonly known as "E-Rate," school districts must certify that they are complying with the Children's Internet Protection Act (CIPA) by adopting and

enforcing "Internet safety policies" that provide for measures to protect against access to visual depictions that are obscene, child pornography, or harmful to minors. Some school districts have been operating under the understanding that this requires schools to block access to social media sites such as Facebook, but regulatory guidance issued by the FCC has clarified that school districts are not required to categorically block these sites.

The confusion over this issue began shortly after Congress introduced the CIPA certification requirement in the Protecting Children in the 21st Century Act of 2008, when the Universal Service Administrative Company conducted several audits in which it found that the schools had violated the CIPA requirements by allowing access to Facebook and Myspace. This suggested that to make the required certifications to qualify for E-Rate, schools must block access to social media sites, and some school districts acted accordingly.

However, in 2011 the FCC amended its CIPA regulations and issued an accompanying Report and Order[1] that explained the amendments and clarified several points regarding the interpretation of new and existing CIPA regulations, including the social media issue.

The FCC declined to find that "these websites are per se harmful to minors or fall into one of the categories that schools and libraries must block."

In the 2011 Report and Order, the FCC stated that under CIPA, material that is harmful to minors (and therefore must be blocked) is defined as "any picture, image, image, graphic image file, or other visual depiction that–(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors."

The FCC stated that while individual pages on social media sites like Facebook or Myspace could contain materials that would be harmful to minors if users happened to post such materials, it declined to find that "these websites are per se harmful to minors or fall into one of the categories that schools and libraries must block." It further reasoned that social media sites may have legitimate educational purposes and that blocking them would be inconsistent with CIPA's purpose of educating children on using the Internet responsibly.

Therefore, the FCC's regulations do not require school districts to categorically block access to social media sites to be eligible for the E-Rate program. However, school districts should still be mindful of their obligation under these regulations to monitor the online activities of minors and take appropriate steps to ensure that students are not using social media sites to access inappropriate

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[1] *Schools and Libraries Universal Service Support Mechanism, A National Broadband Plan for Our Future*, CC Docket No. 02-6, GN Docket No. 09-51, Report and Order, 26 FCC Rcd. 11819 (2011).

content at school. Furthermore, school districts that choose to change their practices regarding social media access should also make sure that any amendments to their relevant policies do not violate any other obligations under applicable state and federal laws. School districts should not hesitate to contact their legal counsel with any questions or concerns regarding federal regulatory compliance.

OCR Issues Dear Colleague Letter Regarding Section 504 and Students with ADHD

by Cheryl A. Dixon

On July 26, 2016, the U.S. Department of Education's Office of Civil Rights (OCR) issued a Dear Colleague letter clarifying and providing guidance to School Districts on the obligation under Section 504 of the Rehabilitation Act of 1973 (Section 504) to students with attention deficit hyperactivity disorder (ADHD). Accompanying the Dear Colleague letter is another publication, *Students with ADHD and Section 504: A Resource Guide*. In its Dear Colleague letter, OCR states that through its enforcement efforts it has observed that many students with ADHD are not being appropriately referred, identified, or evaluated for special education and related services by School Districts. In addition, OCR states that even if properly identified, a student with ADHD may not be receiving services that she requires.

The Dear Colleague letter and *Resource Guide* remind Districts that the Section 504 regulations require a District to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the District's jurisdiction, regardless of the nature or severity of the disability, and specifically how this obligation pertains to students with ADHD. Consequently, in the event a student is found ineligible for special education and related services under the Individuals with Disabilities Education Act (IDEA), the School District must consider if the student could be covered under Section 504. Under Section 504, FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual educational needs as adequately as the needs of the District's nondisabled students are met. Failure to provide a qualified student with a 504 Plan could impose liability on the District for failing to provide the student FAPE and/or for discrimination in failing to permit the student equal access to the District's programs or services.

Your District's special education staff should carefully review both the Dear Colleague letter and *Resource Guide*.

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The *Resource Guide* contains detailed discussions on the obligation of Districts to identify, evaluate, make placement determinations, and provide needed services under Section 504 to students with ADHD. The *Resource Guide* also identifies areas in which OCR frequently finds school districts out of compliance with Section 504. Both documents can be found at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf.

If you have any questions or need guidance on this issue, please contact your District's lawyer.

Alert—Upcoming Seminars!
2016 Fall Education Conference, Wednesday, September 28, 2016 at Tulsa Technology Center's Riverside Campus (9:00 a.m. to 12:30 p.m.)
21st Annual Golf Tournament and Fall School Law Update, Wednesday, October 5, 2016 at Bailey Golf Ranch in Owasso, Oklahoma

Legislative & Policy Follow Up

This year the legislature mandated that several state agencies develop rules/procedures impacting public education, and the following matters have now been finalized:

- SB 1269 required that college and career endorsements be reported on transcripts. OSDE has confirmed that this process will not begin until the 2017-2018 school year.

- The state health department will be adding a statement to its website confirming compliance with SB 1164 in the near future but the concussion and head injury fact sheets districts have been using to comply with the 2010 law are still valid.

We are continuing to monitor other OSDE rules and will keep you updated.

Final federal guidance has also been issued related to district wellness. A special client advisory was recently circulated on this topic, but if you need additional information on bringing your wellness policy current please contact Michelle (msiegfried@rfrlaw.com).

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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.

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.

Please use the form on www.rfrlaw.com (located on the Resources page) to add or change Chalkboard e-mail addresses.

2016 Fall Conference

Program At A Glance	
8:00 a.m. to 9:00 a.m.	Registration and Refreshments
9:00 a.m. to 9:45 a.m.	Fair Labor Standards Act (FLSA) — J. Douglas Mann
9:45 a.m. to 10:30 a.m.	Effective Evaluations — Eric D. Wade
10:30 a.m. to 10:45 a.m.	Break
10:45 a.m. to 11:00 a.m.	Policies and Forms — Michelle D. Siegfried
11:00 a.m. to 11:45 a.m.	Disability's Bermuda Triangle: ADA, Workers' Compensation & FMLA? — Karen L. Long
11:45 a.m. to 12:30 p.m.	Terminations and RIFs — Bryan K. Drummond

Date: Wednesday, September 28, 2016

Where: Tulsa Technology Center Riverside Campus, Tulsa

Cost: Free to all Administrators & Board Members of RFR Clients—Public School Districts and Career Technology Centers

For More Information or to Register, look under *In The News* on www.rfrlaw.com

2016 Fall School Law Update and Golf Tournament

Cost: Seminar Registration Fee – $50 per person (first-come first-serve)
Where: Bailey Golf Ranch, 10105 Larkin Bailey Blvd, Owasso, OK 74055 (Location Change)
When: Wednesday, October 5, 2016
Seminar Format: 2 hour update on school law related issues and relevant topics designed to provide you with new insight and direction.
Golf Format: 4 person scramble – no charge for seminar attendees

All participants will receive a complimentary golf shirt (men's and women's sizes available)
Deadline to Register – Wednesday, September 28, 2016

Schedule	
8:30 a.m.	Registration
9:00 a.m. – 11:00 a.m.	School Law Update
11:00 a.m. – 12:00p.m.	Lunch (provided) and Practice Time
12:15p.m.	Golf – Shotgun Start
5:00 p.m.	Awards Presentation