Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2018 Issue 8

In this issue:

School District Contractors with Past Felony or Sex Offense Convictions

by Adam S. Briepohl

School districts are likely aware that Oklahoma law dictates that individuals with recent felony convictions, and particularly sex offenders, should not be employed to work at school, and school districts should therefore take appropriate steps to vet prospective employees. However, outside contractors whose employees perform work on school grounds may not be so diligent. For this reason, Oklahoma law requires districts to take certain steps to prevent their contractors from allowing those with certain criminal histories onto school property.

This area of the law is governed by OKLA. STAT. tit. 70, § 6-101.48, which imposes two rules prohibiting certain classes of persons from performing work on school grounds. The first provision states that "[n]o person or business having a contract with a school or school district to perform work on a full-time or part-time basis that would otherwise be performed by school district employees" shall allow any of its employees to perform work on school grounds if that employee has been convicted of any felony offense in the last ten (10) years, unless the employee has been pardoned.

The statute goes on to state that, for all other school district contractors, *i.e.* those who do not perform work that would ordinarily be performed by school employees, the contractor "shall at the time of contracting be required to sign a statement declaring that no employee working on school premises under the authority of the business is currently registered or required to register under the provisions of the Oklahoma Sex Offenders Registration Act or the Mary

Rippy Violent Crime Offenders Registration Act." This provision further states that compliance with this requirement is the responsibility of the contactor only, and "there shall be no obligation placed upon a school district to ascertain the truthfulness of the affidavit."

Technically, this statute provides for two separate rules for each category of contractor described above, and does not specifically require school districts to obtain an affidavit from contractors falling within the first category (or provide the accompanying exculpatory language for school districts that obtain the affidavit). Nonetheless, the best practice is for school districts to err on the side of caution by requiring **all** contractors to provide a signed affidavit stating that (1) the contractor will not allow any of its employees to perform work at school that would otherwise be performed by school employees if the employee has been convicted of a felony in the last 10 years, and (2) the contractor will not allow any employee to perform work at school, regardless of the employee's specific job duties, if that employee is required to register either as a sex offender or under the Mary Rippy Act.

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Finally, another provision of the same law provides school district contractors who are subject to the above requirements are allowed to obtain a felony records search of their employees through the Oklahoma State Department of Education, using the same process that school districts use to conduct such background checks on their own prospective employees. This provision helps to mitigate the additional burdens on school district contractors imposed by Section 6-101.48 by allowing contractors to use a streamlined process to verify that their employees do not have felony convictions that would disqualify them from working at school.

Overall, Section 6-101.48 imposes obligations on both school districts and their contractors to ensure that those individuals who pose an undue risk of acting inappropriately are not allowed onto campus, which districts must keep in mind in order to protect their students, employees, and the district itself. School districts that have questions regarding liability issues regarding contractors or campus safety/ security issues in general should consider contacting their legal counsel.

Communications Error: The Unintentional Open Record

by Haley A. Drusen

With recent innovations in technology, communication has become easier and quicker than ever before. In this era of instant messaging, text messaging, and social media, response speed can seem more important than accuracy or formality in a communication. However, a teacher sending an "informal" email about a student or text messaging a parent on the teacher's personal cell phone may have unintended consequences for school districts. These communications create records that the school districts may have to produce to parents, the public, or an opposing party in litigation upon request.

Because school districts are both public entities and educational institutions, school district records primarily fall into three categories: open records, confidential records, and educational records. Under Oklahoma law, the documents that a public entity creates and receives in connection with public business, the expenditure of public funds, or the administration of public property is a "record" no matter what format that document is presented in. *See* OKLA. STAT. tit. 51, § 24A.3. A majority of these documents are "open records" which must be open to inspection and copying by the public upon request. *Id.* § 24A.5. Certain documents, however, are considered confidential, which provides these records with certain protections against inspections based on an open records request. *Id.* Types of records categorized as "confidential" include, but are not limited to, documents protected by attorney-client privilege, records created during executive sessions of public meetings, certain personnel records, teacher lesson plans and teaching material, and individual student records.

Educational records are a special type of confidential record. Even though these records would not be subject to disclosure under an open records request by the public, parents and eligible students have the right to inspect and review these records under a federal law known as the Family Educational Rights and Privacy Act of 1974 (FERPA). Under FERPA, a document is an "education record" if it (1) contains information directly related to a student and (2) is maintained by an educational agency or institution or by a person acting on their behalf. 20 U.S.C. § 1232g(a)(4)(A). It is not always clear whether a particular electronic communication is "maintained" by a school district, and courts and agencies have resolved these disputes differently depending on the facts of each situation.

Because the definitions of a "record" and an "educational record" are based on the content of the message rather than the message's format, school employees may unintentionally create records that the school district would have to produce for inspection. This is particularly worrisome

when these records contain "inside" jokes or commentary that does not meet the standards of professionalism. Though these informal comments and jokes may make sense at the time, explaining their meaning to the Office of Civil Rights during an investigation two years later may be difficult.

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While the best solution to "informal" emails sent on district systems is training employees on open records and email formality, teachers using a personal device for communications (including personal email addresses and text messaging) can be a more difficult challenge to handle. Unlike records created using district provided emails, the school district may not even know these records exist, much less be able to produce them if requested under a record request or in litigation. However, if teachers or administrators use these devices to conduct public business, these devices may well hold open records that the public is entitled to inspect. Additionally, failing to produce these records—especially when the requesting parent knows that the record exists because they were a party to the communication—could paint the district as intentionally withholding information. Districts should consider the following steps to address personal device usage:

- **Develop a policy regarding whether employees can permissibly use their personal devices to conduct school business.** Schools concerned about employees using their personal devices to conduct school business should first develop and approve a board policy regarding personal device usage. This policy could prohibit use of personal devices for all or certain categories of employees, allow employees to use personal devices but require employees to turn over relevant records when requested or when they leave the district, or permit personal devices to be used, but limit employees to using certain district-monitored applications to communicate with students or parents.

- **Educate administrators and teachers on the issues related to using personal devices to contact parents or students and train them how to tactfully refuse to share their personal account information with parents.** Parents often ask teachers for their personal information so that they can contact the teacher easily regarding issues pertaining to their child. While having a teacher's cell phone number may give parents a sense of security, explaining to parents

(and teachers) the issues related to communicating on personal devices—including the issues related to student records—may curb some of these requests.

If your district has any questions regarding records, records requests, or creating a personal device policy, your RFR attorneys are here to help. Your school attorney can help guide you through any questions or concerns your District may have.

Best Practices for School Districts Regarding Employee Investigations

by Staci L. Roberds

When a school district receives a complaint about an employee or learns of potential misconduct by an employee, a prompt and effective investigation is required not only to sort out fact from fiction but also to obtain all relevant information, make informed judgments, and take prompt and appropriate action. The failure to conduct a thorough and prompt investigation can cause employees to question a school district's commitment to maintaining an ethical workplace and lead to flawed disciplinary action against the offending employee, and it may ultimately subject a school district to future litigation by an employee or other individual.

Finally, having an investigation process in place allows for a district to familiarize district employees with that process.

A school district is likely to have policies and procedures in place for a vast array of issues. School districts should educate school employees regarding such policies and any pertinent compliant procedures. Moreover, a school district should have a general investigation procedure and time line established prior to the occurrence of an employment issue. This is important for several reasons. First, by having an investigation process in place, a school district will not be creating its process as it investigates an employee matter. Second, having a standard time line in place for each step of the investigation process (*e.g.*, investigation, resolution, and appeal) allows for a school district to monitor the investigation's progress. Finally, having an investigation process in place allows for a district to familiarize district employees with that process.

Once a school district learns of a complaint, it should (1) confirm that an investigation is necessary, (2) determine the scope of the investigation based upon the matter at issue, (3) decide who should investigate (one or more individuals), and (4) establish the objective of the investigation. It is a school

district's responsibility to ensure that an investigation is fair. The investigator must be impartial when conducting the investigation, and he/she must maintain confidentiality as to those involved in the investigation. If an investigation into an employee matter is necessary, a school district should review the investigation plan in order to ensure the proper people are interviewed and any appropriate documentation is requested. These initial steps should be completed quickly, so as not to delay the investigation process.

Although the investigative process must be sufficiently fluid to deal with the various potential employment issues that can arise, an investigation should generally include (1) interviews with any witnesses, (2) interviews with the accused employee and/ or the complainant, (3) gathering relevant documents, including signed statements from witnesses, the accused employee, and/or the complainant, and (4) detailed documentation of the investigative process utilized by a district's investigator. A school district also may consider the use of a court reporter, audio, or video recording of certain interviews or may elect to have a second individual present during an interview to serve as a witness who can later corroborate what occurred during the interview.

Prior to interviewing the accused employee and/or the complainant, the district's investigator should review any pertinent personnel files to determine if there is anything relevant to the matter being investigated in the employee file. The investigator should also make sure that if the investigation is based upon a complaint, the complainant understands that he/she has responsibilities beyond making the complaint. He/she should produce any documents concerning the complaint, should be readily available for an interview, and should promptly respond to questions from the investigator.

Prior to concluding the investigation, a school district's investigator should (1) determine if there are outstanding issues that need further investigation, (2) determine the facts accumulated from the investigation, *i.e.,* distinguish fact from opinion or speculation, (3) determine any job or school-related consequences for the employee based upon the findings of the investigation, including any cause for discipline or the range of penalties available, considering policies, procedures, and/or past practice (have disciplinary practices been consistent), and (4) consider any mitigating circumstances, including confidentiality and privacy concerns. If further investigation is unnecessary, the school district should take prompt and effective action and should not prolong the process.

School districts are reminded that employment decisions cannot be made based upon consideration of factors such as race, sex, religion, age, or disability. Moreover, the accused employee is entitled

to notice of the allegations which form the basis for any proposed action, an explanation of the evidence against the employee, *i.e.,* the reason for the recommended adverse action, and the opportunity to present his/her side of the story. This may or may not involve an employee hearing depending upon the employee's position with the district and/or Oklahoma law.

Depending on the employment issue involved, several questions may arise regarding a school district's investigation process and how to handle any resulting disciplinary issues involving a district employee. When this occurs, school districts are reminded to contact their attorney for guidance through the investigation process and procedure, and if necessary, to ensure the proper disciplinary procedure is followed.

When a Manifestation Determination must be Conducted for a Student on a 504 Plan

by Cheryl A. Dixon

As a general rule, a change of placement of students with disabilities because of a violation of a code of student conduct is treated the same way under both the Individuals with Disabilities Education Act ("the IDEA") and Section 504 of the Rehabilitation Act ("Section 504"). The U.S. Department of Education's Office of Civil Rights ("OCR") has stated that the same protections available to students classified as students with disabilities under the IDEA are available to students classified as students with disabilities under Section 504, except for students who have a disability solely by virtue of alcoholism or drug addiction.

There is one notable difference, however. Under the IDEA, if the manifestation determination team determines that a student's conduct is not related to a disability, the district must continue to provide 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 her IEP goals. 34 CFR 300.530 (d)(1)(i).

There is no such requirement under Section 504. *See Millcreek Twp. (PA) Sch. Dist.,* 16 IDELR 741 (OCR 1989). Nevertheless, Section 504 does have certain requirements for districts making placement decisions for students with disabilities. When a disciplinary removal constitutes a change in placement, 34 CFR 104.35 requires districts to consider whether a student's new placement is appropriate and will provide a free appropriate public education ("FAPE") given the student's disability-related needs. *See Grossmont (CA) Union High Sch. Dist.,* 113 LRP 27939 (OCR 04/17/13).

Section 504 places requirements on school districts if a student experiences a "significant change in placement." 34 CFR 104.35(a). Therefore, the OCR has taken the position that moving a student to an

alternative education setting constitutes a change of placement for which a manifestation determination must be conducted. Typically, a change of placement occurs due to a long term suspension of a student. In some situations, however, a student may be placed in an alternative education setting instead of being suspended. In determining whether a "change in educational placement" has occurred, the school district must determine whether the proposed change would substantially or materially alter the child's educational program. In making such a determination, the effect of the change in location on the following factors must be examined:

a) whether the educational program set out in the child's IEP has been revised;
b) whether the child will be able to be educated with nondisabled children to the same extent;
c) whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and
d) whether the new placement option is the same option on the continuum of alternative placements.

If this inquiry leads to the conclusion that a substantial or material change in the child's educational program has occurred, a manifestation determination meeting must be conducted.

Section 504 issues have been emerging and do not appear to be fully understood by school districts. To address this issue, training is being developed to assist school district personnel in complying with Section 504. Please let us know if you would like more information on available training.

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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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