Education Update

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Oh, The Tangled Web:

Avoiding Liability for Employees' Off-Campus Activities With School Students

By Suzanne Bogdan (Fort Lauderdale) and Melanie Zaharias (Orlando)

You've just received a phone call advising that one of the school's employees is being sued for engaging in inappropriate activity with students attending the birthday party for the employee's child. The parent tells you that he is also considering bringing a claim against the school. This type of situation is occurring with more frequency today. Unfortunately, many schools have not yet taken action to assess the potential school liability for an employee's off-duty behavior.

How Do The Liability Issues Arise?

When employees engage in off-campus activities (some of which are school related), the risk of claims increases because the level of supervision decreases and the structure of the environment changes. The issue of off-duty or off-campus interaction with students arises in several contexts. In some situations, the employee is in charge of some type of off-duty activity (such as a pizza party, field trip, or other activity).

In other cases, employees of the school have children who also attend the school. These employees' children often invite their friends to participate in traditional activities such as birthday parties, sleepovers, family vacations or day trips. Finally, many employees are looking for ways to earn extra money and volunteer to tutor, teach piano, or babysit other students, in the employee's home or the student's home.

The case of Tanya Craft is a prime example of what can go wrong when employees of the school engage in off-duty conduct with students. Craft was a kindergarten teacher at a Georgia school. Her daughter attended school where Craft taught. Craft's story gained national media attention when, after a sleepover with her daughter's friends who were also students at the school where Craft taught, the children accused Craft of molestation. She was later acquitted.

Craft's situation is an extreme example; unfortunately, it is not an unusual one, especially considering the multitude of sexual-abuse cases asserted against churches nationwide for actions of its clergy with children. In addition to sexual-abuse concerns, many other types of claims can arise, both against the individual and potentially against the school. These include claims involving injury from car accidents while driving students, choking hazards while babysitting students, or negligent behavior by the employee or the school in hiring, recommending, or retaining the employee who later engages in the inappropriate behavior.

What Is The Liability Standard?

Generally, schools are not insurers of their students' safety, and are not strictly liable for any injuries which they may sustain. But a school may face liability if the student can establish that: 1) the school owes a duty to the student; 2) the school breached that duty in such a way that the risk of harm was foreseeable; and 3) the student was injured as a result of the school's breach of duty. Courts have held that schools generally do not

owe a duty to students after school and off school premises. However, a school's on-premises duty of supervision may continue when an off-premises activity is "school sponsored" or "school related."

How Do You Reduce The Risk?

Ensuring that all employees have been cleared through a thorough criminal background evaluation (and updating it periodically) is a critical first step. In addition, the school's administration should talk openly with the staff about the types of activities that frequently occur with school employees and students on an off-campus basis. Assess your comfort level with the various activities and implement guidelines, including notices to parents, handbook policies, or prohibitions on certain behaviors or activities that could result in an appearance of impropriety or a claim against the school.

For example, consider implementing policies requiring that two or more adults be present during any off-duty interaction with non-family students, whether the activity is babysitting, sleepovers, kid parties, or pizza events. Schools may choose to prohibit certain activities that have a higher risk of potential claim, such as sleepovers, or other activities that may involve some level of isolation with the adult and student.

Schools should also critically examine policies in recommending employees as babysitters, drivers (for students who do not have rides to school), or tutors. This is not to say that the school should not offer tutoring if students need extra help. Rather, ensure that all tutoring, piano lessons, karate lessons, swim lessons, or other one-on-one type activities occur only at the school and under guidelines protective of the school and employee. Train employees on a yearly basis regarding the school's policies to ensure that all employees understand their obligations.

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Don't Be Handicapped When Dealing With Student Disabilities

By Dianna Bowen (Dallas)

You've just received a note from a parent of a new student, stating that your school must become "absolutely peanut-free," as her son has a severe peanut allergy and will go into anaphylactic shock if he is even in the same room with a peanut! What do you do? This article will address the obligations of an independent school as it relates to students with disabilities by focusing on 10 essential questions to ask yourself when receiving such a note from a parent.

Question 1 – Does The Law Apply To You?

First, while you may choose to address this situation for the well-being of the child, are you legally obligated to follow all of the requirements of the laws related to students with disabilities? Essentially, there are two laws which could apply to this situation – Title III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. Your state or city may also have local ordinances that mirror these two laws.

Generally speaking, Title III of the ADA applies to all independent schools, unless the school is a religious organization or an entity "controlled by" a religious organization. It is not enough to have a religious focus or identity. Rather, the school must be "controlled" by a religious organization. Courts will look at several factors including the school's curriculum, instruction, mission, board membership, ownership of property, tax status, and funding; and ownership, control, affiliation, and sponsorship by a religious entity. It is a very fact-specific analysis that is based on a desire to protect the free exercise of religious belief.

Section 504 applies to all schools, whether or not you are controlled by a religious organization, if you accept federal financial assistance. Federal financial assistance is defined very broadly and acceptance of such assistance in one area applies to the whole school and possibly the entire organization, such as a group of schools under separate operation. Examples of federal financial assistance include school lunch programs, anti-drug programs, at-risk student programs, technology grants, government contracts, government loans, etc. If you accept federal assistance, it comes at a price, and you must adhere to Section 504 as well as many other laws.

ANSWER: For the student with a peanut allergy, then, if you are an independent school that is not a religious organization or controlled by a religious organization, or if you accept federal financial assistance, you will need to address this parent's request under the law.

Question 2 – Who Is Protected?

The laws mentioned above protect a qualified individual with a disability who can perform the essential functions of the school task with or without reasonable accommodations. In 2009, the ADA was amended to extend the protections of the law to substantially more people, many for the first time. In fact, the majority of the people the law protects have impairments which are not visible to the naked eye. To determine who is protected, a school must analyze whether the individual has an impairment, whether the impairment substantially limits a major life activity, and whether the individual, with or without a reasonable accommodation, is otherwise qualified for the program.

ANSWER: For the student with an alleged peanut allergy, such an allergy, depending on its severity, could be considered an impairment which substantially limits several major life activities, and if the student has already met your enrollment standards, he may be otherwise qualified to participate in your program.

Question 3 – Does The Student Have An Impairment?

A student has an impairment if he or she has a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or a mental or psychological disorder. Although all impairments should be evaluated on a case-by-case basis, the following examples will most likely be considered an impairment covered by the law: clinical anxiety, depression, visual or auditory processing disorder, ADHD, dyslexia, deafness, blindness, cancer, bipolar disorder, epilepsy, autism, HIV/AIDS, diabetes, multiple sclerosis, cerebral palsy, and a mobility impairment.

Although medical evidence may not be necessary when an impairment is obvious, we recommend always obtaining medical documentation to confirm a parent's or student's statement that an impairment exists.

ANSWER: A serious peanut allergy could be considered an impairment under the law, if it is supported by appropriate medical documentation.

Question 4 – Does The Impairment Substantially Limit A Major Life Activity?

A major life activity is defined as any activity that is of central importance to most people's daily lives. Examples include performing manual tasks, thinking, communicating, learning, speaking, breathing, seeing, hearing, eating, sleeping, walking, standing, sitting, lifting, interacting with others, reading, concentrating, and caring for oneself. The assessment does not involve analyzing whether the activity is important to the student – just whether it important to the general population.

ANSWER: The student's peanut allergy, depending on the severity of the allergy, could substantially impair the child's ability to eat, breathe, or interact with others.

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Question 5 – Is The Impairment Temporary?

Temporary, non-chronic impairments do not meet the definition of a protected disability under the law. But there is no bright line rule regarding the amount of time an impairment must last. An impairment that is episodic or in remission is a disability if it substantially limits the student when it is active. For example, many mental impairments such as depression, bipolar disorder, migraine headaches, and post-traumatic stress disorder are episodic in nature and may be completely controlled by medications, but are considered disabilities under the law. In fact, an impairment can be substantially limiting even if it lasts less than six months.

ANSWER: In our case, most allergies, especially severe allergies are not temporary or non-chronic. Sometimes children do grow out of allergies, and therefore the reasonable accommodation may change.

Question 6 – Who Are Covered Persons?

Under the law, more than just individuals with current disabilities are covered. In fact, covered persons include not only those students who are actually disabled, but those students who have a history of a disability, and those students who are regarded as disabled.

Having a history of a disability could include those students who have had cancer in the past or other medical conditions, for which they are currently in remission. While there may not be a need for a reasonable accommodation at this time, schools do need to consider those students as protected under the law.

Being regarded as disabled protects individuals who are discriminated against because of actual or *perceived* physical or mental impairments whether or not the impairment limits or is *perceived* to substantially limit a major life activity. The mere fact that a school makes an accommodation is not evidence that it regarded the student as disabled, but if a student does not have a disability under the law, they are not entitled to a reasonable accommodation.

ANSWER: For our peanut allergy student, he would definitely be covered by the law, after making the determination that he is actually disabled.

Question 7 – What Is A Reasonable Accommodation?

Independent schools are obligated to provide reasonable accommodations to students who demonstrate they have a disability covered by the law. However, the reasonable accommodation requirement does not require any modification or accommodation that would fundamentally alter the nature or purpose of the school's program or that would cause an "undue burden" on the school.

A fundamental alteration to a program is one that would require a school to provide an altogether different program than what it typically provides. For example, a school would not be required to change its required curriculum, grading practices, or enrollment standards, if such change would affect the mission or purpose of the school. An undue burden is one that requires significant difficulty or expense. The relevant factors in determining whether an undue burden exists can include the nature and cost of the action required and the overall financial resources of the school.

When a school determines that an accommodation is unreasonable, it must be able to show that institution officials considered alternative means, the feasibility of the alternative means, the cost and effect on the academic program, and a rationally-justifiable conclusion of lowered academic standards or substantial program alteration. Think outside the box! Even if a requested accommodation imposes an undue hardship, a school is still obligated to attempt to provide an alternative that is reasonable under the law.

ANSWER: In the case of the student with a peanut allergy, depending upon the severity of the allergy, while making the entire school peanut-free may be unduly burdensome, the school may have an obligation to provide a peanut-free table in the cafeteria or place the student in a peanut-free classroom.

Question 8 – Would The Accommodation Cause A Direct Threat To The Student Or Others?

The law does not require the school to make a reasonable accommodation for a student's disability if it could result in a direct threat to the student or to others. A direct threat is a significant, highly probably risk of serious harm to the health and safety of the student or others, which cannot be eliminated by a modification of policies, practices, and procedures, or by the provision of auxiliary aids or services. This standard is very difficult to meet.

ANSWER: Accommodating a peanut allergy likely will not cause a direct threat to the student or others. However, allowing a seeing-eye dog to attend school may cause a direct threat to another student with a severe dog allergy.

Question 9 – What Steps Should The School Take To Determine What Accommodation Is Reasonable?

The law requires schools to engage in an interactive process, which is usually initiated when the student or parent of the student requests an accommodation. But if the school has evidence or knowledge of the disability prior to a request for accommodation, you have an obligation to inquire whether the parent wishes to disclose a disability and engage in this interactive process. Most importantly, each stage of this process should be clearly documented by the school.

The first step of the process is to document the request and ensure that the request is received by the appropriate personnel. If the request is made to a teacher, the teacher should not respond. Instead, the teacher should document the request in writing to the Head of School. The school should also confirm the request, in writing, to the parents.

The second step is to prepare for and set up a preliminary meeting with the parents. To some extent, the individuals who should attend the meeting may depend on what type of accommodation the student is requesting. Generally, the Head of School, and the disability coordinator, if one exists, should attend. If the disability is not apparent, the school may either assume that the student is disabled or prepare an inquiry to the student's physician to determine whether the student is disabled.

Regardless of the decision made, a medical inquiry should always be made to determine whether the accommodation is necessary, whether other possible accommodations exist, and if they would be effective. Narrowly tailor medical inquiries to obtain only the information necessary to determine whether the student is disabled and needs an accommodation, or whether the student is a direct threat. Thus, the school may not request the student's complete medical records or treatment plans.

The third step is to hold the meeting with the parent and appropriate personnel to discuss the disability and the requested accommodation. The school should have the parent sign a HIPAA-compliant Authorization for Release of Medical Information. A copy of the medical inquiry to the student's physician should be attached so that the parent can see what information the school is seeking.

Since the law does not require the school to provide the student's preferred accommodation, if you do not believe the accommodation is reasonable, explore other possible accommodations that meet the student's need. The other accommodation options may be included in the medical inquiry for comment by the treating physician or psychologist. While the school may certainly receive any documentation from the parent related to the student's disability or accommodation request, we recommend that the school request the authority and opportunity to communicate with the student's doctor directly.

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The fourth step is to evaluate the medical documentation and the requested accommodation, and make a decision regarding the appropriate accommodation, if any.

The final step is to communicate your decision to the parent in writing. If the school determines that no accommodation is reasonable, this communication should set out the alternatives considered, the deciding factors, and the rational justifications for the conclusion.

ANSWER: You obtain the medical documentation from the doctor of the student with the peanut allergy. The medical documentation shows that the student does have a peanut allergy, but it is only when the student himself actually ingests a peanut, and it only causes a slight rash to the student, which could affect his ability to concentrate. You find that the student has a disability, but deny the accommodation requested.

Through the interactive process, you offer an alternative accommodation by asking the parent to provide all lunch and snack food for the student. You also inform the student's teachers and other personnel who have direct contact with the student to allow the student to eat only the food provided by the parent, with no exception, unless they obtain written approval from the parent. You have reasonably accommodated this student's disability.

Of course, if the medical documentation had, in fact, supported the parent's initial claim that her child would go into shock by the mere presence of a peanut in the room, your response may be quite different. You may have to ensure that your facility is completely peanut-free, unless you can prove that such measures would cause an undue burden on the school, in that it would require significant difficulty or expense based on the financial resources of the school.

Question 10 – How Do We Prevent Complaints Regarding The Process?

Dealing with students with disabilities can be a formidable process. But with careful planning and specific procedures, a school can certainly address the needs of the child, while preserving the mission and integrity of the school. Some key points to consider are:

- have a disability services coordinator – one person who is responsible for such accommodations and who is able to keep up to date on changing laws and decisions;
- establish good policies and procedures regarding the accommodations process, including required documentation;
- communicate polices and procedures to students and parents annually;
- train administrators and the coordinator regarding the interactive process;
- document all steps of the process as well as the implementation of the accommodation;
- train staff on their accommodation obligations;
- establish a complaint and resolution process; and
- seek guidance from your school's attorney.

By going through these ten questions, even tricky cases such as our peanut-allergy example, can be handled with a minimum of legal exposure.

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Finally, because parents do not always understand the responsibilities of the school employees, don't hesitate to educate parents about off-campus activity guidelines such as a no-babysitting or no-sleepover rule. Let parents know that the school will not be responsible for any behavior occurring off-campus in violation of the school's guidelines.

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