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## Employee Drug Testing Safety Sensitive Positions and Medical Marijuana

by Haley A. Drusen

The beginning of the school year is always busy: getting staff hired, prepared, and ready to greet students in busy classrooms. As part of the hiring process and throughout the year, many school districts drug test their employees to make sure that student and employee safety is a top priority. In light of the legalization of medical marijuana and the recent passage of the Unity Bill, school districts should be aware of how these recent statutory changes affect the ways in which they can discipline employees who are legally using medical marijuana.

With the exception of mandatory drug testing for employees performing CDL driving duties (which is governed by the U.S. Department of Transportation standards), employers (including school districts) have the option of requiring

employees and applicants to submit to certain drug/alcohol testing consistent with Oklahoma law. Under the *Standards for Workplace Drug and Alcohol Testing Act*, OKLA. STAT. tit. 40, § 551, in order to test employees for drugs and alcohol, the employer must have a detailed written policy describing its drug testing procedures. Among other requirements, this policy must state which employees are subject to testing and any potential adverse personnel action which may be taken as a result of a positive test result.

State Question 788 and the legalization of medical marijuana changed how employers could discipline medical marijuana license holders for a positive drug test. Under SQ 788, unless failure to do so would cause an employer to imminently lose a monetary or licensing related benefit

under federal law or regulations, employers could not refuse to hire, discipline, discharge, or otherwise penalize any applicant or employee for (1) their status as a medical marijuana holder or (2) based on the results of a drug test showing positive for marijuana or its components.

The recent passage of the Unity Bill, HB 2612 (effective August 29, 2019) changes these requirements. Under the Unity Bill, an employer still may not refuse to hire, discipline, discharge, or otherwise penalize any applicant or employee for their status as a medical marijuana holder. However, the law clarifies that *on the basis of a positive drug test for marijuana* an employer may take action against any employee or applicant who is a license holder

if (1) the licensee possess, consumes, or is under the influence of medical marijuana while at their place of employment or during the fulfillment of employment obligations, or (2) the employee's position is one involving "safety-sensitive duties."

The Unity Bill defines "safety sensitive" as "any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others" and provides a non-exclusive list of nine

categories of job duties that would qualify. These categories of job duties include carrying a firearm, dispensing pharmaceuticals, operating heavy machinery or equipment, and the handling of potential volatile, flammable, combustible materials or chemicals, among others. School districts should note that this list is non-exclusive and, therefore, positions that do not fit within one of the listed categories may still qualify as "safety sensitive" if the school district reasonably believes that the duties carried out could affect employee or student safety. However, we would caution districts that expanding this category too extensively may encourage litigation. We encourage districts who wish to designate certain employment positions as "safety sensitive" to

contact their school attorney to ensure that these positions fit within this requirement.

Once a district has designated an employment position as "safety sensitive," it should note those positions (or the categories of positions) in its drug testing policy.

Affected employees should be given notice that they are considered to be in a "safety sensitive" position.

School districts should be aware that if they change their employee drug testing

**Once a district has designated an employment position as "safety sensitive," it should note those positions (or the categories of positions) in its drug testing policy.**

policy—including by adding safety sensitive positions—they must give ten (10) days written notice to all employees of the change and providing employees with a copy of the policy changes. Okla. Stat. tit. 40, § 555. This notice could be accomplished by mailing or emailing the policy to every employee or posting the policy changes on the district's website or intranet site.

*If you have questions about drug testing, the associated policies, or testing requirements in general, RFR is here to help. Your RFR attorney can guide you through crafting policies and practices that comply with employee drug testing laws.*

## Setting Realistic Transition Goals for Students

*by Cheryl A. Dixon*

It is important that every student's IEP contains individualized postsecondary goals based on the particular student's needs. Under the Individuals with Disabilities Education Act (IDEA), its implementing regulations, and Oklahoma policy, the IEP for each student with a disability must include annual secondary transition services that are in effect no later than the beginning of the student's ninth grade year or upon turning 16 years of age, whichever comes first, or younger if determined appropriate by the IEP Team. The IEP must include (1) appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills; and (2) the

transition services needed to assist the student in reaching those goals.

Members of a student's IEP Team involved in postsecondary transition planning should help the student identify realistic goals and identify the steps necessary for achieving them. In a recent decision, a hearing officer in the District of Columbia was required to determine whether the transition services of a student qualified under the disability category of other-health impaired, whose postsecondary goals included becoming a professional basketball player or professional businessman, were adequate. In this case, the hearing officer found that while the student's transition plan listed his interests in becoming a businessman or professional athlete, there was nothing specific "about how the Student might actually become" any of those things. Ultimately, the hearing officer concluded that the student's transition plan was deficient given the absence of a concrete strategy for the student to achieve his goals, and the failure to provide transition services that related to the student's expressed vocational choices.

To set a proper foundation for transition planning, school districts should have the student involved and help him/her define his/her own interests. Thereafter, it is important to identify specific steps for how the student will achieve the identified postsecondary goals.

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

## Responding to Subpoenas for Education Records

by Adam S. Breipohl

Oklahoma school districts are often served with subpoenas requesting the district turn over education records of a student to an attorney representing a student's parent. Such subpoenas are typically related to a child custody dispute and often make broad requests for documents that are frustratingly vague and/or burdensome in nature. Districts may assume that because a subpoena is issued by a court and signed by an attorney, the subpoena is valid and there is nothing to be done but provide the records requested, but this is not always true. In fact, such subpoenas are generally invalid under Oklahoma law, and districts must take care to comply with applicable law in responding to this type of subpoena.

A provision of the Oklahoma Children and Juvenile Code states that certain types of records regarding children, including "nondirectory education records," are considered confidential under Oklahoma law, and "shall be inspected, released, disclosed, corrected or expunged only pursuant to an order of the court." OKLA. STAT. tit. 10A, § 1-6-102(C). The same statute goes on to state that "[a] subpoena . . . purporting to compel

testimony or disclosure of such information or record **shall be invalid.**" *Id.* (emphasis added). To the extent that student records contain information other than "directory information" (which is the kind of information that would likely appear in a student directory, yearbook, etc.), the records are protected under Section 1-6-102 and cannot be obtained via a subpoena. The best practice is for the district's board policy on student records to include a "directory information notice" specifying which types of information are considered directory information that may be released to the public, such as students' names, grade levels, participation in extracurricular activities, etc. so there can be no dispute as to whether records that have been requested are nondirectory education records or not.

If a party wishes to obtain records deemed confidential under Section 1-6-102, the same statute mandates the procedure the party must use to do so. Rather than issuing a subpoena, the requesting party must file a motion with the court stating which records are being sought and identify a "compelling reason" why the disclosure of the records is necessary. The court is required to provide notice to all interested parties that may wish to object and conduct a hearing where the parties can present arguments on the issue of

**Attorneys who do not routinely deal with education law issues are often unaware of Oklahoma's prohibition on subpoenas for education records**

whether the records should be disclosed. If the court decides that disclosure is appropriate, the judge will first conduct a private "in camera" review of the documents before releasing them to the requesting party.

If your school district receives this type of subpoena, the best course of action is to call the district's legal counsel for assistance. Attorneys who do not routinely deal with education law issues are often unaware of Oklahoma's prohibition on subpoenas for education records, and may be disinclined to accept legal arguments about the validity of their subpoenas from school officials. However, an experienced school attorney should be able to educate the requesting attorney as to the relevant legal authorities and explain why the subpoena is invalid.

Because of the involved nature of the formal notice and hearing procedures required under Section 1-6-102, attorneys who issue these subpoenas will often be willing to work with the school district's attorney to reach a compromise solution that allows the attorney to obtain the records necessary for his or her case, but without imposing an undue burden on the district.

However, if such efforts are unsuccessful, the district would need to file a motion with the court raising its objections to the subpoena, which also requires the assistance of legal counsel. For the above reasons, seeking assistance from the district's attorney as soon as the subpoena is received will typically save the district a significant amount of trouble in the long run.

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**ROSENSTEIN FIST & RINGOLD**  
ATTORNEYS & COUNSELORS AT LAW

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*Chalkboard* is a Rosenstien, 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 Rosenstien, 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.

*Chalkboard* is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to: Rosenstien, 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](http://www.rfrlaw.com) (located on the *Chalkboard* page) to add or change *Chalkboard* e-mail addresses.



# 24th Annual RFR Fall School Law Update and Golf Tournament

RFR

ROSENSTEIN FIST & RINGOLD

Date - Wednesday, October 2, 2019

## 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

**Cost:** School Law Update Registration Fee – \$50 per person (first-come first-serve)  
Note – This seminar is limited to the first 120 registrants – Please register early

**Where:** Bailey Golf Ranch, 10105 Larkin Bailey Blvd, Owasso, OK 74055

**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 Titleist Golf Hat and Titleist Golf Balls!  
Plus many chances to win additional prizes!

**Deadline to Register – Friday, September 20, 2019**

*Please Read Instructions on Page 2*



# 2019 FALL SCHOOL LAW UPDATE AND ROSENSTEIN, FIST & RINGOLD GOLF TOURNAMENT

**2019 Fall School Law Update  
PLEASE REGISTER THE FOLLOWING FOR THE SEMINAR AND GOLF:  
(PLEASE NOTE – ONLY SCHOOL DISTRICT EMPLOYEES or BOARD MEMBERS  
ARE ELIGIBLE FOR SEMINAR AND GOLF)**

**Please register:**

Please mark an "X"  
in the appropriate  
box

Seminar    Seminar  
and Golf    only

Name	School District Employed By/Position/Board Member	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY)			
Name	School District Employed By/Position/Board Member	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY)			
Name	School District Employed By/Position/Board Member	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY)			
Name	School District Employed By/Position/Board Member	<input type="checkbox"/>	<input type="checkbox"/>
E-Mail Address (PLEASE PRINT LEGIBLY)			

Method of Payment     Bill School     Check Enclosed    Total: \_\_\_\_\_

**INSTRUCTIONS**

If you are requesting to play on a specific team, please list each name and related school district. Please contact each member on your request prior to submitting your registration form and remind them that each golf participant MUST submit a registration form. If you do not list any additional players on your team request, you will be randomly assigned a team and we will not be able to shuffle teams the day of the event.

**ALL REGISTRANTS WILL BE CONFIRMED VIA E-MAIL, PLEASE WRITE LEGIBLY.**

**Deadline to Register – Friday, September 20, 2019  
Registration cancellations after September 20 will be charged \$50**

<p><b>Mail, Fax or E-mail this Registration Form to:</b>  <b>Rosenstein, Fist &amp; Ringold</b>  <b>525 S. Main, Suite 700</b>  <b>Tulsa, Oklahoma 74103</b>  <b>Fax: 918-583-5617</b>  <b>E-mail: jimh@rflaw.com</b></p>	<p><b>RFR Contact Info:</b>  <b>Phone: 918-585-9211</b>  <b>For Questions: Contact</b>  <b>Jim Hoffmeister</b>  <b>Email: jimh@rflaw.com</b></p>
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