Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2018 Issue 3

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Service Animals and Emotional Support Animals in the Workplace

by Adam S. Breipohl

As demonstrated by a recent (and highly publicized) incident involving an airline passenger who was barred from boarding an aircraft with her emotional support animal, which happened to be a fully-grown male peacock,[1] it is becoming increasingly common for individuals with disabilities to utilize service animals to assist them in various areas of daily life. School districts should be aware of the possibility that an employee request to bring an animal to work could potentially be protected under the Americans with Disabilities Act (the "ADA").

Under Title I of the ADA, which deals with employment of disabled individuals, an employer unlawfully discriminates on the basis of a disability if it fails to make "reasonable accommodations" to the known limitations of an otherwise qualified employee. Interpretive guidance under Title I uses a blind individual being allowed to bring a guide dog to work as an example of a reasonable accommodation, indicating that service animals are considered reasonable accommodations in some circumstances, but does not provide any specific rules to clarify the issue. Federal

UPDATE

2018 RFR School Law Conference Has Been Rescheduled to April 11, 2018 at the Metro Tech Campus in Oklahoma City.

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regulations interpreting Title III of the ADA, which deals with public accommodations (restaurants, movie theaters, etc.) provide some insight into which service animals are afforded protection under the ADA:

> *Service animal* means any dog that is **individually trained to do work or perform task**s for the benefit of an individual with a disability, **including a physical, sensory, psychiatric, intellectual, or other mental disability**... The work or tasks performed by a service animal must be directly related to the individual's disability.... The crime deterrent effects of an animal's presence and the **provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition**.

28 C.F.R. § 36.104 (emphasis added). This definition indicates that service animals that have been specifically trained to perform a task that assists a disabled individual with something related to that individual's disability are more likely to be entitled to protection, but "emotional support animals" that have not received special training and assist their owners by passively providing emotional support are less likely to be protected. However, this would not be binding on a court in Oklahoma faced with an ADA discrimination case involving a service animal in the workplace.

There have been relatively few court decisions dealing with ADA claims related to employees and service animals in the workplace, but such litigation has become more common in recent years. For example, one court held that an employee with reduced ability to walk and dissociative identity disorder was allowed to use a service dog that was trained to assist her with using stairs and getting up after a fall as well as bump into her to rouse her from a dissociative episode. *McDonald v. Department of Environmental Quality*, 214 P.3d 749 (Mont. 2009). Another recent case held that a teacher who suffered from panic attacks was allowed to pursue a claim for ADA discrimination based on evidence that the school district had not allowed her to bring a service dog to work; the dog had been trained to respond to the symptoms of anxiety/panic attacks by providing "deep pressure" to the plaintiff's chest and acting as a physical buffer between the plaintiff and other people. *Clark v. Sch. Dist. Five of Lexington and Richland Counties*, 247 F.

> the question of whether a particular service animal would be a reasonable accommodation for a particular employee would be highly dependent on the facts of a given situation.

Supp. 3d 734 (D. S.C. 2017).

The extent to which employees' use of service animals in the workplace can be considered a reasonable accommodation under the ADA is an issue that has not been definitively resolved, and the question of whether a particular service animal would be a reasonable accommodation for a particular employee would be highly dependent on the facts of a given situation. Nonetheless, school district administrators should be aware that they could create a liability risk for the district if they do not take such requests seriously. School districts that have questions about compliance with state and federal employment discrimination laws should consider contacting their legal counsel.

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[1] http://www.bbc.com/news/world-us-canada-42880690

Political Speech in School Hallways

by Haley A. Drusen

With recent events, student speech is on the rise, particularly regarding issues such as gun regulation and social injustice, and it will undoubtedly remain prevalent as this election year continues along its rapid road. Although it would be easy to reflexively state that politics – especially national politics – has no place in schools, that would be a misstatement of the law governing student political speech.

The United States Supreme Court has recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969). However, "a public school student's First Amendment rights are not coextensive to those held by others." *Newsom ex rel. Newsom v. Albemari Cnty. Sch. Bd.*, 354 F.3d 249, 255 (4th Cir. 2003). Generally, student speech involving political issues is held to be one of the highest forms of protected speech, which a school district generally cannot regulate unless the speech substantially and materially disrupts the educational process.

While it is easy to say that a student's pro-Trump shirt or Bernie Sanders socks qualify as protected speech, school officials have a harder time when the student's political speech advocates for controversial issues rather than candidates. For instance, Oklahoma's 2014 gubernatorial candidate Chad Moody ran on the slogan "God, Grass, and Guns." Does a school need to allow that slogan on campus?

Likely, yes. Though schools can regulate clothing worn by students, that regulatory ability does not extend to all forms political speech. Schools *can* regulate student speech (even political speech) in five different ways: (1) enacting content neutral restrictions, (2) barring "lewd" speech, (3) regulating school-sponsored speech, (4) prohibiting speech reasonably regarded as encouraging illegal drug usage, or (5) managing speech that (a) causes a substantial disruption to the educational envi-

ronment or (b) shows "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514.

First, schools can affect content neutral restrictions on clothing and behavior. For instance, a school that has enacted a policy requiring all students to wear a certain uniform shirt need not permit a student to wear a nonconforming uniform shirt, let alone a politically charged T-Shirt. Generally, content neutral policies do not require any judgment calls on the part of administrators – it is simply a matter of whether the policy has been followed or not.

Next, schools may bar "lewd, vulgar, indecent, or plainly offensive" speech no matter how it is presented. In *Bethel School District n. 401 v. Fraser*, 478 U.S. 675 (1986) the Supreme Court opined that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school's basic educational mission." However, what makes up "lewd, vulgar, indecent, or plainly offensive" speech is a quite narrow category. This category would include curse words and sexually explicit language, but it would not encompass speech advocating political or social action unless the terms used are patently offensive. *See B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) (en banc) (refusing to categorize a breast cancer awareness bracelet as "lewd").

Schools may also regulate speech that is viewed, by a reasonable observer, as school-sponsored speech. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Depending on the situation, this category may include school newspaper publications, school-sponsored student associations' T-Shirt designs, and student presenters. Sometimes, this category also extends to cover students who participate in athletic events. However, administrators should be cautioned – especially in the case of student athletes – that the only speech that would fit into this category would be speech that a "reasonable observer" would view as school sponsored. When examining non-disruptive protests that student athletes have participated in, at least one court has held that a school could not ban protest that reasonable observers would link to "similar, well-known protests" unless the protest was also disruptive. *V.A. v. San Pasqual Valley Unified School District*, No. 17-2471 (S.D. Cal. Dec. 21, 2017) (discussing student athletes taking a knee during the national anthem).

Additionally, schools may regulate speech if that speech is reasonably regarded as encouraging illegal drug usage. The Supreme Court defined this new category of regulation in *Morse v. Fredrick*, 551 U.S. 393 (2007). However, the Court was careful to hold that such regulation was appropriate only when no one could reasonably regard the message as having political connotations. So, while a student could be prohibited from wearing a T-shirt saying "Marijuana is Awesome," the same student probably could not be prohibited from

wearing a T-shirt saying "Legalize Marijuana."

Finally, school administrators can regulate any student speech—even political speech—if it becomes a material and substantial disturbance or if they have a well-founded expectation that it will cause such a disruption. This category would include student walkouts and disruptive student protests. However, case law is quite clear that fear that the speech will cause discomfort in the community does not meet this standard. Additionally, when school administrators preemptively ban a protest for disruption, they must have specific facts that led them to think that disruption is likely. For example, where a school has experienced intense racial conflict, regardless of whether or not it is prompted by displays of the Confederate flag, school administrators will have a strong argument for reasonably forecasting a disruption if the flag is displayed.

While the law is clear that students have the right to express their political viewpoints, when they do so on school grounds school administrators can limit that expression in certain cases. If you have questions about whether your administration can regulate specific school speech, your RFR attorneys are here to help.

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Coaches Exempt from Wage and Overtime Provisions of the FLSA

by Staci L. Roberds

The Wage and Hour Division ("WHD") of the United States Department of Labor ("DOL") recently reissued a prior opinion letter wherein it determined that lay coaches (that is, individuals who are employed by a school district solely as coaches and not in any other capacity) are exempt under the teacher exemption from the wage and overtime provisions of the Fair Labor Standards Act ("FLSA"). This prior opinion letter was reproduced in full and designated by the WHD as an official ruling.

The factual circumstances upon which the WHD based its opinion involved a school district that did not employ any full-time coaches and relied solely on community members to fulfill its coaching needs. The school district's coaches spent most of their time instructing student athletes about the rules and fundamentals of their particular sports, while also devoting time to recruiting students to play sports, supervising team members, disciplining team members when necessary, and accounting for all related equipment. For purposes of its opin-

ion, the WHD assumed (1) the coaches were not employed by the school district in a nonexempt capacity, i.e., as a coach whose primary duties for the school district were unrelated to teaching, such as clerical or administrative tasks, the recruitment of students to play sports, or the performance of manual labor, and (2) the school district qualified as an educational establishment under the DOL's regulations.

The WHD relied upon the DOL regulations, wherein the teacher exemption applies to "any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed." The term "primary duty" refers to the main or most important duty the employee performs for the employer. The WHD reasoned that coaches would qualify under the teacher exemption "if their primary duty is teaching and imparting knowledge to students in an educational establishment." It concluded that coaches primarily performing the duties as represented by the school district were "teaching" as outlined by the applicable regulation, which specifically states that "[t]hose faculty members who … spend a considerable amount of their time in extracurricular activities such as coaching athletic teams … are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student."

The WHD further determined that although DOL's regulations specify that a teaching certificate provides a means by which to identify employees who qualify for the teacher exemption, there is no requirement that an employee have a teaching certificate in order to qualify for the exemption. It explained there is no minimum education or academic degree required for the teacher exemption, thus, the exemption's application is not dependent upon an employee possessing a bachelor's degree. The WHD concluded that a coach whose primary duty is "teaching" qualifies for the exemption regardless of whether he/she holds a teaching certificate or possesses a college degree.

The WHD's opinion applies the teacher exemption from the wage and overtime provisions of the FLSA to coaches who are employed by a school district solely as coaches, and not in a different, nonexempt capacity. When determining the exempt status of a coach, school districts should pay particular attention to the coaches' "primary duties," as the WHD's opinion, although an official ruling, is expressly based upon the facts and circumstances as conveyed by the school district requesting the opinion. If a school district has questions regarding application of the FLSA's teacher exemption to coaches, it should consult with its school attorney.

What Constitutes a Free Appropriate Public Education For Special Education Students

by Cheryl A. Dixon

It has been a year since the U.S. Supreme Court issued its unanimous decision in the case *Endrew F. v. Douglas County Sch. Dist.*, No. 15–827, 580 U.S. ___; 137 S. Ct. 988; 2017 WL 1066260 (March 22, 2017). School districts need to be aware of the Court's decision and how it may affect individual education plans ("IEPs") written by IEP teams as well as the provision of a free appropriate public education ("FAPE") to special education students. The importance of this case has prompted the U.S. Department of Education to issue a Question and Answer document to assist school districts in complying with the FAPE standard expressed in *Endrew F.*

Endrew F. involved an autistic student from Colorado whose parents sued the local school district for private school tuition because the parents claimed their student did not receive a "meaningful" education in the public school. The issue for the Court was whether the standard to be applied in determining whether a student received a FAPE was whether the IEP, as written, was reasonably calculated to confer a meaningful educational benefit or some (de minimus) educational benefit. The U.S. Supreme Court unanimously decided that the standard for a FAPE approved by the Tenth Circuit – an educational benefit that is merely more than a de minimus benefit – was too low. However, the Court declined to set a bright line test (*i.e.*, adopt a standard of a "meaningful educational benefit") and stated that "[t]he adequacy of an IEP turns on the unique circumstances of the child for whom it was created." Importantly, the Court held that to meet its substantive obligation under the IDEA, a school must offer an IEP **reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances**.

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To summarize the U.S. Department of Education's Q&A, to comply with the FAPE standard articulated in *Endrew F.*, each child's educational program must be appropriately ambitious in light of his or her circumstances, and every child should have the chance to meet challenging objectives. IEP teams must develop, monitor, and revise IEPs as necessary to ensure they are appropriately individualized and ambitious. Furthermore, each child's IEP must include, "among other information, an accurate statement of the child's present levels of academic achievement and functional performance and

Red Banner Updates

RFR Red Banner Updates provide concise overviews of new laws impacting public education, and the first updates of 2018 will soon be added to the client only section of the firm's website.

Please email Bernadette Young (byoung@rfrlaw.com) if you need to access or update your information.

measurable annual goals, including academic and functional goals. This information must include how the child's disability affects the child's involvement and progress in the general education curriculum." Additionally, if student behavior is an issue, the IEP team "must include consideration of behavioral needs in the development, review, and revision of IEPs," and, if necessary to provide FAPE, "include appropriate behavioral goals and objectives and other appropriate services and supports in the IEPs of children whose behavior impedes their own learning or the learning of their peers."

The focus of *Endrew F.*, as well as the Q&A, is the individual needs of each particular student. The Q&A stresses the importance of writing IEP goals that are appropriately ambitious so that all children have the opportunity to meet challenging objectives. The complete Q&A can be found at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrewcase-12-07-2017.pdf.

If you have any questions about this issue, or any other special education issue, please contact your school district's attorney.

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