Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2018 Issue 6

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Teacher Dismissal for Out-of-School Misconduct

by Staci L. Roberds

Teachers serve in positions of trust and as role models to students. Thus, the actions of teachers, even away from school, are subject to greater scrutiny than the actions of the average person. School districts sometimes face situations in which a teacher engages in questionable conduct off school grounds and while off duty. A school district may seek to dismiss a teacher for such out-of-school conduct if there is a nexus between the conduct and the effect of the conduct on the teacher's fitness to teach.

Generally, private conduct by a teacher outside the classroom that does not affect a teacher's performance of school duties and responsibilities will not support a teacher's dismissal. However, a teacher's conduct ceases to be private when the conduct directly affects the teacher's performance or the conduct significantly impairs the teacher's ability to meet teaching responsibilities.

When determining whether a teacher's dismissal is supported by a sufficient nexus between a teacher's out-of-school conduct and the effect on the teacher's performance or responsibilities to the school and students, there are several factors a school district should consider: (1) the intent behind the teacher's conduct, e.g., did the teacher intend for the action to be humorous or was there a derogatory intent behind the action; (2) the age of the students taught by the teacher, *e.g.*, the age of the student may determine how impressionable they are with regard to the conduct; (3) the likelihood the conduct may have or can be anticipated to adversely affect students and/or fellow teachers, and the degree of anticipated adversity that may arise from the conduct; (4) the proximity or

remoteness in time of the conduct; (5) the type of teaching certificate held by the teacher; (6) any extenuating or aggravating circumstances surrounding the conduct; and (7) the likelihood that the conduct will reoccur. The primary focus of the nexus factors is how the conduct will affect the teacher's ability to teach, including the teacher's ability to maintain discipline of students, the effect on students, and the attitudes of the students' parents toward the teacher.

The required nexus between the conduct and the effect on the teacher's fitness to teach is generally established if a teacher commits a felony, as a felony is a public offense to which the teacher has no right to privacy. For example, conduct that involves criminal violence, the potential of violence, violent action against a child, actions involving the illegal possession of a weapon, the illegal possession of drugs, and conduct involving sexual acts with minors, will likely meet the nexus test because such acts would make parents fearful for their children's safety, impair the teacher's ability to discipline and counsel children, and could potentially confuse students in light of the drug and violence-free message promoted by schools and communities. Moreover, such conduct would be counter to one of the goals of education—instilling in students respect for the law. For non-felony and non-criminal conduct by a teacher, the nexus factors become even more important, but the required nexus may still be established if the conduct has a reasonable and adverse relationship to a teacher's continuing ability to perform professional duties in an effective manner.

A board of education may dismiss a teacher based upon the harm that is likely to occur if the teacher remains an employee of the district.

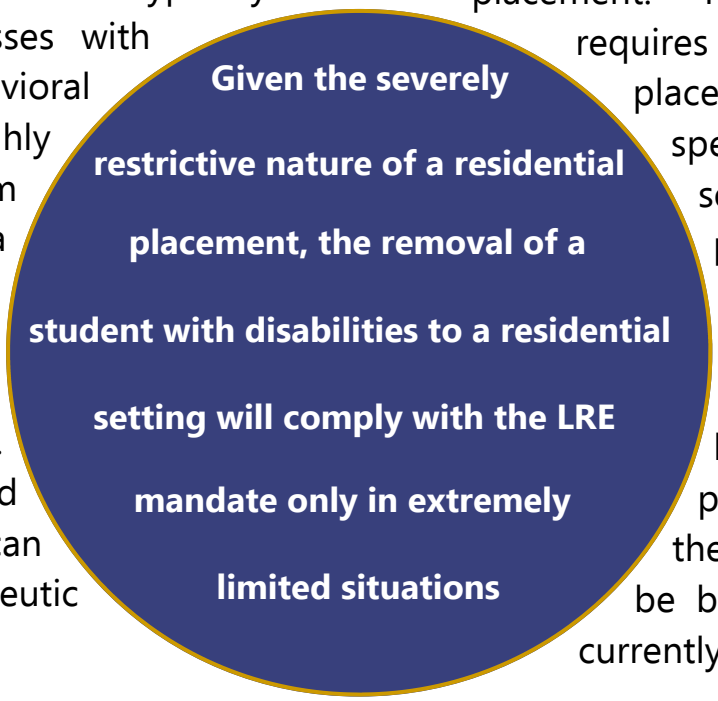
It is only the likelihood that a teacher's conduct will have an adverse effect on students or the teacher's duties that must be demonstrated to support a teacher's dismissal. A teacher does not have to be convicted of a crime to be dismissed, as the dismissal of the teacher is not sought because of a conviction, but it is based upon the nature of the conduct itself. It is the duty of a school district's superintendent to examine the teacher's conduct and determine whether a sufficient nexus exists. Likewise, when deciding whether to dismiss a teacher based upon the recommendation of the superintendent, a school district's board of education is not required to wait until actual harm occurs at school. A board of education may dismiss a teacher based upon the harm that is likely to occur if the teacher remains an employee of the district.

If a school district has specific or general questions regarding teacher dismissals based upon out-of-school conduct or any other questions regarding district employee dismissals, it is encouraged to contact its attorney for guidance.

LRE Requirement and Therapeutic Placements

by Cheryl A. Dixon

The least restrictive environment ("LRE") requirement of the Individuals with Disabilities Education Act (the "IDEA") requires that students with disabilities be educated with their nondisabled peers to the maximum extent appropriate. While the IDEA does not define "therapeutic placement," such a placement typically consists of small classes with emotional and/or behavioral support, such as a highly structured classroom setting with a therapeutic component to provide a student with social-emotional support. Both day schools and residential facilities can qualify as therapeutic placements.



Under the IDEA's LRE requirement, students with disabilities must not be placed in special classes, separate schools, or otherwise removed from the regular education environment unless "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR 300.114 (a). Because a therapeutic placement would likely require a student's removal from the general education environment, therapeutic placements are considered one of the most restrictive placements on the LRE continuum.

School Districts must consider a continuum of alternative placements for students with emotional disturbances or behavioral problems. If a student cannot return to a general education classroom, the student's IEP team should evaluate whether he can be educated in a setting that is less restrictive than a therapeutic placement. However, if a student requires a therapeutic placement to benefit from special education services, the therapeutic placement may be that student's LRE. As with other placement decisions, the decision by the IEP team to place a student in a therapeutic setting must be based on the student's currently identified needs.

Given the severely restrictive nature of a residential placement, the removal of a student with disabilities to a residential

setting will comply with the LRE mandate only in extremely limited situations, such as, for example, a student with severe disabilities who is unable to receive FAPE in a less restrictive environment. Just because an evaluation indicates a student's need for a therapeutic placement does not mean the school district has an obligation to place the student in a residential facility. On the contrary, federal courts have held that a school district must provide a residential placement only when doing so is necessary for the student to make educational progress. Therefore, an IEP team should consider whether a student requires a residential placement only if the student is not making progress in a therapeutic day program. Conversely, a residential placement is likely not required when the student is making progress in a less restrictive therapeutic day program.

If you need assistance with this issue, or any other special education matter, please contact your school district's attorney for guidance.

New Dates for School District Board Elections

by Haley A. Drusen

Beginning in 2019, election dates for board of education members are changing. HB 2082 goes into effect November 1, 2018. This bill switches the dates of the former general and run-off elections for board of education elections in School Districts having more than 10,000 children in average daily membership. Instead, those school districts will have a primary election—if necessary—in February and a general election in April.

The second Tuesday in February (or the date of the Presidential Preference Primary, if held in February) will now be the date of a primary election for candidates for the board of education. Primary elections will be held only if more than two candidates qualify to have their names appear on the ballot for a position on the board of education. If one candidate receives more than fifty percent of the votes cast, that candidate will be elected to office and there will be no general election. Otherwise, the two candidates with the most votes will proceed to the general election.

The general election will now be held on the first Tuesday in April each year. The two candidates who qualify to have their names appear in this election (either because they are the only two candidates that ran for the position or because no candidate received a majority of all votes cast in the primary election) will appear on the ballot. The candidate that receives the majority of all votes cast will be elected.

This legislative change does not affect the dates for filing declarations of candidacy

which is the first Monday in December through the following Wednesday. However, this legislative change means that school districts will need to update their election resolutions to reflect the new system of primary and general election. As a reminder, these resolutions must be served on the County Election Board no later than fifteen days prior to the candidate filing period.

If your District has any questions about these legislative changes or would like assistance preparing your election resolution, RFR is here to help. Your school attorney can help guide you through any questions or concerns your District may have.

Employee Military Leave of Absence

by N. Roxane Mock

Approximately 800,000 Americans serve in the Reserve and Guard components of the United States Armed Forces. Members of the Reserve and Guard components are required to attend unit training assemblies twelve (12) weekends a year as well as several weeks or months of active duty for training, temporary deployments, and long-term deployments. Most of these Americans also have full-time civilian employers. The Uniformed Services Employment and Reemployment Rights Act ("USERRA") provides guidance and instruction to employers on how to treat employees who are absent from their

Major Election Events	Date for 2019 Elections
Election Resolutions must be served on County Election Board	November 16, 2018
Deadline for Publishing Legal Notice	November 23, 2018
Candidate Filing Period	December 3-5, 2018
Primary Election (if necessary)	February 12, 2019
General Election	April 2, 2019

civilian employment as a result of their military service.

USERRA provides that an employee who is absent from civilian employment while performing military duty is deemed to be on furlough or a leave of absence. There is no obligation under USERRA to pay an employee during a period of military service. However, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or a leave of absence. The non-seniority rights and benefits to which an employee is entitled during a period of military service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or a leave of absence.

USERRA provides that an employee who is absent from civilian employment while performing military duty is deemed to be on furlough or a leave of absence.

If the non-seniority benefits to which employees on furlough or a leave of absence are entitled vary according to the type of leave, the employee that is on a leave of absence due to military service must be given the most favorable treatment accorded to any comparable form of leave when he or she performs military service. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered. This means that if a school district provides similarly situated employees with paid leaves of absence or paid holidays while employees are on a leave of absence, then employers are required to also provide that same pay to employees that are on a leave of absence for military service.

School districts should be aware that Oklahoma law provides that teachers who are absent due to military service are

owed thirty (30) days of pay without loss of status or efficiency rating and without loss of pay during the first thirty (30) days of such leave of absence. The Oklahoma Attorney General has interpreted the use of the word "days" to mean working days as opposed to calendar days. This means that a teacher who is absent for military service is entitled to his or her full regular pay during the first thirty (30) regularly scheduled work days that he or she is absent due to military service. Oklahoma law also provides that support employees are entitled to thirty (30) calendar days or the first thirty (30) regularly scheduled work days, not to exceed two hundred forty (240) hours, of pay during a military leave of absence. Support employees entitled to pay during a military leave of absence are those support employees who are employed twenty-five (25) hours or more per week.

If you have any questions regarding employer requirements while an employee is absent because of a military leave of absence, please contact your school district's attorney.

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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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