Chalkboard

An Education Newsletter from the Attorneys of Rosenstein, Fist & Ringold 2022 Issue 1

Attorneys at Law

John G. Moyer, Jr.
Jerry L. Zimmerman
Frederick J. Hegenbart
Eric P. Nelson
John E. Priddy
Bryan K. Drummond
Kent "Bo" Rainey
Eric D. Wade
Samanthia S. Marshall
Brian J. Kuester
Adam S. Breipohl
John E. Howland
Emily C. Krukowski
Alison A. Verret
M. Scott Major

C.H. Rosenstein
(1893-1990)
Henry L. Fist
(1893-1976)
David L. Fist
(1931-2008)
A.F. Ringold
(1931-2021)

In this issue:

What Should I Read Next? The Rise in Challenges of Optional Reading Materials in School Libraries

by Alison A. Verret

Efforts to ban books are nothing new, but a wave of challenges to library books in Oklahoma school districts reflects a nationwide trend seeking to limit materials available in school and classroom libraries. Unlike prior attempts to ban books involving classic literature, many of the current challenges focus on books addressing social issues, including race, sexual identity, and gender identity issues. With this recent uptick in challenges, now is a good time to review the legal standards governing removal of library materials and your district's policies regarding selection of and reconsideration of materials.

Because library materials are non-curricular and optional rather than required reading, decisions to remove them are subject to additional First Amendment scrutiny. The United States Supreme Court recognizes that freedom of access to ideas plays a critical role in the preparation of students for active and effective participation in society. Furthermore, the Constitution does not permit suppression of ideas. As a result, the motivation for removal of library materials must not be partisan, political, or in any way based on disagreement with the ideas contained therein. Instead, materials can only be removed for lack of "educational suitability." Final decisions regarding reconsideration rest with the board of education.

Familiarity with your selection and reconsideration policies

will help you navigate challenges to materials. Typically, selection policies are quite inclusive and track the American Library Association's standards, which seek to provide comprehensive collections that take into consideration the varied needs, interests, and maturity levels of the district's students. The language in the selection policy can be used to support the selection and acquisition of the material by the district. Thorough reconsideration policies, on the other hand, ensure a review process that takes all information into account, including the district's selection policy. This prevents a reactionary decision based only on small excerpts of material.

The language in the selection policy can be used to support the selection and acquisition of the material by the district.

A thorough reconsideration policy provides a form for the parent requesting the reconsideration to complete that includes information such as whether he or she has read the work in its entirety, any specific objections to the material, and information about critical reviews of the material. The reconsideration process often occurs in phases, with an attempt at informal resolution by the site principal as the first level of review. If necessary, many policies call for review by a committee of individuals from the district, potentially including librarians, English teachers, and members of district administration. The committee then creates a report that responds to the specific complaints identified by the parent and makes a recommendation as to whether the book should be retained in the district's libraries and for which grade levels. If the parent decides to appeal the committee decision, the matter then goes to the board of education for a final decision.

It is important to note in the reconsideration process that parents do have the right to restrict their own children's access to materials that they believe are unsuitable. Ensuring that your district has appropriate and effective procedures in place to restrict access on an individualized basis, if requested, may resolve many issues. However, a parent's right to determine what is appropriate for his or her own child does not extend to a determination of what is appropriate for every child in the district without moving through the comprehensive reconsideration process outlined above.

RFR is monitoring ongoing challenges to library materials, as well as any legislative developments in this area. If you have questions about your policies and procedures or best practices in regard to library materials, your RFR attorneys are here to advise you and help you develop compliant policies and procedures.

Dealing with Subpoenas Requiring School Employees to Appear in Court

by Adam S. Breipohl

Oklahoma school districts are frequently required to deal with highly vexatious situations where employees are served with subpoenas which purport to require them to testify in a court proceeding. These subpoenas are a source of great inconvenience and disruption to districts, their employees, and students—especially since they are frequently issued on very short notice, require employees to travel significant distances to attend court, and/or require multiple employees at the same school site to miss work on the same day. School districts should be aware of Oklahoma statutory provisions which require the parties issuing those subpoenas to take measures to mitigate the inconvenience and expense to districts and their employees associated with the subpoenas.

The most important of these is OKLA. STAT. tit. 28, § 84.1, a statute designed to ensure that "court appearances should not adversely affect the education of students enrolled in school districts in this state." It further admonishes that "[t]o the extent possible, court appearances of public school district employees should be scheduled to minimize the disruption of class time." To that end, it provides that if a school district employee is subpoenaed to appear as a witness in a civil court proceeding (other than in a case in which the school district itself or the State of Oklahoma is a party), the employing school district is entitled to a "witness fee equal to the amount of the substitute teacher cost" not to exceed one hundred dollars ($100.00) per day. While the statute could arguably be read as implying that the witness fee is intended to offset the cost to a school district associated with paying a substitute teacher to cover for a teacher who is forced to miss class in order to testify in court, the statutory text clearly states that this rule applies to any "school district employee," not only to teachers. Thus, school districts are also entitled to the statutory fee when administrators or support employees are required to testify.

Another provision of Section 84.1 states that whenever an employee of a school district is issued a subpoena which requires the employee to testify in a county other than his or her county of

residence or employment, the school employee shall be entitled to receive a witness fee and reimbursement for his or her mileage pursuant to the State Travel Reimbursement Act (the "STRA"). However, the applicability of this provision is limited by the fact that the STRA only applies to witnesses who are called to testify in criminal cases and certain other specific types of court proceedings, and **does not** apply to civil lawsuits or family court matters, the types of proceedings in which school employees are most commonly served with subpoenas. Nonetheless, districts should be aware of this provision to ensure their employees are appropriately reimbursed for travel expenses if they are called to testify in a proceeding that is subject to the STRA.

In fact, the greatest utility of these statutes arises from the fact that many attorneys who do not practice in the area of education law are not familiar with their requirements. As a result, the majority of subpoenas issued to school employees are actually invalid because they do not include checks for the required witness fee(s). This alone may provide a sufficient basis for the subpoena to be quashed, relieving the employee of the obligation to testify on the appointed date, or at least a basis to delay the employee's testimony until the check is provided. For all of the above reasons, when a school employee receives a subpoena compelling them to provide testimony in court, it is often worthwhile for the district to make a call to its school attorney, who will be able to identify and address potential issues such as payment of required fees, sufficiency of service, or confidentiality requirements, and attempt to work with the issuing attorney to ameliorate the disruptions caused by the subpoena.

As a result, the majority of subpoenas issued to school employees are actually invalid because they do not include checks for the required witness fee(s).

Therapy Visits and the FMLA

by Emily C. Krukowski

Educators throughout the United States, including Oklahoma, have undoubtedly suffered from mental health challenges these past several years, as schools have had to navigate through a global pandemic, societal changes, and political unrest. There is no question that school district employees and staff should be mindful of these concerns and prioritize the importance of taking care of one's mental health. One aspect of taking care of mental health includes seeking treatment from mental health professionals, which can range from psychologists, psychiatrists, counselors, and

therapists. An important issue for school districts to consider with respect to employees is whether the person that is treating an employee for mental health issues qualifies as a "health care provider" under the Family and Medical Leave Act ("FMLA"), and thus an individual who can certify an employee's need for FMLA leave.

The FMLA provides a right to medical leave "[b]ecause of a serious health condition." 29 U.S.C. § 2612(a)(1)(D). The FMLA prohibits employers, such as school districts, from interfering with "the exercise of or the attempt to exercise" that right, which includes the implied claim of retaliation. *Id.* at § 2612(a)(1). Thus, it becomes important to consider the meaning of the phrase "serious health condition." The FMLA expressly defines "serious health condition" as one that involves "continuing treatment by a health care provider." 29 U.S.C. § 2611(11)(b).

A "health care provider" is defined as a licensed "doctor of medicine or osteopathy" or "any other person determined by the Secretary of [Labor] to be capable of providing health care services." *Id.* at § 2611(6). The Department of Labor has regulations, which list categories of individuals who are "capable of providing health care services," which includes clinical psychologists and clinical social workers. Absent from this list is licensed clinical professional counselors—an important provider of mental health services. However, the regulations contain a very broad category of "[a]ny health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits." Thus, licensed clinical professional counselors are not "health care providers" under the FMLA unless accepted by the employer or the employer's group health plan.

This element of the FMLA is an important reminder that, despite what is happening in society, there are still specific statutory requirements that come into play when determining whether an employee is allowed protected medical leave, which includes what "health care provider" is allowed to certify an employee's need for FMLA leave. As we move forward in today's society, school districts should be mindful of the importance of ensuring its employees prioritize their mental health, and should also be mindful of the parameters of the FMLA.

The attorneys at RFR continue to monitor the requirements of the FMLA, and school districts should always contact their attorneys if they need further guidance navigating through the FMLA requirements and determining who is a "health care provider."

RFR News

Rosenstein, Fist & Ringold is pleased to announce that Alison Verret has been hired as an Of Counsel lawyer. Alison advises and represents educational institutions in all areas of law and provides guidance and contract assistance as well as litigation support. Ms. Verret also provides litigation support for clients in a variety of areas, specializing in research and writing in complex civil litigation.

Alison's litigation experience includes analysis of appropriate motion practice, defense strategy, and drafting pretrial motions. She drafts pretrial motions, jury instructions, motions in limine, trial briefs, and any necessary appellate briefs. In addition, Alison's litigation experience includes product liability defense, premises liability defense, and appellate work, including submissions to courts at all stages of litigation, including appellate submissions to the Oklahoma Supreme Court and the Tenth Circuit Court of Appeals.

Alison A. Verret

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

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

ROSENSTEIN FIST & RINGOLD
ATTORNEYS & COUNSELORS AT LAW

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 *Chalkboard* an asset to you.

Please use the form on www.rfrlaw.com (located on the *Chalkboard* page) to add or change Chalkboard e-mail addresses.

©2022 Rosenstein, Fist & Ringold, Inc.