Chalkboard

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An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2019 Issue 6

Attorneys at Law

A.F. Ringold
Coleman L. Robison
John G. Moyer, Jr.
John E. Howland
Jerry L. Zimmerman
Frederick J. Hegenbart
Eric P. Nelson
Karen L. Long
John E. Priddy
Bryan K. Drummond
Kent "Bo" Rainey
Eric D. Wade
Matthew P. Cyran
Jerry A. Richardson
Cheryl A. Dixon
Adam S. Breipohl
Haley A. Drusen
M. Scott Major

C.H. Rosenstein
(1893-1990)
Henry L. Fist
(1893-1976)
David L. Fist
(1931-2008)

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Important Reminders for Long-Term Suspensions of Special Education Students

by Cheryl A. Dixon

Because a school district may not suspend a student with a disability for more than 10 consecutive school days for conduct that is related to the student's disability, a school district contemplating suspending a student with a disability must first determine if the triggering misconduct was a manifestation of the student's disability. Under the IDEA, the behavior is a manifestation of the student's disability: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or (ii) if the conduct in question was the direct result of the school district's failure to implement the student's IEP.

In circumstances where the student's IEP Team concludes that the student's behavior **was** related to his disability or a failure to implement his IEP, the school district must either conduct a functional behavioral assessment (unless the school district had conducted a functional behavioral assessment prior to the behavior that resulted in the change of placement) and implement a behavior intervention plan (BIP) for the student; or, if a BIP had already been developed, review the BIP and modify it, as necessary, to address the behavior. The student must also be returned to the placement from which he was removed, unless the parent and school district agree to a change of placement as part of the modified BIP.

If the student's behavior is determined **not** to be a manifestation of his disability or a failure to implement the IEP, the student may be disciplined in the same manner and duration as non-disabled

students. However, a student who has been removed for more than 10 consecutive school days must continue to receive 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 the goals set out in the student's IEP. The school district may provide the educational services in an interim alternative educational setting determined appropriate by the student's IEP Team.

Under the IDEA, a long-term suspension requires the school district to provide written notice to parents.

Under the IDEA, a long-term suspension requires the school district to provide written notice to parents. Also, once the decision has been made to make a change in a student's placement, the school district must notify the parents of that decision and provide them with notice of the procedural safeguards.

Remember, school district personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student, (i) carries or possess a weapon at school, on school premises, or to a school function, (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function, or (iii) inflicts serious bodily injury upon another person while at school, on school premises, or at a school function. You may wish to contact to your school district's attorney before making a suspension decision on these grounds, especially when it involves a "weapon" and "serious bodily injury," as these two terms have specific definitions.

If you have any questions related to discipline of special education students, please contact your school district's attorney.

Drug & Alcohol Testing for Bus Drivers Required Return to Duty & Follow-Up Testing

by Haley A. Drusen

With the fall semester underway, many students use the classic yellow school bus daily to get to class. Given the recent legalization of medical marijuana, school districts are concerned with making sure that drivers are transporting students safely to school. An important part of ensuring these students' safety is implementing and enforcing a drug and alcohol testing policy. While drug and alcohol testing for other

categories of employees is optional in Oklahoma, drug testing for bus drivers and other employees who are required to have a CDL to perform their job duties (collectively "drivers") is required under regulations issued by the United States Department of Transportation (DOT). DOT drug testing must be performed according to specific standards and regulations, which includes required post-accident testing as well as random drug testing of drivers.

While most districts are very familiar with the process for preemployment, post-accident and random drug testing, many are less familiar with the return-to-duty procedure that must be followed after a driver has a positive drug or alcohol test. This process has three steps: (1) evaluation of the driver by a Substance Abuse Professional and the driver's completion of any treatment/education requirements, (2) return to duty testing, and (3) follow-up testing.

When a driver tests positive for drugs, has an alcohol concentration of 0.04 or higher on an alcohol test, or refuses to take a drug or alcohol test, the driver must be evaluated by a Substance Abuse Professional ("SAP") prior to returning to any safety-sensitive functions. 49 CFR § 40.285. The employer must provide each employee with a contact list of SAPs at no charge. The SAP will then determine if the individual needs treatment and/or additional education. The driver must complete all of the SAP's prescribed education and/or treatment plan (other than follow-up testing—described below) prior to either taking a return to duty test or performing any safety-sensitive duties.

Please note that, as an employer, you are not required to provide an SAP evaluation or any subsequent recommended education or treatment to a driver that violates DOT drug and alcohol violations. However, if you intend to return the employee to safety sensitive functions, the driver must undergo a SAP evaluation. Who pays for the cost of any treatment or education is left for employers and employees to decide, within the context of their existing agreements (i.e. collective bargaining and what may be covered under the employer's health care benefits program). 49 C.F.R. § 40.289.

Once the employee has successfully complied with the SAP's evaluation recommendations, the employee must test negative on a return to duty test (or in the case of alcohol abuse, less than 0.02 alcohol concentration). After the employee successfully completes a return to duty test, the employee may return to safety sensitive functions.

Finally, even after a driver returns to duty, the driver is subject to follow up testing. The SAP's report must prescribe a regiment for follow-up testing. At a minimum, this testing will include six (6) unannounced follow-up tests in the year following the employees return to duty, but it may include additional tests. 49 C.F.R. § 40.307. It is the employer's responsibility to schedule and carry out the follow-up tests required by the SAP after the driver has returned to duty. These follow up tests should be

unannounced and follow no discernable pattern. 49 C.F.R. § 40.309. Drug tests done for other purposes (for instance, post-accident testing or random drug testing) do not count towards the employee's number of follow-up tests.

It is also important to note that DOT regulations do not distinguish between medical marijuana and any other drug. Therefore, a driver who tests positive for marijuana must go through the same return to duty and follow-up drug testing prior to returning to safety-sensitive job duties, even if the driver holds a valid medical marijuana card. Because these employees would be unable to perform their job duties under federal law and because their driving duties are "safety sensitive," school district employers may take adverse employment action against these employees, consistent with school law regarding such adverse actions, if the employee tests positive for marijuana. 63 O.S. § 427.8.

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

DOT regulations do not distinguish between medical marijuana and any other drug

Applicants for Employment with Criminal Records

by Adam S. Breipohl

When a school district learns that an applicant for employment with the district has a criminal history of some kind, administrators may be understandably wary of hiring the applicant out of concern for safety and security on campus. However, districts must also be aware of the potential consequences associated with pursuing an overly harsh or inflexible approach in this area, as doing so can pose a liability risk under some circumstances.

Specifically, an applicant who is denied employment due to a policy or practice of screening applicants based on prior criminal history may bring a claim for racial discrimination under Title VII of the Civil Rights Act of 1964. Such claims are based on the theory that the policy/practice that led to the plaintiff's disqualification has a disparate impact on candidates who are members of the plaintiff's race due to disparities in the rates of arrest and/or incarceration among members of various races. However, even if the applicant can establish that the district's policies have a disparate impact on certain groups, the district will

not be liable if it is able to prove that its requirements are both job related for the position involved and consistent with business necessity, which is commonly known as the "business necessity defense."

The leading case of *Green v. Missouri Pacific Railroad* identified three factors that are relevant to assessing whether an employer can raise this defense to avoid liability for enforcing an exclusion from employment based on past offense history:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense or conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

Regulatory guidance issued by the EEOC states that if an employer provides an individualized assessment for each applicant that takes into account each of the three *Green* factors (although other factors may also be considered) to determine whether applying the policy in a given case is job related and consistent with business necessity, an employer will "consistently" be able to prevail based on the business necessity defense. The EEOC further recommends that employers give applicants disqualified due to their criminal history the opportunity to demonstrate why they should not be excluded, but acknowledges that doing so is not required.

Notwithstanding the above, courts have also upheld policies that imposed categorical rules, rather than using individualized assessments of each applicant. Policies that survive such challenges are generally tailored to address specific potential risks associated with certain convictions and job positions, e.g. only certain types of offenses that are clearly germane to the involved position and occurred relatively recently will disqualify the applicant, etc. However, it is difficult to predict whether a particular policy would be upheld under every possible circumstance to which is might be applied, so there is still an element of risk associated with pursuing this approach.

Overall, it is clear that districts should avoid implementing a heavy-handed, "one-size-fits-all" policy that could exclude applicants under circumstances where doing so cannot easily be justified in terms of business necessity. Nonetheless, this is an area of the law where outcomes are very fact-dependent, and there is no universally-applicable policy that strikes an optimal balance between the risks associated with hiring or disqualifying applicants with prior criminal histories. For that reason, districts should not hesitate to contact their legal counsel when faced with a situation that could even arguably be considered a close case.

If districts have questions about policies or procedures regarding criminal background checks of prospective employees or how to act on the information these searches yield, RFR is here to help. Your RFR attorney can guide you through crafting policies and practices that comply with state and federal employment laws.

M. Scott Major joins RFR as Associate Attorney

Rosenstein, Fist & Ringold is pleased to announce that M. Scott Major has joined the firm as an associate attorney. Scott is a native of Oklahoma and was admitted to the Oklahoma Bar in 2019. He graduated from college at Oklahoma City University (B.A. in World Religions, 2000, magna cum laude) and from the University of Central Oklahoma (M.A. in English-TESL, 2008, with honors). After graduating, Scott served as an overseas humanitarian worker and then returned home to teach Advanced Placement English in Owasso, Oklahoma, before attending law school. Scott graduated from the University of Tulsa (J.D., with highest honors, 2019). While in law school, Scott was a staff editor for the *Tulsa Law Review*.

Tulsa Office:
525 S. Main, Suite 700
Tulsa, Oklahoma 74103
Phone: 918.585.9211
Fax: 918.583.5617
Toll Free: 800.767.5291

ROSENSTEIN FIST & RINGOLD
ATTORNEYS & COUNSELORS AT LAW

Oklahoma City Office:
3030 NW Expressway
Suite 200
Oklahoma City, OK 73112
Phone: 405.521.0202

Chalkboard is a Rosenstein, 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 Rosenstein, 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: 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

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