Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2019 Issue 2

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2018 Farm Bill's Legalization of Hemp, Hemp Products, and Hemp CBD Oil

by N. Roxane Mock

The Agricultural Improvement Act of 2018 (the "2018 Farm Bill"), was signed by President Trump on December 20, 2018. The 2018 Farm Bill modified the definition of marijuana in the Controlled Substances Act (the "CSA") by excluding hemp with a THC content of .3 percent on a dry weight basis from the definition. Hemp is a variety of plant in the cannabis family that contains less cannabidiol, often referred to as "CBD," than the marijuana plant. As a result of this change, federal law no longer prohibits individuals from possessing hemp, hemp products, or hemp CBD oil with a THC content of .3 percent or less. However, possession and use of hemp, hemp products, and hemp CBD oil is also regulated by Oklahoma law.

Oklahoma law regulates drugs and controlled substances via the state's Uniform Controlled Substances Act ("UCSA"). Oklahoma law has previously removed hemp and pure CBD oil that is THC free from the UCSA's definition of marijuana. In Oklahoma, whether hemp, a hemp product, or hemp CBD oil is legal depends upon the THC content contained in the hemp, hemp product, or hemp CBD oil. Currently, Oklahoma law is stricter in its regulation of hemp, hemp products, and hemp CBD oil as compared to corresponding federal law.

Oklahoma citizens may legally possess and use hemp, hemp products, and hemp CBD oil with zero percent THC. If an Oklahoma citizen has an Oklahoma medical marijuana license, then a citizen may legally possess and use hemp, hemp products, or hemp CBD oil with a THC content of .3 percent or less. Oklahoma law also provides for exceptions for possession of hemp, hemp

products, and hemp CBD oil with .3 percent or less THC content for certain enumerated medical conditions so long as the citizen has a certification from an Oklahoma licensed physician stating that the citizen has one of the statutory enumerated conditions. Those enumerated conditions include: Lennox-Gastaut Syndrome; Dravet Syndrome; any other severe form of epilepsy that is not adequately treated by traditional medical therapies; spasticity due to multiple sclerosis or paraplegia; intractable nausea and vomiting; or appetite stimulation with chronic wasting diseases. Individuals meeting these qualifications must receive hemp CBD in a liquid form.

The 2018 Farm Bill undoubtedly requires that school districts reconsider and possibly revise or add to their current medical marijuana policies. These changes in the legal landscape surrounding medical marijuana and hemp may result in a student, employee, or individual on school district grounds legally using hemp, hemp products, or hemp CBD oil. Because of this school districts are encouraged to examine their current medical marijuana policy with the 2018 Farm Bill and UCSA provisions in mind so that school districts can regulate medical marijuana and hemp in accordance with state and federal laws. *If you have any questions about implementing these changes into your school district's medical marijuana policy, please contact your school district's attorney.*

Technical Assistance Issued on FERPA and School Safety

by Cheryl A. Dixon

The U.S. Department of Education's Privacy Technical Assistance Center has released a Q&A on the Family Educational Rights and Privacy Act ("FERPA"). *The School Resource Officers, School Law Enforcement Units and the Family Educational Rights and Privacy Act ("FERPA")* was released in response to a recommendation by the Final Report of the Federal Commission on School Safety that the U.S. Department of Education provide assistance to clarify the "substantial misunderstanding" by school district personnel concerning FERPA and school-based threats of violence.

The Q&A states that while FERPA generally requires that written consent be obtained from a parent or eligible student prior to disclosure of confidential student records and student personally identifiable information ("PII") contained therein, FERPA gives school districts flexibility to disclose PII under certain limited circumstances in order to maintain school safety. The Q&A is focused on health or safety emergencies faced by public elementary and secondary schools and includes discussion of several "health or safety emergency" exceptions to the consent requirement.

Among some of the questions the Q&A addresses are as follows:

Can law enforcement unit officials who are school employees be considered school officials with legitimate educational interest?

Yes, if certain conditions apply. A law enforcement unit official who is a school employee generally will be considered a school official to whom disclosure may be made without consent, if the law enforcement official meets the criteria specified in your district's annual FERPA rights to parents as being a "school official" with a legitimate "need to know."

Can law enforcement unit officials who are off-duty police officers or SROs be considered school officials under FERPA and, therefore, have access to students' education records?

Yes, if certain conditions are met. Under FERPA, districts may consider law enforcement unit officials, such as off-duty police officers and SROs, to be "school officials" if the district has outsourced the function of providing safety and security for the district to the law enforcement unit officials.

When is it permissible to disclose student education records under FERPA's health and safety emergency exception?

FERPA's health and safety emergency provision permits disclosure to appropriate parties when it is necessary to protect the health and safety of the student or other individuals.

Does FERPA permit school officials to release information that they personally observed or of which they have personal knowledge?

As FERPA applies to education records and PII from education records, it does not prohibit a school official from releasing information that they personally observed or know that is not obtained from student records.

The full Q&A can be found at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf. If you have questions about FERPA or any of its exceptions, please contact your school district's attorney.

Best Practices for Protecting School District Trademarks

by Adam S. Breipohl

Trademark law has important implications for school districts; it offers districts both opportunities to protect their property rights in their names, logos, etc. (and associated revenue streams), as well as legal pitfalls for districts that fail to follow best practices. School districts should take care to protect their trademarks from misuse and ensure that their practices do not create a liability risk.

Trademarks are defined as "any word, name, symbol, emblem, or device or any combination thereof adopted and used by a person to identify goods made or sold or services rendered by him and to distinguish them from goods made or sold or services rendered by others." OKLA. STAT.

tit. 78, § 21(A). The purpose of trademark law is to protect members of the public from being misled as to the source of products or services. For example, when motorists on the highway see a billboard bearing the trademarked "golden arches," they know that the restaurant at the next exit is a genuine McDonald's franchise and not an off-brand imitator, because other restaurants are barred from using that logo under state and federal trademark laws.

In the school context, trademarks that are commonly owned by school districts include the district's name, team nicknames, logos, and wordmarks, and the main area of activity by districts that implicates trademark law is the creation and sale of merchandise bearing the district's trademarks. From a legal standpoint, there are two main areas that should be of concern to school districts: protecting the district's trademarks from misuse by third parties, and protecting the district from allegations that it is misusing trademarks owned by third parties.

One important way to protect a district's trademarks from misuse by others is to register them with the Oklahoma Secretary of State, which entails completing an application and providing various information such as an example and detailed description of the trademark, information on how the trademark is used, etc. This process is relatively technical in nature, so it is advisable for districts to seek the assistance of legal counsel in undertaking it. The main benefit of registration is that in a trademark infringement lawsuit, it becomes much easier to prove the district's ownership of the relevant trademark(s) if it has registered the trademark before the case began. There is also a parallel federal system of trademark registration, but federal registration is much more involved and confers benefits that are less useful to a school district that does little, if any, business outside Oklahoma, and is typically less important for Oklahoma school districts.

This process is relatively technical in nature, so it is advisable for districts to seek the assistance of legal counsel in undertaking it.

Districts should also consider adopting written policies governing trademark use. These policies should address issues such as listing which trademarks the district owns, requiring any outside entity that wishes to use a school district trademark to obtain a license, and providing procedures for them to do so, and guidelines for the use of district trademarks by licensees.

Finally, school districts should review their existing trademarks to ensure that they are not overly similar to existing trademarks. In some cases, professional sports organizations and universities have

become aware of school districts using logos that are similar to their own and raised allegations of trademark infringement as a result. While it may be possible to resolve such issues through negotiation of a license agreement, the better course of action is to preemptively review the district's trademarks to determine whether changes may need to be made to avoid trademark infringement.

School districts that have questions regarding trademark law, whether related to registration of trademarks, compliance issues, or how to respond to potential infringement by third parties, should consider contacting their legal counsel.

Confidentiality of Student Records

by Staci L. Roberds

Even when a school district is not a party to a lawsuit, it may receive a subpoena for student records. Such records often include confidential information and should not be produced unless a court orders disclosure.

Federal and state law protects certain student records and information from disclosure. The Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, is a federal law that protects the privacy interests of parents and students. FERPA forbids providing access to personally identifiable information in education records, other than "directory" information as set out by school policy, unless one of two conditions occurs. Parents may provide express written consent to the disclosure of records, or a judicial order may demand it. Thus, a subpoena for such records is not enough. Although a school district need not seek prior consent when a judicial order compels disclosure, a school district must make a "reasonable effort" to give advanced notice to parents, providing them time to seek protective action against the order.

As stated above, FERPA does allow for the disclosure of student "directory" information without consent if a parent/ student has been notified about "directory" information and is given a reasonable amount of time to request that the school district not disclose the information. "Directory" information includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

The Oklahoma Open Records Act also references the confidential nature of student records in OKLA. STAT. tit. 51, § 24A.16. That statute defines student "directory" information in the same manner as FERPA and provides that a school district making student "directory" information public must give notice to a

student and/or parent of the categories of information it has designated as directory information. It also requires that a school district allow a reasonable time after such notice for the student and/or parent to notify the school that he/she does not want such information disclosed without prior consent of the student and/or parent. The Open Records Act further allows for a school district to keep individual student records and personal communications concerning individual students confidential.

Further, the Oklahoma Children's Code specifically states that "nondirectory education records" are confidential and should only be disclosed pursuant to a court order in OKLA. STAT. tit. 10A, § 1-6-102. A subpoena or subpoena duces tecum compelling testimony or disclosure of such records is deemed invalid. The Children's Code includes a detailed procedure outlining the steps that must be taken by a party requesting such records and the steps a court will take when determining whether to order the disclosure of confidential student records.

Determining what information is or is not confidential when responding to a subpoena for student records can be a difficult task with implications under both federal and state law. If a school district receives a subpoena for student records, the school district should notify its attorney for guidance in determining the confidential nature of the records requested and how the school district should proceed with responding to the request.

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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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