Disciplining Students With Disabilities

By Myra Creighton

When a private school disciplines a student for inappropriate or disruptive conduct, it may expect an angry telephone call from the student’s parents. These days, some of those parents may argue that the discipline is discriminatory because the child’s conduct is disability-related. Depending on the circumstances, the parents may be right.

The Law

Title III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (for schools that receive federal funding) prohibit schools from discriminating against students with disabilities. Discrimination includes using criteria that tends to screen out disabled students; failing to make reasonable modifications to policies, practices, and procedures when they are necessary to accommodate disabled students; and failing to ensure that disabled students are not excluded, denied services, segregated, or otherwise treated differently than other students. Given these expansive requirements, the difficult question is how a school should address inappropriate, disability-related behavior.

The first inquiry is: does the school have actual knowledge of a disability? If not, you may apply your conduct policies as usual. If, on the other hand, the parent has notified the school that the child has a disability that caused the misconduct, you may be required to modify the school’s disciplinary procedures. This is only required if the parent requests them. Thus, even if a teacher suspects that the child may be unfocused, distracted, etc., which may be signs of certain disabilities, the school does not have to treat the child as disabled unless and until the parent notifies the school of the disability and requests an accommodation.

Policy Matters

Of course, the school has an obligation to tell the parents about its non-discrimination policy and disability accommodation procedure. You should have a policy in your handbook that clearly advises parents that if their child has a disability for which an accommodation is necessary, it is the parent’s obligation to notify the school of the disability and to cooperate in the school’s processes to confirm the nature of the disability, the restrictions or limitations it imposes, and the range of appropriate accommodations. Once parents do request an accommodation, the school should submit a medical inquiry to the treating physician to determine whether the student is disabled and to inquire what the necessary accommodations are.

Students are legally entitled to the accommodation only if they are actually disabled as determined under the ADA or Rehabilitation Act. Whether or not a particular type of accommodation that a disabled student requests is reasonable depends on the particular circumstances of each case. To keep parental conflicts to a minimum, advise the parents that as long as they cooperate in the process of determining the nature and scope of the disability, the school will work cooperatively with them to determine the best response to the misconduct, even if the confirmation of disability process is not yet complete.

How Much Accommodation Is Enough?

Even if the child has a disability, there are limits to what the school will be required to do. You do not have to make modifications that would fundamentally alter the nature of the school’s services, programs or activities. For example, the ADA and the Rehabilitation Act both permit the expulsion or non-renewal of contract of a student who posed a direct threat, i.e., a significant

continued on page 2
We’re interested in your opinion. If you have any suggestions about how we can improve the Education Labor Letter (or its sister publication the Labor Letter), let us know by contacting your Fisher & Phillips LLP attorney or email the editor at mmitchell@laborlawyers.com.

No Smoking

On June 23, Governor Jeb Bush signed off on the new Florida Clean Indoor Air Act. The law took effect on July 1, 2003, and essentially bans smoking in all enclosed indoor workplaces. There are several exceptions to this prohibition, including: private residences; retail tobacco shops; designated smoking guest rooms in public lodging establishments; medical or scientific research; smoking-cessation programs; custom smoking rooms in airports and “stand-alone bars.” The Act also prohibits individuals under 18 years of age from smoking in, on, or within 1,000 feet of a public or private elementary, middle, or secondary school between 6:00 am and midnight. Exceptions are made for individuals occupying a moving vehicle or within a private residence.

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DISCIPLINING STUDENTS WITH DISABILITIES
continued from page 1

risk of immediate harm to other students, which cannot be eliminated through less extreme action. Even though this part of the law sounds easy to apply, whether expulsion is appropriate depends on the nature of the threat. For example, in responding to an inquiry from a daycare about whether it could expel a disabled student who hit and bit students, the Department of Justice ("DOJ") advised that the school should try to work with the parents to see if other less drastic actions (such as extra naps, changes in medications or diet, or "time out") would curb the behavior. If these alternatives did not work, then the school could expel the child. On the other hand, if a high school student brought a gun to school and threatened others with it, the courts would most likely uphold his immediate expulsion even if the misconduct was disability-related.

After attempting less extreme measures to curb inappropriate conduct, a school may also expel a disabled student who exhibits continued disruptive and disrespectful conduct to the degree that it adversely affects the educational experience of other students and significantly taxes the school’s resources. A school is not required to suspend its disciplinary code or its honor code when doing so would constitute an alteration of the fundamental goals of the academic program.

Denying Benefits

Although there are few cases, courts have upheld disciplinary measures that have excluded disabled students from a service or program or denied them a benefit. For example, an Arizona court held that locking a student in a windowless “time-out room” as a disciplinary measure did not violate the ADA since the plaintiff was excluded from the classroom for approximately ten minutes as a result of his own misconduct.

Recently, a Minnesota court upheld a decision to exclude a student from a special field trip because of his conduct. In that case the school had an American geography program built around professional football teams. The student, diagnosed with ADHD, was an avid Green Bay Packers fan and consistently incorporated the Packers into the school project. Some of the projects, however, required students to follow specific directions and did not permit the use of a student’s favorite team. Nevertheless, on one assignment, although specifically instructed to color a football player’s uniform using the colors of the Minnesota Vikings, the student used the Packers’ colors. As part of the program, the class won a contest to visit the Vikings’ practice facility and have lunch with Chris Carter. The school excluded the student from the field trip because of his 25 behavioral deficiencies in the month preceding the trip, his disruptive behavior during the week before the trip, and the school’s concern that he would embarrass it by being disrespectful and insulting to the Vikings. The court upheld the decision on the grounds that the student was excluded because of his misconduct rather than his disability.

Summing Up

Disability issues are difficult and time consuming. Although schools are not required to ignore misconduct or throw out their disciplinary codes when dealing with disability-related misconduct, the right process often requires creativity and patience. In this area, applying common sense to the situation may not get you to the right (legal) answer. For that reason, schools should seek advice of an attorney with knowledge of the disabilities laws when faced with these difficult issues.

For more information, contact Myra Creighton at mcgreighton@laborlawyers.com or (404) 240-4285.
Defamation Lawsuits: The Fired Employee’s Revenge

By Stacy Gordon

When an employee leaves, the school must decide what to say, if anything, to a prospective employer. If the employee left on good terms, the decision is easy. However, if the employee was fired or resigned under less than ideal circumstances, there is a risk that your response to a prospective employer will result in the school being named in a lawsuit alleging defamation or retaliation. As a result, it is critical for schools to understand what is lawful and unlawful in the context of making oral or written statements about former employees.

In most situations, the safest course of action is simply to confirm or deny limited factual inquiries concerning the former employee, such as dates of employment, position held, and salary. More detailed responses concerning the quality of the employee’s work can potentially give rise to a lawsuit.

Employees can bring claims alleging that a negative recommendation was defamatory or invaded their privacy. In addition, if the employee engaged in any “protected activity,” such as filing a claim of harassment or workers’ compensation benefits, the employee can claim that the negative evaluation was retaliatory.

The View In California

Recently, in *Brauner v. Gauthier-Washington*, a retired California school teacher filed suit when her former employer gave her a negative recommendation. The teacher’s former principal filled out a form, checking boxes that were designed to describe the teacher’s performance. The principal’s responses ranged from “inadequate” to “below average” or “satisfactory.” The teacher sued both the principal and the public school board alleging defamation, intentional interference with economic relations, negligent interference with economic relations, intentional infliction of emotional distress, negligent infliction of distress, and retaliation.

The court found that unless the principal falsely accused the employee of prior criminal conduct, dishonesty, lack of integrity, etc., there would not be sufficient evidence to support an action for defamation. The court recognized that truthful statements regarding a person’s background or personality traits, for the limited purpose of providing an accurate opinion or evaluation, are not actionable. In the court’s view evaluations are an important part of the employment process, especially where close contact with children is involved. Specifically, the court held: “In the interest of encouraging honesty by supervisors of persons who seek to work with children, we set aside the questionable conduct of [the principal] and let considerations of public policy predominate.” The *Brauner* decision is consistent with the common law in many states.

And In Florida

Some states, including Florida, have even broader protections for employers. A Florida Statute provides that employers are immune from civil liability for providing truthful information about a current or former employee as long as the employer 1) received a request for the information from a prospective employer, and 2) did not provide information that would violate the employee’s civil rights. For example, the employer cannot disclose that the employee brought a claim for harassment or discrimination.

Some Practical Advice

Of course, whether one looks to the common law, as in *Brauner*, or to various statutory protections, such as Florida, an employer may still be sued for the disclosure, which means that it will cost the employer some amount of money in attorneys’ fees to assert its defense or immunity. In other words, if your school decides to disclose information about a current or former employee, you must understand that there is a risk involved. To minimize the risk, your school should have a written policy that requires that all reference requests be directed to one specific individual (such as the Head of School). Moreover, the school should decide up front whether it will provide information beyond dates of employment, position held, and salary to prospective employers. If so, you must be consistent in applying this policy.

In addition, every school should understand that if it decides to “speak,” it should tell the whole truth. Cases in Florida and elsewhere have held that if the employer provides some information, but leaves out negative or harmful information, it can be sued for a negligent reference if harm results from the omission.

Finally, consider requiring a written release from the former employee before providing a detailed recommendation to a prospective employer. If the former employee refuses to sign the release, this act in itself should tell the prospective employer that there may be a problem with this potential employee.

For more information contact Stacy Gordon at (954) 847-4725 or sgordon@laborlawyers.com.
Fingerprinting Volunteers Who Serve in the School

By Corbett Gordon

Why Consider Fingerprinting?

Any organization is vulnerable to a lawsuit if it is negligent in the hiring or supervision of its employees. The theory of negligence arises from the legal theory that there is a "duty of care" inherent in the standard of work and supervision expected by a community in many situations: driving a car, performing surgery, or working with children. For instance, if a school hires a known child molester to work with children or if that school has not performed at a minimum a criminal background check to attempt to eliminate child molesters from those who work unsupervised with children, it is vulnerable to a lawsuit for negligence. Your school should routinely require volunteer applicants to consent to a criminal background check in an attempt to determine whether a potential volunteer has a history of violence, child abuse or other crimes that relate directly to the standard of care expected in an educational setting where the volunteer is given access to minor children. Fingerprinting is a reliable method of identifying individuals who have a past criminal history despite name changes, moves, and other attempts to hide their true identities.

The Fair Credit Reporting Act

In 1970 Congress passed the Fair Credit Reporting Act (FCRA) to protect consumers by regulating the reporting, by a "consumer reporting agency," of any information "bearing on a consumer's credit worthiness, credit rating, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" to be used for credit, insurance, employment, or other legitimate purposes. This law has been applied to employers which use third-party consumer reporting agencies to obtain criminal background history regarding an individual, even where the "report" is made orally.

The FCRA does not apply when an employer performs its background investigation internally, for example, using school personnel to check public records or to check references. However, if you utilize an outside agency for these purposes, applicants must authorize the background check and you must advise them of the results if you take any "adverse action," such as a decision not to hire, based on those results. There are strict statutory requirements and penalties for non-complying employers.

Check with your regular Fisher & Phillips attorney, who can work with you to ensure you are using appropriate forms of notice and authorization with employment applicants or with those who apply to volunteer in the school.

Is Fingerprinting of Volunteers Legally Permissible?

In most states, both public and private schools are required to include fingerprinting as a necessary pre-requisite before they may begin working in an educational setting. Where challenged, fingerprinting requirements have been found to be a legitimate invasion of an applicant's privacy rights because protection of minor children is a sufficiently important goal and is sufficiently tied to the results of this invasion of privacy, despite the fact that the results will disclose personal background information about the volunteer or employee. Courts have reached the same conclusion regarding constitutional search and seizure challenges to fingerprinting in this context.

While fingerprinting is a legal requirement for teaching in most states, the issue of background checks for volunteers is rarely addressed. For instance, in California all program staff and volunteers are subject to fingerprint clearance requirements, and in Florida deregulated public school employees and charter school employees are required to be fingerprinted. We recommend that your school conduct a criminal background check, including fingerprinting, of volunteers who work alone with minor children just as thorough as those you perform on regularly employed instructional and other personnel.

Do We Fingerprint Parents Who Bring in a Treat? Volunteers on Field Trips?

To be a lawful intrusion on a volunteer's rights under the Fourth Amendment to the U.S. Constitution (right of privacy, right against illegal search and seizure), the invasion undertaken by state regulation (i.e., public schools or state-regulated private schools) must be closely tied to the interest of the state to protect minor children. The same analysis makes sense in a non-regulated setting: if a volunteer will be left alone with a child, without direct supervision by regular school personnel, it is not only legally permissible, but it just makes sense to conduct as thorough a criminal background investigation as possible, including fingerprinting. Common sense dictates that the intrusion of fingerprinting is advisable where a volunteer will work alone with an individual child or group of children but not where the volunteer only appears briefly in the classroom to distribute a tray of cupcakes.

What About State Law?

Where states expressly require that teachers be fingerprinted, there is usually a strong public policy that will support applying the same requirement to a volunteer. Some states (California, Maine, Massachusetts, Minnesota, Montana, New Mexico, New York, Oklahoma, and Washington) also regulate the form in which an organization notifies an individual of the use or results of a background check. These requirements are in addition to those set forth in the FCRA.

Conclusion

While there are a number of legal and technical hurdles involved in implementing such a program, the concept of fingerprinting persons who work in schools, including volunteers when they deal unsupervised with children, is an idea that is both legal and practical.

For information about your school's compliance with state and federal laws in this area, contact Corbett Gordon at (503) 242-4262 or cgordon@laborlawyers.com.