State Bar
Section Report
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To the Members of the School Law Section:

If there is any practice of law that is more rewarding than school law, I can not imagine what it might be. The school law Section is unique in the family atmosphere that our members enjoy.

We need your involvement in the Section. We need your continued membership and we need you to encourage other interested lawyers to join our section. We need authors for our newsletter and suggestions of topics and speakers for our conferences. We are committed to maintaining the highest quality in our section newsletter and in our seminars.

As a section, we are busy! On January 13, as your Chair, I made a report to the Council of Chairs of the State Bar at the regular meeting of the Council. The other Sections of the State Bar are interested in how our section continues to successfully sponsor an outstanding summer retreat without substantial involvement of the State Bar staff.

We have also been invited by the State Bar of Texas to produce a brief seminar for an upcoming state bar webcast. If you are interested in participating in this, please contact me.

Please mark your calendars for our summer retreat which will be held at the Woodlands on July 21st - 22nd.

It is my distinct privilege and honor to serve as your Chair. Please contact me if you have any questions or suggestions about any activity of the School Law Section. I look forward to working with each of you.

Respectfully,

Wayne D. Haglund
Chair
State Bar of Texas School Law Section
WDH/bg

STATE BAR OF TEXAS
SCHOOL LAW SECTION OFFICERS 2006

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TEXAS HIGHEST COURT RULES ENTIRE SCHOOL FUNDING SYSTEM UNCONSTITUTIONAL

Analysis by Professor Norma V. Cantu

The Texas Supreme Court decision in *Neeley et al. v. West Orange-Cove et al*, No. 04-144 (Tex. Nov. 22, 2005) provided Texas voters with significant guidance for understanding how the state's school finance system had degraded into an unlawful form of state taxation, that teetered on the brink of becoming an unconstitutionally inadequate and inefficient funding system. The Supreme Court's opinion gave the State a deadline of June 14, 2006 in which to cure the constitutional deficiencies. Without crossing into the Legislature's policy-making role, the Court urged the Legislature to avoid surface touch-ups and to engage in widespread overhauling of the school finance system in order to prevent future litigation.

This article will summarize briefly the legal arguments raised by each of the parties regarding the state constitutional requirements, how the Court responded to each of those arguments, and the directions that the Court clearly cautioned the Legislature to avoid in fashioning a remedy.

Brief Summary of the West Orange-Cove Ruling

Following a five-week bench trial, Judge John Dietz ruled that school districts had prevailed in challenging the manner in which the State of Texas had operated to fund public schools, holding that both articles VII and VIII of the Texas Constitution had been violated. *West Orange-Cove I.S.D. et al. v. Neeley et al*, No. GV-1000528 (250th Dist. Ct., Travis County, Tex., Nov. 30, 2004). The trial court issued an injunction halting the continued funding of Texas school under an unconstitutional system, but halted the implementation of the injunction for ten months, until October 1, 2005 so as to give the Texas Legislature ample time to remedy the constitutional deficiencies. The Legislature failed to enact public education legislation addressing the constitutional violations despite a regular session in January 2005 and two special sessions in June and July 2005. West Orange-Cove II, at 9-10 (hereinafter WOC II).

Seven of the Justices joined in the majority decision delivered by Justice Hecht. The newest justice on the Court did not participate in the ruling. Justice Brister dissented. The bloc of seven votes should send a strong message to the State leaders about the commitment by the Justices to continue oversight of the case. There is no question that the Justices deliberated thoughtfully and carefully about this complex case. What was surprising was the frequent reaching into State and Federally maintained web sites. Some of the citations to web pages were less than two weeks before the decision was rendered.

The Texas Supreme Court upheld the trial court's ruling that local ad valorem taxes had become a state property tax in violation of article VIII, section 1-3 of the Texas Constitution. WOC II, at 11. At the same time, the Court overturned the portion of the trial court's rule that held the school finance system unconstitutional under article VII, section 1. Id. The Supreme Court acknowledged that the State's strategy of continuing to infuse greater amounts of money into the entire system had succeeded in deferring a ruling of unconstitutionality under article VII, but noted that the strategy merely delayed the inevitable. Lawsuits under article VII would no doubt continue until the entire school funding system was substantially reformed. Id.

From the perspective of local school leaders who struggle to put together a school budget in which only 38% of the budget comes from State appropriations, the single most important outcome of the West Orange-Cove ruling by the Texas Supreme Court was its groundbreaking ruling that the Texas constitution is violated when districts lose meaningful discretion to set their own local property tax rates below the maximum rates.

From the perspective of parents of children attending public schools in property poor school districts, the most important outcome of the ruling was the Court's reiteration of the mandate from *Edgewood I* that "children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds." West Orange-Cove II, at 4-5. The repeated pronouncements by the highest court in Texas that mere Band-Aid changes would be insufficient may instill hope in residents of property poor districts that the overhaul of the funding system may one day occur.

Each time the appeals have reached the Texas Supreme Court, some court watchers have predicted that the justices will veer away from the legal precedents of the first Edgewood case and will cut the safety net away from children who live in property-poor districts. The ruling in West Orange-Cove II firmly establishes the important role that the courts play in keeping the Texas Legislature focused on its constitutional obligation to provide for the education of all of Texas' school children.

Re-Cap of the Basic Structure of Texas' Present System

The Texas public school system presently serves 4.3 million children. WOC II, at 3. With 1031 independent school districts (WOC II, at 14) and un-counted numbers of state funded charter and alternative schools, the state public school system is one of the largest in the nation. The number of districts has decreased from a peak of 6953 districts in 1936 (WOC II, at 20), but the number of districts has been stable since 1995. The Court noted several times that the system harbored a wide array of district sizes, with two-thirds of districts having fewer than 1200 students, one-half fewer than 700 and one-fourth having fewer than 350 students each. WOC II, at 14. Some researchers have speculated that the Justices were mystified by the State leaders' unwillingness to take on the difficult task of school consolidations.

The Court observed that policy choices about the organization and structure of the public school system were clearly left to the Legislature. However, having chosen to rely on local property taxes, the Court could not help by notice that this decision has made it more difficult for the Legislature to compensate for differences in size and property wealthy among districts. The present structure of school finance and

the presence of tax haven districts both flow from the Legislature's decisions to retain large numbers of small districts. WOC II, at 16. The Court acknowledged that the Legislature faced pressure from local districts that naturally resisted consolidation, and mentioned the interest in local control as a function in the decision to retain the present organizational structure. WOC II, at 19.

When the first ruling in the school finance cases prompted the Legislature to adopt changes in the funding system, the Court struck down a number of unconstitutional approaches by the Legislature. County-wide appraisal districts were found unconstitutional under article VIII as denying school districts local control, and measures to exempt the five percent of districts with the greatest property wealth were struck down as violating the equity provisions of article VII of the Texas Constitution. With the Supreme Court narrowing the legal options available, the Texas Legislature finally arrived at the tiered system of finance in which the Legislature defined property wealthy districts, property poor districts and afforded to property wealthy district five different approaches for reducing their ratios of wealth to pupil so as to reduce the gap in access to funds per student. WOC II, at 25. The funding portion of the public school system received Supreme Court approval, with the Court not being offended that most property wealthy districts would be losing public funds through a recapture system, commonly known as Robin Hood. The Court reasoned that wealthy districts had other options, such as consolidation, or partnerships with property poor districts, that maintained a constitutionally acceptable level of local control. The Court noted that several of the options were rarely used, but did not see this as offending the Constitution. WOC II, at 26.

The system of school finance reduced the gap in funding per student to $505, or 17%. WOC II, at 29. While intervenors objected to this gap, the Court found it minimally acceptable. The system also met with approval in Edgewood IV because the State committed to eliminating certain tax havens for wealthy districts (called hold-harmless provisions), and committed to work on sufficient funding for school facilities.

Besides the funding portion of the public school system, the Texas system includes an instruction component. Instruction in Texas consists of four elements: curriculum, standardized tests, accreditation standards, and sanctions/remedies. WOC II, at 35.

The West Orange-Cove plaintiffs brought two legal challenges. First, the plaintiffs asserted that the shift of state funding from 60% to 38% of the total cost of public school education represented an evolution of the system into an unconstitutional state property tax (a condition that is prohibited by article VIII, section 1-e of the Texas Constitution). WOC II, at 4. With the local districts bearing a much greater share of the total cost of education, the plaintiffs claimed that the districts lacked the "meaningful discretion" to set local property tax rates that the constitution anticipated. The Texas Supreme Court has predicted that the $1.50 cap on the maintenance and operations tax rates could possibly become a barrier or ceiling to districts if more districts were to find themselves taxing at the maximum rates.

The West Orange-Cove plaintiffs also amended their pleadings to make clear that the State had failed to provide sufficient funding to provide for a constitutionally adequate education. With this clarification, all plaintiff and intervenor parties contended that the system could achieve not general diffusion of knowledge because the system was under-funded. WOC II, at 6. The funding inadequacy, they asserted, denied to students the "general diffusion of knowledge" that was guaranteed by article VII, section 1 of the Texas Constitution. Article VII required efficient education, which this Court has previously defined as effective or productive of results. WOC II, at 6.

The Edgewood intervenors focused on the problems faced by districts with the lowest levels of property wealth. These districts raised adequacy claims under article VII, section 1, and also alleged that the efficiency, suitability and equity requirements of this part of the Texas Constitution were not met. In particular, the Edgewood intervenors claimed that the gap in maintenance and operations funding between property-poor and property rich districts had escalated past the point that had previously been accepted by the Court.

The Alvarado intervenors echoed the claims of the other parties. The school districts represented by these intervenors asked the court to not retreat from its earlier holdings on closing the funding gap between property-poor and property-rich districts

State's Procedural Claims

Before the Texas Supreme Court could hear whether the State had provided for the general diffusion of knowledge required by Texas Constitution Article VII or the preservation of property taxes as a locally controlled function as required by Texas Constitution Article I, the Court was presented with motions to dismiss under procedural grounds. The Supreme Court held that school districts had standing to sue, noting that school districts have an interest in not collecting an illegal tax. WOC II, at 57.

The legal standard was whether there is a real controversy and a party asserting a claim. The Court decided that the parties in this case met both requirements, and therefore, had standing to sue. WOC II, at 63.

The Supreme Court also ruled that the case need not be dismissed for raising political questions. Relying on federal cases involving one person-one vote, the Court rejected the State's claim that it was intruding into the roles of elected officials. WOC II, at 66.

Most importantly, the Texas Supreme Court affirmed earlier holdings that the Legislature is not above the Constitution. The Courts are the final authority on the legal meaning of the Constitution, not the state representatives. WOC II, at 67.

State's Arguments

The Court adopted the State's argument that regarding Article VII, Section 1 and facilities. For example, the Court reversed the lower court's findings that facilities funding was inefficient. The Supreme Court accepted the State's assertion "facilities needs vary widely depending on the size and location of schools, construction expenses, and other variables." The State urged the Court to adopt a requirement that direct

evidence was needed to show that the district court failed to make findings with regards to school districts that were not part of the Edgewood intervenor group. Objectively, one cannot find any Court ruling prior to the November decision that speaks to how many and which districts should present evidence. The Edgewood intervenors have asked the Supreme Court to reconsider this ruling affecting facilities.

As to the challenges to the instructional component of the public school system the State succeeded in convincing the Court that no constitutional infirmities required a remedy. The State was successful in persuading the Supreme Court to accept evidence of recent progress in partially closing the gaps in achievement between various sub-groups of Texas students.

The trial court relied on the State's own reports to make findings concerning instructional gaps. He noted that only 4 districts were found instructionally unacceptable. WOC II, at 43. Only one district had been taken over by the state. WOC II, at 44. The evidence showed some achievement gains on the TAAS exam which was discontinued in 2002. WOC II, at 41. The evidence based on the newer exam TAKS had yet to show a pattern. The trial court concluded that the achievement gaps were large. The gaps were greatest for low-income and Limited English proficient students. For example, the most recent data on college readiness of Texas llth-graders showed the following gaps (WOC II, at 46):

Subject	All students	African-American	Hispanic	White	Limited English
English	28%	18%	20%	36%	3%
Math	42%	21%	28%	55%	13%

These gaps resulted in additional costs to school districts for remediation and to address teacher turn-over. WOC II, at 45.

The Court readily cited to 2003 data that "Texas ranked last among the states in the percentage of high school graduates at least 25 years old in the population." WOC II, at 46. Moreover, the unchallenged data pointed to a severe drop-out problem for minorities: "more than half of the Hispanic ninth-graders and approximately 46% f the African-American ninth-graders leave the system before they reach the twelfth grade." Id. This evidence did not seem to persuade the Court that Texas' funding system was constitutionally inadequate. Instead, the Court agreed with the State's lawyers that its review of the statutory provisions would inquire whether the system was arbitrary and therefore would examine the issue as a question of law. WOC II, at 83. The Court held that the ultimate decision on the constitutional issues would not rely exclusively on the findings of fact; "those findings have a limited role." WOC II, at 83.

Thus, the trial court found that the State failed to bring together facts that it had succeeded in proving that all Texas children have meaningful access to the essential knowledge and skills necessary so that upon graduation, "students are prepared to 'continue to learn in postsecondary educational, training, or employment settings."

On appeal, the Supreme Court excused the State its lack of proof by holding that the public education system "need not operate perfectly." WOC II, at 87. The State's expert witness compared Texas' children to other states, performing a statistically analysis that compared poorly prepared students to poorly prepared students. In other words, low-income students in Texas were expected to score poorly because low-income students in other states also performed poorly. The witness did not factor in that all but 5 of the 50 states have been sued for the lack of educational services for low-income students. Thus, the State was successful in persuading the Texas Supreme Court to reach the ultimate conclusion of law a public school system operates adequately if "districts are *reasonably* able to provide their students, access and opportunity…." WOC II, at 87. Apparently, this ultimate conclusion of law needed no grounding in the trial court's findings of fact.

The section on achievement gaps was troubling and difficult to understand because the Texas Supreme Court recognized many findings of fact demonstrated educational deficiencies in the public school system, but agreed with the State defendants that the findings were too focused on "inputs" or resources available to the public education system. The Court agreed that "the constitutional standard is plainly result-oriented." WOC II, at 88. By this, the Court described results as "the results of the educational process measured in student achievement." Id.

The best explanation for the disconnect between the evidence available to the Court and the legal conclusions reached is that the Texas Supreme Court noted that the web sites for the National Assessment of Educational Progress offered some evidence that seemed inconsistent with Texas' own data reports on the gap and chose to believe the web reports rather than the trial evidence.

Finding the State's Funding System Unconstitutional

The Texas Supreme Court carefully recounted the substantial changes that had already occurred in the basic structure of Texas' public school finance system, beginning with Senate Bill 7 which was enacted in 1993. WOC II, at 12-47.

Despite greater investments in education, the evidence taken together, showed that the present system consisting of tiered system of funding that recaptured local funds from property wealthy districts, caused local districts to lose meaningful discretion to tax below the maximum rates allowed by the State. WOC II, at 110. The Court decided that it was" not even a close question" as to whether districts had the necessary meaningful discretion to set their own property tax rates.

The Court held that wealthy districts who sought to supplement local programs with additional funding did not have a constitutional right to supplementation. WOC II, at 111. However, the Court noted that the Legislature was driven by a basic philosophy of local control, and opened the door for local supplementation provided that all three conditions were met. First, the constitutional equalization of funding must be first accomplished. Secondly, supplementation could not harm the foundation school program. Thirdly, the supplement could not re-introduce unequal access to resources for students. WOC II, at 111.

To guide the Legislature, the Court made clear that the legal standard of review would be arbitrariness. Giving a specific example, the Court wrote that it would be arbitrary "for the

Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide an insufficient means for achieving those goals." WOC II, at 81. This sentence will give school districts an important tool for working with the Legislature to achieve a constitutional public school system.

Cautioning the State of Near -Unconstitutionality on Other Bases

Throughout the Supreme Court's decision, the majority included cautionary language to alert the State's leaders to constitutional problems that could and should be avoided.

For example, the Court admonished the Legislature that the Court had repeatedly urged a broader remedy, not merely a Band-Aid approach to achieving compliance with the Constitution. In particular, the Court identified a variety of elements of the present school finance system that would make it very difficult for the Legislature to produce an enduring solution:

- The heavy reliance by the Legislature on local property taxes to fund public education, especially where the districts vary greatly in size and wealth. WOC II, at 16
- The great number of small districts. WOC II, at 19.
- The mistaken belief that merely pouring money into the flawed system will forestall legal challenges. WOC II, at 9 and 117.

Moreover, the Court expressed its concern about certain outputs of the present system, acknowledging that these outputs do not yet amount to a constitutional violation (WOC II, at 108):

- Highest non-completion rates for high school students in the country
- Low literacy rates
- Falling teacher certification rates
- Growing teacher turnover and attrition
- Increasing numbers of limited English proficient students not obtaining services
- Increasing numbers of economically disadvantaged students not obtaining services.

The Court did not disturb the trial court's findings that health and safety problems were connected to inadequate facilities. WOC II, at 34. The facts were undisputed that school districts lacked all the facilities essential for providing students a learning environment in which to attain a general diffusion of knowledge. Id.

Edgewood Appellees' Motion for Rehearing

The Supreme Court left the record open for proceedings on attorneys' fees, but a new action should be noted. On December 6, 2005, the Edgewood I.S.D., et al., appellees filed a motion for rehearing, asking the Court to reconsider and withdraw its judgment regarding the constitutionality of the facilities efficiency claim. In its November ruling, the Texas Supreme Court observed that the vastly insufficient funds for facilities made available to property-poor districts subjected the children in these districts to substandard learning environments, including, but not limited to: overcrowded schools and classrooms, aging buildings, inadequate libraries, inadequate and unsafe science laboratories, and inadequate heating, air conditioning and ventilation. West Orange-Cove II, at 39. The Edgewood intervenor districts followed the same procedure for presenting evidence as in the earlier Edgewood trials, submitting evidence about the State's actions and omissions with regards to funding, and illustrating the consequences of the State's decisions with precise factual evidence related to illustrative districts. This technique of using model districts to present the evidence was also used by the West Orange-Cove plaintiffs in demonstrating their lack of local control over property taxes.

While the Supreme Court had no concerns about the sufficiency of the evidence on the tax rates, the Court asked for more evidence on facilities funding. Despite the abundant evidence in the record, the Supreme Court declined to find the facilities funding unconstitutionally inefficient because the evidence had not been accompanied by a trial court finding that property poor districts (other than the Edgewood intervenor districts) shared similar needs for facilities funding.

The Edgewood intervenors have claimed that the November ruling has announced a new legal standard for proving constitutional violations related to facilities funding that the Court has never applied to other claims in prior Texas school finance appeals.

Legislative Paths Certain to Lead to Constitutional Challenges

The Supreme Court greatly simplified the work of the Texas Legislature by adopting a standard of adequacy that gives great deference to the policy role of the elected officials. By avoiding the tension between these two branches of government, the Court has helped the Legislature to focus on its main educational business—afforded children access to general diffusion of knowledge. Some critics may be disappointed that the Court steered away from a common-sense definition of adequacy. In fact, the Court itself admitted that it had not used the term "adequacy" in the dictionary sense. But, overall, the Court adopted the trial court's definition of adequacy and delivered structured guidance that should assist the Legislature avoid future conflicts with the Texas Constitution.

The Court's stay of its injunction to halt all state educational spending is in effect until June 1, 2006. This period of six months is ample time for the elected officials to determine the manner and source of funding for the reform it chooses.

The Legislature has an obligation to implement a system in which "all students must demonstrate knowledge and skills necessary to read, write, compute, problem solve, think critically, apply technology, and communicate across all subject areas. The essential knowledge and skills shall also prepare and enable all students to continue to learn in postsecondary educational, training, or employment settings." WOC II, at 90. These objectives, adopted by the Texas Legislature and approved by the Court in earlier rulings are more than mere rhetoric. Id.

The Court without hesitation has stated in its most recent ruing that when the Texas public school system reaches the point that continued improvement in student results will not

be possible, then that system has reached constitutional inadequacy. The Court, having reviewed the evidence and engaged in some research of its own, predicts that the point of unconstitutionality on the basis of inadequacy is very near. WOC II, at 92. Similarly, the point of inefficiency with regards to instruction and facilities is also very close. WOC II, at 93.

The Court also cautioned the Legislature that short-term answers, such as reducing the tax rate to $1.20 or $1.00, without any new funds added to the system, would not provide a stable remedy. Similarly, merely adding more money into the system would provide welcome relief to many districts, but the Court viewed that approach as a temporary fix because the structural problems and tensions remain.

Thus, the Legislature has before it the challenge of correcting the existing article VIII violation and, at the same time, designing a system to prevent article VII problems, not yet reaching the point of unconstitutionality.

To add to the challenge, the highest court has reminded the Legislature that it may be prudent to consider the issue of waste in the bureaucratic administration of the system. WOC II, at 101. No evidence was presented at trial on this subject, though, so these hints may likely be purely dicta.

In sum, the Supreme Court has provided guidance, without usurping the role of the Legislature. It has pressed the issue of urgency, and has delivered a real deadline to the elected branch of government. While some representatives may complain that the decision is not specific enough, I predict that the vast portion of legislators will recognize this opportunity to provide leadership as a unique chance to deal with a real crisis, and to avoid other imminent legal challenges.

LIFE GOES ON IN THE FISHBOWL: RELATIONSHIP REPORTING REQUIREMENTS UNDER NEW LOCAL GOVERNMENT CODE CHAPTER 176

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In this New Year, local governments, local government officials and vendors are subject to a new conflicts of interest disclosure law (referred to in this article as the "Relationship Reporting Law"):

> Chapter 176 of the Texas Local Government Code, "Disclosure of Certain Relationships with Local Government Officers; Providing Public Access to Certain Information"

It has for a long time been prudent for school officials to avoid even the appearance of a conflict of interest. Many school districts have addressed these issues at a local level through special provisions in Board Policies and/or employment contracts. The Relationship Reporting Law ushers in a legislative approach to address continuing public concerns about the relationships of local government officials to vendors seeking to do business with local governmental entities.

More specifically, pursuant to this new law, school board members, school superintendents and vendors who market to school districts are subject to new relationship disclosure reporting requirements.

Vendors, including any person or entity that has or courts school district business, must report certain affiliations or business relationships with school board members and superintendents. Similarly, school board members and superintendents must report outside employment with and gifts received from vendors.

School districts must receive and maintain these reports, and must post these reports on the Internet and produce them upon request from any member of the public.

The Relationship Reporting Law does apply to all "local governmental entities" and all "local government officials," as such terms are defined in the statute.[1] However, this article is focused on the impact of the Relationship Reporting Law on public school districts. In the public school district context, the defined term "local government officials" specifically includes only members of the school district's board of trustees ("school board members") and the school district's executive officer, being the superintendent ("school superintendent"). Accordingly, although the statute has a broader application to the officers of other local governmental entities, specific attention and reference is made in this article to school districts and to school board members and to school superintendents.

Conflicts of Interest Laws - Background.

The Attorney General for the State of Texas generally described the purpose and background of conflict of interest laws as follows[2]:

> "Conflict of interest rules are directed at preventing public officials from using their authority for personal economic benefit rather than for the benefit of the public. This area of the law has traditionally focused on public contracts in which a member of the contracting body has a personal economic interest."

Laws that reflect this traditional focus prohibit public officials from exercising discretion on contracts and matters in which they have any pecuniary interest.

The Relationship Reporting Law reflects the continuing expansion of this State's laws beyond the narrower traditional focus (described above). In fact, conflict of interest laws now cast a much wider net to catch not only those interests that are directly tied to and affected by the outcome of a single governmental decision, but also many other interests,

which in many cases are more indirect. This expanding scope includes those interests that, although there may be no specific, direct economic benefit to the public officer as a result of any given action, may nevertheless interfere with the impartial execution of their duties in the public interest.

Existing Laws - Prohibiting Improper Influence.

An array of current state laws that predate the Relationship Reporting Law exist to eliminate influence peddling and certain other improper influence on purchasing decisions by government agencies, entities and subdivisions, including school districts.

Such conduct that reflects improper influence and is prohibited and criminalized by current state law includes, but is not limited to, the following (described only generally below, but more specifically set forth in the statutes cited in the endnotes):

- Bribery of public servants.[3]
- Honorariums, solicited or accepted by public servants.[4]
- Gifts, solicited or accepted by public servants.[5]
- Abuse of official capacity by a public servant.[6]
- Misuse of official information.[7]
- Failing to abstain from participation and/or to file required affidavit in matters involving a business entity or real property before a vote or decision thereon.[8]
- Gifts, favors or services, accepted by a school trustee, administrator or teacher that might reasonably tend to influence them in the selection of a textbook.[9]

Criminal penalties exist for persons who are convicted for engaging in the criminal conduct that is prohibited by these listed statutes, representing a range of offenses from misdemeanors to felonies.

New Law - New Requirements for Reporting of Relationships and Public Access.

A. Summary Description.

The Relationship Reporting Law includes at least four new disclosure and information requirements that affect public school districts in the State of Texas, described generally as follows:

1. *Conflicts Disclosure Statement*[10] *- Board Members and Superintendent*

A conflicts disclosure statement must be timely[11] filed by a superintendent or board member if:

The school district has contracted with the vendor or is considering doing business with the vendor, **and**,

The school board member or school superintendent (or a family member[12]) either:

- has an employment or other business relationship with the vendor and receives taxable income,

or,

- has been given by a vendor one or more gifts that have an aggregate value of more than $250 in a 12-month period; but not including gifts of food, lodging, transportation or entertainment accepted as a guest.

2. *Conflict of Interest Questionnaire*[13] *- Vendors*

A conflict of interest questionnaire must be timely[14] filed by vendors[15] in school districts.

3. *Internet Website Posting*[16]

Internet website posting of all conflict of interest questionnaires and conflicts disclosure statements is required.

4. *List of Local Government Officers*[17]

A list of local government officers (i.e., the school board members and school superintendent) shall be maintained and made available to the public.

B. Compliance.

The summary description above is a snapshot of the four new disclosure and information requirements identified above is supplemented by the following information about the Relationship Reporting Law, which is organized by making key compliance inquiries: Who?, What?, When?, Where? and Why?

1. *Who?*

a. School board members and school superintendents, individually

A conflicts disclosure statement must be timely filed by a school board member or superintendent if the school district has contracted with the vendor or is considering doing business with the vendor (referred to in this article as a "Vendor-District Relationship") and the school board member or the superintendent (or a Family Member [as described below]) has, either[18]:

(i) an employment or business relationship with the vendor resulting in the receipt of taxable income; for convenience referred to in this article as an "Outside Business Relationship with a Vendor"; or,

(ii) has been given by the vendor one or more gifts that have an aggregate value of more than $250 in a 12-month period, but not including gifts of food, lodging, transportation or

entertainment accepted as a guest; for convenience referred to in this article as a "Gift Required to Be Reported."

A "Family Member" is defined in the statute to mean a person related to another person within the first degree of consanguinity or affinity, as described by Subchapter B, Chapter 573, Texas Government Code.[19] For example, the "Family Members" of a superintendent who is married, would include the superintendent, the superintendent's parents, the superintendent's children, the superintendent's spouse, the spouse's parents and the spouse's children.

b. Vendors

The Relationship Reporting Law, specifically provides that the following persons must timely file a completed conflict of interest questionnaire with the school district[20]:

(i) Any person who contracts or seeks to contract for the sale or purchase of property, goods or services with the school district,
or
(ii) An agent of a person described in the preceding subsection '(i)' in the person's business with the school district;

provided, however, that a person is not subject to the disclosure requirements of the Relationship Reporting Law if the person is:

(aa) A state, political subdivision of a state, the federal government, or a foreign government,
or
(bb) An employee of an entity described in the preceding subsection '(aa)', acting in the employee's official capacity.

For convenience, the persons required to file a completed conflict of interest questionnaire as described above are referred to in this article as a "vendor" or as "vendors."

It should be noted that the term "person" includes not only an individual but also a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, associations, and any other legal entity.[21]

c. School district's records administrator

The school district's records administrator is that person responsible for maintaining the records of the local governmental entity.[22] Absent some unusual or extraordinary circumstance, the school superintendent is the records administrator for a public school district.

d. Other school district employees

The Relationship Reporting Law expressly permits a school district to extend the requirements for filing a conflicts disclosure statement to all or a group of employees.[23] A knowing violation by any employee to whom the filing requirements were extended by the school district is a criminal offense.[24] Furthermore, a failure to comply with the filing requirements subjects the employee to adverse employment action, including reprimand, suspension or termination.[25] An analysis or discussion of the advantages and/or disadvantages of extending these filing requirements as permitted by the statute, the process for undertaking such extension and/or the operational implementation of same is beyond the scope of this article.

2. *What?*

The Texas Ethics Commission ("Commission") is specifically charged with adopting forms for both the conflicts disclosure statement and the vendor conflict of interest questionnaire; for convenience such forms are collectively referred to in this article as the "Disclosure Forms."[26]

As required by the new statute and in anticipation of the January 1, 2006 effective date, the Commission adopted the Disclosure Forms at its board meeting held on November 2, 2005.

At the time this article was prepared, the adopted Disclosure Forms are accessible for viewing or downloading as .pdf files on the Commission's Internet website at:

http://www.ethics.state.tx.us/whatsnew/conflict_forms.htm

a. School board members and superintendents-conflicts disclosure statement[27]

School board members and superintendents who are required to file a conflicts disclosure statement should use the Commission adopted form: Form CIS.

b. Vendors - conflict of interest questionnaire[28]

Vendors should use the Commission adopted form: Form CIQ.

Please be aware that the Commission has indicated its intention to consider adopting a revised conflict of interest questionnaire at its January 13, 2006 board meeting.

c. School district's records administrator and purchasing department

The school superintendent's duties as records administrator or otherwise in connection with school district purchasing operations may be assigned to and carried out by other district employees. In the event of such assignment, proper information and training should take place so district employees can properly assist school board members and vendors by having ready access to the Disclosure Forms adopted by the Commission, which can then be provided upon individual request. It should also be noted that the Relationship Reporting Law provides that the filing requirements may be satisfied by electronic filing.[29]

3. *When?*

All of the requirements of the Relationship Reporting Law first became effective on or before January 1, 2006.

a. School board members and superintendents[30]

Because of the January 1, 2006 effective date, all school board members and school superintendents should have already acted to evaluate and comply with the conflicts disclosure statement requirement, if applicable. In this regard it is again noted that although all vendors are required to timely file a vendor conflict of interest questionnaire, not all school board members and school superintendents are required to file a conflicts disclosure statement.

A conflicts disclosure statement must be filed by any school board member or school superintendent who themselves (or their Family Members) have, either an Outside Business Relationship with a Vendor, or have received from a vendor a Gift Required to Be Reported.

If required, the completed conflicts disclosure statement must be filed by a school board member or school superintendent not later than 5:00 p.m. on the seventh business day after the date on which he or she becomes aware of the facts that require the filing of the disclosure statement.

b. Vendors[31]

Vendors should have already acted to come into compliance with the requirements for filing completed conflict of interest questionnaires with the records administrator of each school district with which they have a contract or are seeking to contract.

The completed conflict of interest questionnaire must be filed by a vendor not later than the seventh business day after the date the vendor: (i) begins contract discussions or negotiations with the school district, or (ii) submits to the school district an application, response to a request for proposals or bids, correspondence, or another writing relating to a potential agreement with the local governmental agency.

Furthermore, vendors should be prepared in which there are ongoing activities in the school district to update their completed questionnaires within seven days of any event that would make a statement in the questionnaire incomplete or inaccurate.

Still further, vendors should be prepared to update the completed vendor questionnaires each year in which there are ongoing activities in the school district. The first deadline to update the completed vendor questionnaire is on September 1, 2006, with such annual update requirement recurring each September 1 thereafter.

c. School district's records administrator

Furthermore, each school superintendent and records administrator (if someone other than the school superintendent) should ensure that the school district's operating procedures specifically contemplate and address the following: collecting and maintaining completed vendor questionnaires; promptly posting all filed statements and questionnaires on the district's website; and, having staff informed about this new law to field any requests for the district's list of officials or copies of the vendor questionnaires or disclosure statements. In undertaking this effort and given the many facets of this new statute, school district officials would do well to seek and receive appropriate support and assistance from the school district's legal counsel.

The Relationship Reporting Law includes ongoing obligations, some of which are referenced above, requiring those persons subject to this statute to be ever vigilant and mindful of the requirements.[32] Some of these ongoing obligations include:

- Vendors must file questionnaires with each school district as they first seek to contract with them.
- Vendors must act to promptly update their filed questionnaire(s) within seven days of any event that would make a statement in the questionnaire incomplete or inaccurate.
- Vendors must act annually, by September 1 each year in which there are ongoing activities in the school district, to file an updated completed questionnaire.
- New board members, upon taking office, must promptly act to evaluate and comply with the disclosure statement requirement, if applicable.

This requirement could be covered in board candidate information sessions and should be covered as a part of an immediate new board member orientation/training session.

- New superintendents, upon being hired, must promptly act to evaluate and comply with the disclosure statement requirement, if applicable.

4. *Where?*

Disclosure Forms must be filed with the school district and the school district must in turn post same on the school district website.

a. Filing

The disclosure statements and the vendor questionnaires must be filed with the records administrator for the school district.[33]

b. Posting

These records once filed must in turn be posted by the school district on its Internet website.[34]

5. *Why?*

Criminal penalties exist for failure to comply with the requirements for filing a vendor questionnaire or a disclosure statement.

a. School board members and school superintendents, individually.

It is a Class C misdemeanor for a school board member or school superintendent to knowingly violate the requirements for timely filing a required conflicts disclosure statement.[35]

It is a defense to prosecution that the required conflicts disclosure statement was filed not later than the 7th business day after receiving notice of the violation.

b. Vendors

It is a Class C misdemeanor for a vendor to violate the requirements for timely filing an initial and/or updated completed questionnaire.[36]

It is a defense to prosecution that the required conflict of interest questionnaire was filed not later than the seventh business day after receiving notice of the violation.

C. Pitfalls, Potholes and Other Notables.

Filing Requirements Apply to All Vendors But Only Some School Officials.

All school district vendors must file the conflict of interest questionnaire, regardless of whether or not they have certain affiliations or business relationships with school officials.

However, only those school board members and school superintendents who themselves (or their Family Members) actually have either an Outside Business Relationship with a Vendor, or have received a Gift Required to Be Reported, must file a conflicts disclosure statement. Thus, school board members and school superintendents (including their Family Members) who do not accept gifts or receive income from vendors are not required to file anything.

Disclosure Requirements Are Broader for School Officials Than For Vendors.

As specified above, school board members and school superintendents must disclose outside employment or business relationships with vendors and gifts received from vendors.

Vendors are not required to disclose gifts that they give to school officials, but must disclose certain affiliations or business relationships with school officials.

A Lot of Persons Are Required to File Vendor Conflict of Interest Questionnaires.

Conflict of interest questionnaires must be filed by all persons, including individuals, entities and their agents, who: (i) contract with a school district, or (ii) seek to contract for the sale or purchase of property, goods or services with the school district. The "seek to contract" prong really opens up this standard, to catch even those vendors who are courting the business of a school district but have yet to earn same. Undoubtedly, the administrative requirements placed on vendors and school districts by this statute are significant.

Internet Website Posting Requirements.

The requirement that a school district post on the school district's Internet website the conflict of interest questionnaires and conflicts disclosure statements that it receives presumes that a school district has a website and maintains that website on a regular basis.

It is also noteworthy that the Relationship Reporting Law does not specify any deadline for posting questionnaires and statements to the website.

Furthermore, the Relationship Reporting Law does not identify any criminal violation associated with the Internet website posting requirements.

Practical Consequences for Abuse of Gift "Exception" for Food, Lodging, Transportation and Entertainment Accepted as a Guest.

The requirement to report gifts from a vendor has a threshold value of $250.00 aggregate in

any 12-month period. Although food, lodging, transportation and entertainment accepted as a guest are excepted altogether from reporting requirements, school officials are forced to be always cognizant that they are living in a fishbowl. In such an environment, the appearance of impropriety can be very damaging even though it falls short of a violation of law. Consider for example a school official who accepts an invitation to attend an extravagant vendor-paid trip to play the Pebble Beach golf course, complete with airfare, meals and hotel. Every aspect of that trip may well fall outside the statutory requirements for reporting, but how do the District's employees and patrons respond to the headlines reporting such activity?

Disclosure Forms Include Limited Explanation - Only Lawyers Should Give Legal Advice.

Individuals who are responsible for completing one of the Disclosure Forms truly need knowledge and an understanding of the Relationship Reporting Law itself. An individual who relies only a simple reading of the Disclosure Forms for understanding may very well reach false conclusions with bad results; consider the following examples:

- The conflicts disclosure statement does not offer a definition of "family member."

- The only reference on the face of the conflicts disclosure statement itself that the statement in fact requires any reporting concerning a "family member" and that it covers a "12-month period" appear in very small type font towards the bottom of the page, located well away from the specific questions posed on the statement. This lack of conspicuousness is mitigated some by the brief references that are included in the instructions page that is provided with the statement form by the Commission.

- The vendor conflict of interest questionnaire is subject to even greater misunderstanding, as for example, it uses the term "person doing business with the local governmental entity" to refer to those who are required to file a questionnaire. This is significant because the term "person doing business with the local governmental entity" does not even appear in the Relationship Reporting Law. Furthermore, this term is not likely to be understood by vendors as extending either: (i) to those who are seeking to contract (but do not yet have a contract) with a school district, or (ii) to those who are agents.

- The questionnaire form currently adopted by the Commission includes at least two questions (Nos. 3 and 4) that suffer from wording that is awkward and difficult both to understand and to answer. However, as noted above, the Commission is scheduled to consider an alternative questionnaire form at its January 13, 2006 board meeting. The alternative questionnaire form as proposed would address the issues that exist with respect to question Nos. 3 and 4.

Given the issues described above, school officials must be particularly careful to avoid providing technical advice to vendors. No matter how well-intentioned such cooperation may be, vendors should be referred to the vendor's legal counsel for guidance.

Role of the Texas Ethics Commission is Limited to Adopting Disclosure Forms.

The Commission has no authority to provide guidance in interpreting the Relationship Reporting Law. In a message that currently appears on the Commission website, the Commission specifically informs the public as follows:

> "Please note that the Texas Ethics Commission does NOT have jurisdiction to interpret or enforce Chapter 176 of the Government Code. Also, please note that these forms [the Disclosure Forms] are NOT filed with the Texas Ethics Commission."

The Commission has made clear that other then adopting the Disclosure Forms as expressly required by the new statute, they cannot serve as a public resource on issues concerning the Relationship Reporting Law.

Other Conflict of Interest Authorities.

This article would not be complete without acknowledging other sources of authority that guide school board members and/or school superintendents in the context of conflicts of interest. Prior to the Relationship Reporting Law becoming effective, the conduct of officials in public school districts all over the state was guided by reference to state and local rules, standards and authorities. Such rules, standards and authorities include but are not limited to applicable provisions of the Code of Ethics for Texas Educators[37], the Standards Required for the Superintendent Certificate[38], local Board Policies[39], and the terms and conditions of employment contracts for school superintendents and administrators. The Relationship Reporting Law specifically provides that its requirements are cumulative of any other disclosures required by law.[40] Accordingly, the other authorities cited above in this paragraph, are supplemented, not supplanted, by this new statute.

Conclusion.

A review of the Relationship Reporting Law reveals that the stakes are as high as the future is uncertain. Indeed a failure

to strictly comply with the terms of this new law can result not only in a criminal conviction as specified in the new law, but also in collateral damage which may include a loss of confidence, forfeiture of contracts, losing political office, termination of employment and/or jeopardized professional certificates. Undoubtedly, there should and will be great effort put into complying with the various requirements of this new law.

The Relationship Reporting Law has been described as a "gotcha" law. Accordingly, school districts, school district officials and those vendors who conduct business with school districts will benefit greatly from and should rely heavily on the assistance of their legal counsel in this specific arena.

The author wishes to express appreciation and gratitude to Dori Hawker, Esq., for the time and effort she contributed to this article.

ENDNOTES

1 *Tex. Loc. Gov't Code Sec*. 176.001 (3) and (4).

2 *2004 Public Officers: Traps for the Unwary*, Attorney General for the State of Texas (2004).

3 *Texas Penal Code Section 36.02.*

4 *Texas Penal Code Section 36.07*.

5 *Texas Penal Code Section 36.08*.

6 *Texas Penal Code Section 39.02*.

7 *Texas Penal Code Section 39.06*.

8 *Tex. Loc. Gov't Code Chapter 171*.

9 *Tex. Educ. Code Sec. 31.152*.

10 *Tex. Loc. Gov't Code Sec. 176.003*.

11 Statement must be filed with school district's records administrator not later than 5:00 p.m. on the seventh business day after the date on which the officer becomes aware of the facts that require the filing of the statement under subsection (a) of Tex. Loc. Gov't Code Sec. 176.003.

12 A family member is a person related to another person within the first degree of blood or marriage. *Tex. Loc. Gov't Code Sec. 176.002.*

13 *Tex. Loc. Gov't Code Sec. 176.006.*

14 Questionnaire must be filed with school district's records administrator not later than the seventh business day after the date the vendor: (1) begins contract discussions or negotiations with the school district; or (2) submits to the school district an application, response to a request for proposals or bids, correspondence, or another writing related to a potential agreement with the school district.

15 Vendors include any person who (1) contracts or seeks to contract for the sale or purchase of property, goods, or services with a school district; or (2) is an agent of a person described by Subdivision (1) in the person's business with a school district.

16 *Tex. Loc. Gov't Code Sec. 176.009(a)*.

17 *Tex. Loc. Gov't Code Sec. 176.007*.

18 *Tex. Loc. Gov't Code Sec. 176.003*.

19 *Tex. Loc. Gov't Code Sec. 176.001(2)*.

20 *Tex. Loc. Gov't Code Secs. 176.002 and 176.006*.

21 *Tex. Gov't Code Sec. 311.005(2)*.

22 *Tex. Loc. Gov't Code Sec. 176.001(5)*.

23 *Tex. Loc. Gov't Code Sec. 176.005(a)*.

24 *Tex. Loc. Gov't Code Sec. 176.005(c)*.

25 *Tex. Loc. Gov't Code Sec. 176.005(b)*.

26 *Tex. Loc. Gov't Code Secs. 176.004 and 176.006*.

27 *Tex. Loc. Gov't Code Sec. 176.004*.

28 *Tex. Loc. Gov't Code Sec. 176.006*.

29 *Tex. Loc. Gov't Code Sec. 176.008*.

30 *Tex. Loc. Gov't Code Sec. 176.003*.

31 *Tex. Loc. Gov't Code Sec. 176.006*.

32 *Tex. Loc. Gov't Code Secs. 176.003 and 176.006*.

33 *Tex. Loc. Gov't Code Secs. 176.003(b) and 176.006(a)*.

34 *Tex. Loc. Gov't Code Sec. 176.009(a)*.

35 *Tex. Loc. Gov't Code Sec. 176.003(c)*.

36 *Tex. Loc. Gov't Code Sec. 176.006(f)*.

37 *19 Tex. Admin. Code Sec. 247.2*.

38 *19 Tex. Admin. Code Sec. 242.15*.

39 Consider e.g., Board Policies BBF (Local), DBD (Legal), DBD (Local), DBF (Local), DH (Legal), DH (Local), DH(Exhibit).

40 *Tex. Loc. Gov't Code Sec. 176.010*.

DID CONGRESS HAVE ANY NEW IDEAS? HIGHLIGHTS OF THE 2004 REAUTHORIZATION OF THE IDEA

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Congress approved the long-awaited reauthorization of the Individuals with Disabilities Education Act (IDEA) in late November 2004 during a lame duck session of Congress. The bill was long-awaited among educators because it held the promise of resolving major issues arising since the Act was last revised in 1997, including how special education teachers will meet the highly qualified standards under the federal No Child Left Behind Act, whether there should be more latitude in disciplining special education students, and how to improve the dispute resolution processes. The reauthorized Act did not disappoint in addressing these issues, although some of the answers were not necessarily the ones desired by educators. This article provides an overview of some of the major issues addressed in the reauthorization that relate directly to educators. Please note that it does not address issues related to hearing rules, transition and enforcement.

Highly qualified special education teachers

One of the most awaited decisions by Congress in the reauthorization of IDEA was whether special education teachers would have to demonstrate competency in every core academic subject they teach, in response to the requirements of the federal No Child Left Behind Act that all teachers of core academic subjects be highly qualified by the end of the 2005-2006 school year. Educators were concerned because no state, Texas included, certifies its special education teachers in particular subject areas because they have traditionally taught classes that are not defined by content subject area, but are inclusive of all subjects. This generalist role does not lend itself to narrow categories of certification, and requiring special education teachers to become "highly qualified" in every subject that they teach would work an incredible hardship on currently certified special education teachers, particularly at a time when special education teachers are in such high demand. Unfortunately, Congress did not give veteran special education teachers much of a break in this regard. The Act requires all special education teachers to hold a special education teaching certificate. It also requires veteran special education teachers in most situations to demonstrate competency in every core subject area they teach, just like all other veteran teachers, either through HOUSE, or passing the applicable certification exam, or having an academic major or coursework equivalent to the subject taught (secondary level) by the end of the 05-06 school year.[1]

The final bill does contain some options for certain circumstances:

1) New elementary special education teachers who are teaching students who exclusively take an alternative assessment (typically the State Developed Alternative Assessment or SDAA) have the option of meeting HOUSE for elementary teachers in order to be highly qualified; veteran secondary special education teachers who are teaching these students on an elementary level also have the option of meeting HOUSE for elementary teachers in order to be highly qualified. Veteran and new special education teachers teaching these students at the secondary level have the option of demonstrating competency by being determined by the state to have the subject matter knowledge appropriate to the level of instruction being provided needed to effectively teach to those standards.

2. New special education teachers who are not in the situation described immediately above, must demonstrate competency in every subject taught when hired, UNLESS teaching 2 or more core academic subjects, in which case competency must be demonstrated in at least one core subject area when hired, leaving two years from the date of hire to demonstrate competency in the other core subjects taught. Competency can be demonstrated via HOUSE, or passing the applicable exam, or the additional option for secondary level teachers of having an academic major or coursework equivalent to the subject taught.[2]

Personnel qualifications:

In place of the Comprehensive System of Personnel Development, the reauthorized law directs the State to establish and maintain qualifications to ensure that personnel are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Related services personnel and paraprofessionals must (i) be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which these personnel are providing special education or related services; (ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and (iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services under this part to children with disabilities.

Each state must also adopt a policy to require that local educational agencies in the State take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services to children with disabilities.

Finally, the new law states that nothing in the section shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency.[3]

Discipline

Congress responded to complaints about restrictions regarding discipline of special education students from school dis-

tricts across the country by expanding the circumstances in which a special education student can be placed in an interim alternative setting for not more than 45 school days (used to be calendar days) without regard to whether the behavior is determined to be a manifestation of the child's disability. In addition to firearm and drug offenses, school personnel may remove the student to an alternative setting when a child has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.[4]

The statute defines "serious bodily injury" at U.S. Code, Title 18, Section 1365(h)(3) and (4):

(4) "bodily injury" means
(A) a cut, abrasion, bruise, burn, or disfigurement;
(B) physical pain;
(C) illness;
(D) impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary.

(3) A "serious" bodily injury involves -
(A) a substantial risk of death;
(B) extreme physical pain;
(C) protracted and obvious disfigurement; or
(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary.

The reauthorized law makes significant changes to the manifestation determination review ("MDR"), which is still required when administrators are considering disciplinary action.

1. It changes the burden of proof in a due process hearing to challenge ARD committee's decision in an MDR. Previously, the school district had to demonstrate that the child's action was **not caused** by the child's disability. The reauthorized law requires the parent to show that the child's action was the direct result of the child's disability.[5]

2. Administrators must still consider whether a child's behavior was the result of a disability. But the new law clarifies that the test is whether the behavior was caused by *or has a direct and substantial relationship to the disability*. An FAQ document from the U.S. House of Representatives Committee on Education and the Workforce, states that the intent of the drafters in adding "direct and substantial relationship" was to tighten up the language and eliminate the prior practice of allowing any tangential or attenuated relationship to suffice as a manifestation.

3. Now only *relevant* members of the IEP Team (ARD committee in Texas) must be part of the manifestation determination process.[6]

New language addresses what happens if a child's behavior is determined to be directly related to the disability. The statute requires the IEP Team to determine whether a behavioral intervention plan has been implemented for the child. If one has not, then one must be implemented. If one has, then the IEP Team must review and revise it if necessary to address the behavior. Additionally, unless the parent and the district agree to a change of placement, the child must be returned to the placement from which the child was removed.[7]

New language also clarifies that if a child's behavior is determined not to be directly related to the disability, the child can be disciplined in the same manner and for the same duration as a non-disabled student, including placement in a DAEP.[8] If such a child's placement is changed for longer than 10 days, the child will continue to receive educational services to make progress on his or her IEP.[9]

On the "stay-put" front, the reauthorized law makes clear that the DAEP will be the "current" placement when parents appeal the manifestation determination.[10]

Do these safeguards apply to children who have not been identified as having a disability? The reauthorized law tightens up the standard for determining that a child **should have been afforded the protections** of IDEA in assessing discipline. It now requires teachers or other school personnel to have addressed specific concerns about the student directly to the special education director of other supervisory personnel. It also eliminates the option of allowing regular education students to avail themselves of the protection of the law when the behavior or the performance of the child demonstrates the need for special education services. Finally, school districts will not be deemed to have knowledge that the child is a child with a disability when the parent has not allowed an evaluation of the child or has refused services, or the child has been evaluated and has been determined NOT to be a child with a disability.[11]

School personnel may now consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct and may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).[12]

Reducing paperwork and meetings

Another chief concern among educators is the large amount of time spent in meetings and doing paperwork. Congress responded by providing for a pilot program that allows 15 states to submit and be approved for waivers from federal special education laws/rules. The states must submit plans to reduce excessive paperwork and noninstructional time burdens that do not assist in improving educational and functional results for children with disabilities. Exceptions: Civil rights can't be waived, procedural protections can't be waived, and nothing can be waived that would affect the right of a child to receive FAPE. Those waivers can be terminated if a school starts slipping under the federal accountability system or if the waiver is improperly implemented.

By 2006, the USDE will present a report to Congress about the effectiveness of waivers granted and include recommendations for broader implementation of waivers in:

1. reducing the paperwork burden on teachers, principals, administrators, and related service providers;

2. reducing noninstructional time spent by teachers in complying with part B; and
3. enhancing longer-term educational planning, improving positive outcomes for children with disabilities, promoting collaboration between IEP Team members; and ensuring satisfaction of family members.[13]

The bill now allows members of the IEP Team to be excused from attending meetings if the parent of the student and the school district agree that person's attendance is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. However, the excused member must submit written input into the development of the IEP before the ARD meeting .[14] Furthermore, members can be excused even if the member's area of curriculum or related services is being modified or discussed in the meeting if the parent and district agree and the excused member submits written input into the development of the IEP before the meeting.[15]

Other measures are designed to reduce the amount of time spent in meetings and on paperwork by allowing the parent and the school district to agree to make changes to an IEP after the annual IEP meeting without convening another meeting, but by merely making the changes in writing; by allowing the IEP Team to meet via conference call or video, and by requiring school districts to consolidate IEP Team meetings as much as possible.[16]

Finally, the bill allows a 15-state pilot project in which states will experiment with developing IEPs that are valid for up to 3 years.[17]

Funding

The bill limits states' allowable uses of federal discretionary funds to the following:

''(i) For support and direct services, including technical assistance, personnel preparation, and professional development and training.
''(ii) To support paperwork reduction activities, including expanding the use of technology in the IEP process.
''(iii) To assist local educational agencies in providing positive behavioral interventions and supports and appropriate mental health services for children with disabilities.
''(iv) To improve the use of technology in the classroom by children with disabilities to enhance learning.
''(v) To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities.
''(vi) Development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of children with disabilities to postsecondary activities.
''(x) To support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with sections 1111(b) and 6111 of the Elementary and Secondary Education Act of 1965.
''(xi) To provide technical assistance to schools and local educational agencies, and direct services, including supplemental educational services as defined in 1116(e) of the Elementary and Secondary Education Act of 1965 to children with disabilities, in schools or local educational agencies identified for improvement under section 1116 of the Elementary and Secondary Education Act of 1965 on the sole basis of the assessment results of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers, who teach children with disabilities, based on scientifically based research to improve educational instruction, in order to improve academic achievement to meet or exceed the objectives established by the State under section 1111(b)(2)(G) the Elementary and Secondary Education Act of 1965.[18]

Under the reauthorized law, states may reserve up to 10 percent of the funds already reserved for State-level activities in each fiscal year to establish risk pools to help districts pay for "high need" students and for the unexpected enrollment of students with disabilities. Each state must establish its definition of a "high need child with a disability," in consultation with local school districts. The definition of a high need child must, at a minimum, address the financial impact a high need child with a disability has on the budget of the child's school district; and ensure that the cost of the high need child with a disability is greater than 3 times the average per pupil expenditure (as defined in section 9101 of the Elementary and Secondary Education Act of 1965) in that State.[19]

Children in private schools

The reauthorized law requires schools to engage in "timely and meaningful consultation" with representatives of private schools to determine how many special education students are being educated in private schools and to provide records and information to the State about the consultation.

"Timely and meaningful consultation" means designing the child find process to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of those children. The school district must consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—
''(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;
''(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;
''(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;
''(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of

types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and
''(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

School districts must provide the state with a written affirmation signed by private school representatives that the above has occurred. The private school can complain to the state if consultation has not occurred.[20]

Hearing officers will now have the discretion to reduce reimbursement to parents who place their child in private school if the parent fails to provide notice to the district of intent to enroll their child in a private school, unless the parent is illiterate or cannot write English, or compliance with the notice requirement would likely result in serious emotional harm to the child.[21]

Over-identification and disproportionality:

States must have and enforce policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities.[22] Districts with significant over-identification of minority students must operate pre-referral programs that work to reduce over-identification.[23]

Prohibition on mandatory medication:

Similar to a requirement Texas imposed in 2003 (Tex. Educ. Code § 38.016), the reauthorized bill requires states to prohibit state and school district personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation, or receiving services under this title. But it also provides that nothing in that prohibition can be construed to create a federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph.[24]

Early intervening services:

The bill may offer some help for children who struggle in school but have not qualified for special education services. It allows schools to use up to 15% of their federal special education funds to develop and implement coordinated, early intervening services for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade 3) who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

The funds can be used for the following activities:

1) professional development (which may be provided by entities other than local educational agencies) for teachers and other school staff to enable such personnel to deliver scientifically based academic instruction and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
2) providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.[25]

The bill may also help more children who struggle in school qualify for special education services by removing the requirement that they meet an IQ discrepancy criterion before qualifying as learning disabled. School continue to have the discretion, but are not required, to take into consideration whether a child has a "severe discrepancy" between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning. In determining whether a child has a specific learning disability, a school may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures.[26]

Evaluations, Services:

For Texas educators, the requirement to conduct an evaluation within 60 days of receiving parental consent will continue in place. But the federal law allows an exception to the 60-day requirement if a child enrolls in a school served by the school district after the 60-day requirement has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability, but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or the parent of a child repeatedly fails or refuses to produce the child for the evaluation.[27]

If the parent refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—
(1) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and
(2) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.[28]

Screening of a student to determine appropriate instructional strategies for curriculum implementation is not an evaluation for eligibility for special education and related services.[29]

The new law places limits on how often reevaluations can occur, providing that a reevaluation cannot occur more than once per year unless the parent and the local educational

agency agree otherwise; and must occur at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.[30] It also requires school districts to ensure that assessments of children with disabilities who transfer from one school district to another school district in the same academic year are coordinated with the child's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.[31]

No longer must the individualized education program contain short-term objectives for all students (with the exception of those with significant cognitive disabilities). The statute also eliminates the requirement for parents to be regularly informed of progress at least as often as the parents of nondisabled children and instead requires a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.[32]

At the time this article was written, the federal government had yet to issue final regulations to accompany the reauthorized Act. Since regulations serve to give additional guidance and interpretation of the law, it may be that some of the analysis contained in this article will change as a result. Additionally, it is expected that once the federal regulations are issued, the state will then issue its rules, which, again, may impact the final analysis of the Act. Thus, it will be some time before the full implications of the reauthorized IDEA are realized.

ENDNOTES

1 The federal No Child Left Behind Act requires that all teachers of core academic subjects be highly qualified by the end of the 2005-2006 school year. (Core academic subjects are defined as English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history and geography.) However, due to concerns expressed by states across the country, Margaret Spellings, U.S. Secretary of Education, issued a letter on Oct. 21, 2005, in which she announced that states making a good faith effort to meet the deadline will not lose federal funding for failure to do so. Specifically, Sec. Spellings stated:

"The U.S. Department of Education (Department) will determine whether or not a State is implementing the law and making a good-faith effort to reach the HQT goal by examining four elements of implementation of the HQT requirements: (1) the State's definition of a "highly qualified teacher," (2) how the State reports to parents and the public on classes taught by highly qualified teachers, (3) the completeness and accuracy of HQT data reported to the Department, and (4) the steps the State has taken to ensure that experienced and qualified teachers are equitably distributed among classrooms with poor and minority children and those with their peers. In addition, the Department will look at States' efforts to recruit, retain, and improve the quality of the teaching force. If States meet the law's requirements and the Department's expectations in these areas but fall short of having highly qualified teachers in every classroom, they will have the opportunity to negotiate and implement a revised plan for meeting the HQT goal established in statute and regulation by the end of the 2006-07 school year. However, for States that either are not in compliance with the statutory HQT requirements or are not making a good-faith effort to meet the goal of having all teachers highly qualified, the Department reserves the right to take appropriate action such as the withholding of funds."

According to TEA, USDE will be conducting a monitoring visit in Texas in mid-February to determine whether Texas will be eligible to extend the deadline for meeting highly qualified. If so, Texas will have to submit a revised plan to USDE by May 31, 2006 to meet all requirements for highly qualified by the end of the 2006-2007 school year.

2 20 U.S.C. 1402(10)

3 20 U.S.C. 1412(a)(14)

4 20 U.S.C. 1415(k)(1)(G)

5 20 U.S.C. 1415(k)(3)(B)

6 20 U.S.C. 1415(k)(1)(E)

7 20 U.S.C. 1415(k)(1)(F)

8 20 U.S.C. 1415(k)(1)(C)

9 20 U.S.C. 1415(k)(1)(D)(i)

10 20 U.S.C. 1415(k)(4)

11 20 U.S.C. 1415(k)(5)(B)-(C)

12 20 U.S.C. 1415(k)(1)(A)-(B)

13 20 U.S.C. 1409

14 20 U.S.C. 1414(d)(1)(C)(i)

15 20 U.S.C. 1414(d)(1)(C)(ii)

16 20 U.S.C. 1414(d)(3)(D)

17 20 U.S.C. 1414(d)(5)

18 20 U.S.C. 1411(e)(2)(C)

19 20 U.S.C. 1411(e)(3)

20 20 U.S.C. 1412(a)(10)

21 20 U.S.C. 1412(a)(10)(C)

22 20 U.S.C. 1412(a)(24)

23 20 U.S.C. 1418(d)(2)

24 20 U.S.C. 1412(a)(25)

25 20 U.S.C. 1413(f)

26 20 U.S.C. 1414(b)(6)

27 20 U.S.C. 1414(a)(1)(D)

28 20 U.S.C. 1414(a)(1)(D). The proposed regulation that would accompany this law, proposed Section 300.300(a)(3), changes the current regulation by adding the italicized words: "…a public agency may, *but is not required to*, pursue an initial evaluation of a child suspected of having a disability" if the parent does not provide consent for the initial **evaluation**.

This author believes that the inclusion of the words "but it not required to" in the proposed regulation violates federal law by exceeding federal statutory authority based on the following rationale:

Section 614(a)(1)(D)(ii) of the federal law sets out separate circumstances for lack of parental consent for an **initial evaluation** versus lack of consent for **services**:

(I) FOR INITIAL EVALUATION.—If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request to provide the consent, the local educational agency *may* pursue the initial evaluation of the child by utilizing the procedures described in section 615, except to the extent inconsistent with State law relating to such parental consent."

(II) FOR SERVICES.—If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency *shall not* provide special education and related services to the child by utilizing the procedures described in section 615.

Further, the law specifically exempts LEAs from having to provide FAPE only in circumstances in which a parent has refused to consent to **services**:

(III) EFFECT ON AGENCY OBLIGATIONS.—If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent."

Due to this, the author believes that the inclusion of the words "but is not required to" in the proposed regulation regarding consent for initial evaluations violates federal law by exceeding federal statutory authority. It remains to be seen whether the final regulation continues to contain this language.

29 20 U.S.C. 1414(a)(1)(E)

30 20 U.S.C. 1414(a)(2)

31 20 U.S.C. 1414(b)

32 20 U.S.C. 1414(d)

TEXAS ANTI-BULLYING LAW AND EDUCATOR'S LIABILITIES

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Introduction

The new Texas Anti-Bullying Law requires Texas school districts, beginning in the 2005-2006 school year, to include the in their student code of conduct the district's policies, grievance procedures, and disciplinary actions on bullying and hazing. The statute does not create a specific cause of action for bullying or failure to report bullying. Liability for an individual educator for failing to report bullying, harassment, or discrimination of a student by another student or by a fellow educator is derived from various statutes designed to protect specific classes of individuals. The liability may therefore depends upon whether the victim student was of color, male or female, disabled, or of a different national origin, or if the alleged violation was a denial of rights under U.S. Constitution, federal statutes, state tort law or the state penal code.

Liability for a school district depends on whether the district had "actual knowledge" of and whether its response was "deliberately indifferent" to the bullying. Typically, any response to a claim of harassment, discrimination, or bullying (even a negligent response that does not follow district policy) has been viewed by a Texas court as not "ignoring the claim," therefore the district was not "deliberately indifferent."

Possible federal constitutional and statutory grounds that a bullying, harassment, or discrimination lawsuit could be filed under are 42 U.S.C. §1983, Equal Education Opportunities Act (EEOA), Title VI, Title IX, Rehabilitation Act § 504, Individuals with Disabilities Education Act (IDEA), and the Title II of the ADA. Liability for educators and districts under state law is very limited as long as they are acting within the scope of their duties and using discretion, but there are exceptions that will be discussed below.

Qualified, official, and qualified good faith immunity defenses are available to individual school professionals and sovereign immunity is available to school districts. Bullying has been defined in varying forms and degrees. It should be noted that nothing protects an educator from violations of criminal law under the Texas Penal Code. There are also penalties under Penal Code §39.06, Family Code §261.109, and Chapter 249 of the Texas Administrative Code for failure to report child abuse within 48 hours of suspecting abuse. Ethical violations should also be considered also under Title 19 of the Texas Administrative Code, Chapter 247, Educator's Code of Ethics.

I. What is Bullying?

"It appears that bullying is not an isolated behavior, but a sign that children may be involved in more violent behaviors." - Duane Alexander, M.D., Director of the National Institute of Child Health and Human Development

Bullying occurs when a person willfully and repeatedly exercises power over another with hostile or malicious intent. A wide range of physical or verbal behaviors of an aggressive or antisocial nature are encompassed by the term bullying. These include "insulting, teasing, abusing verbally and physically, threatening, humiliating, harassing, and mobbing." Bullying may also assume less direct forms (sometimes referred to as "psychological bullying") such as gossiping, spreading rumors, and shunning or exclusion. According to an article from the American Medical Association, "youth who are bullied generally show higher levels of insecurity, anxiety, depression, loneliness, unhappiness, physical and mental symptoms, and low self-esteem." When students are bullied on a regular basis, they may become depressed and despondent, even suicidal or homicidal. As a report by the National Association of Attorneys General notes, bullying "is a precursor to physical violence by its perpetrators and can trigger violence in its victims." (1)

Emotional Violence: Using Relationships to Harm Others

Emotional violence can affect the student's social environment and create a climate of fear and rejection, which can ultimately inhibit a students' ability to learn to the same extent as physical bullying. As noted above, there are different types of bullying; physical, verbal, and psychological. The Ophelia Project is a national non-profit organization that helps adolescent girls and boys deal with covert, social or relational aggression, raise awareness on the issue, and provide educational resources and programs. (2)

Facts From The Ophelia Project on Relational Aggression:

- Relational aggression (RA) is a type of emotional violence whereby individuals use relationships to harm others. Examples include exclusion from a group and rumor spreading.
- National data report that adolescents are most concerned and hurt by emotional violence.
- Correlates of relational aggression include increased suicide risk, increased depressive symptoms, maladaptive eating patterns, loneliness, externalizing behavior, such as acting out behavior and substance abuse.
- Relational aggression affects both boys and girls. In an Ophelia study of middle school children, no gender differences were found when looking at relational aggression.
- Ophelia research has found that kids that experience high levels of relational aggression are less connected to their schools, experience more intense feelings, and participate in fewer activities.
- Relational aggression exists on a continuum – from eye-rolling to suicide and school shootings.
- We know that beliefs are measurable and malleable. That is, they can be changed through intentional prevention and intervention efforts. This is good news for prevention efforts.
- Potential protective factors of relational aggression include empathy, genuine self-esteem, internalization of values, and beliefs that RA is not OK.
- As with any intervention or prevention program, raised awareness and education creates an increase in reporting

of targeted behaviors. Reports of relational aggression will increase over time as schools begin to navigate effective ways to address this pervasive behavior. (3)

II. Texas Anti-Bullying Law

The new anti-bullying law, which became effective September 1, 2005, can be found at Texas Education Code (TEC) §25.0341. The new law states in part:

- The district's school board or its designee, **shall transfer the victim** to another classroom or campus upon the request of the parent of the student who is the victim of bullying.
- Before the transfer is granted, the school board **shall** first verify that the student has been a victim of bullying, and may consider past student behavior when identifying a bully.
- The district **is not required to provide transportation** to such a student who transfers to another campus.
- The law also requires that the district's student code of conduct **must prohibit bullying, harassment, and making hit lists**.
- The student code of conduct must also provide methods and options for managing and disciplining students and for preventing and intervening in student discipline problems.
- The student code of conduct must allow the school district to consider whether **self-defense** was a factor in the bullying episode.
- The law defines "bullying," "harassment," and "hit list."
- The law states that a student enrolled in a **special education program** may not be disciplined for such conduct until an ARD Committee meeting has reviewed the conduct.
- Each school district shall adopt and implement the **discipline management program** in the district improvement plan must provide for prevention of and education concerning **unwanted physical or verbal aggression, sexual harassment, and other forms of bullying in school, on school grounds, and in school vehicles**.

Hazing

The Texas hazing law, found at Texas Education Code § 37.151-§37.155 Subchapter F, is much more specific than the bullying law, in defining what constitutes hazing and what the consequences are for committing a hazing offense or failing to report a hazing offense if the person has first hand knowledge of a hazing incident.

The new law states in part:

- Defines **hazing** as any **intentional, knowing, or reckless act**, occurring on or off the campus of a public or private high school, by one person alone or acting with others, directed against a student, that endangers the **mental or physical health** or safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in an organization.
- **Physical Brutality** includes; whipping, beating, branding, electronic shocking, placing of a harmful substance on the body.
- **Physical Activity** includes; sleep deprivation, exposure to the elements, confinement in a small space, calisthenics.
- **Food or Liquid Consumption** includes; alcoholic beverage, liquor, or drug.
- **Intimidation or Threats** towards the student that create ostracism or subjects the student to extreme mental stress, shame, or humiliation.
- Any activity that requires the student to perform a duty that involves a violation of the **Penal Code**.
- **Immunity** is granted a person who reports a hazing incident or a person who testifies for the prosecution in a judicial proceeding

III. VIOLATION OF STUDENTS' FEDERAL CIVIL RIGHTS CREATES LIABILITY FOR EDUCATORS UNDER THE U.S. CONSTITUTION AND FEDERAL STATUTES

Recent violence at schools across the country, most importantly, the Columbine shootings, has made educators, parents, and students unable to accept that bullying is just "a normal part of growing up" or that "children will be children." (4) Therefore, it is important to examine potential causes of action that a plaintiff may have available when bullying occurs.

Federal Statutes Under Which A Lawsuit May Be Filed

42 U.S.C. §1983

Liability under §1983 occurs when a school board violates an individual's rights. Congress passed 42 U.S.C. § 1983 in 1871 to make accountable people who contemptuously disregarded the guarantee's of the Fourteenth Amendment's equal protection clause.

§ 1983 allows an injured party to:

- Reach individual school employees who might otherwise be shielded from liability;
- Provides for a choice of forum;
- Generally permits an award of attorney's fees for a prevailing plaintiff.

The deprivation is caused by "state action," an act of the state or a subdivision of the state like a school district. It does not create substantive rights.

A §1983 lawsuit involves the alleged abuse of governmental authority that deprives a student or teacher of federally protected rights under the U.S. Constitution or a federal statute. The government is not liable just because a governmental employee takes an action that deprives someone of their federal rights. The U.S. Supreme Court has stated in *Monell v. New York City Dept. of Social Services*, that the governmental entity can be held liable only if the wrong is committed pursuant to either an official policy or custom of the government, or by a policy maker that has final decision making authority. (5) Therefore, teachers and administrators cannot be held liable in a § 1983 lawsuit because they do not have "final policymaking authority."

Equal Educational Opportunities Act (20 U.S.C. §1703)

The Equal Educational Opportunity Act of 1974 ("EEOA" or "the Act") prohibits denial of equal educational opportunity on account of race, color, sex, or national origin in federally assisted programs. Injunctive relief and monetary damages are available. When Congress passed the Act, §1703(f) required that states take "appropriate action to overcome language barriers that impede equal participation by its students." Testimony in the legislative history showed that the EEOA was likely intended to create "a right to receive bilingual education." (6)

The U.S. Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), recognized that recipients of federal financial assistance have an affirmative responsibility, pursuant to Title VI, to provide persons of limited English proficiency with meaningful opportunity to participate in public programs. In *Lau*, the Supreme Court ruled that a public school system's failure to provide English language instruction to students of Chinese ancestry who do not speak English denied the students a meaningful opportunity to participate in a public educational program in violation of Title VI of the Civil Rights Act of 1964. (7)

The Fifth Circuit Court of Appeals held that the "the essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in § 1703(f)." (8)

Title VI [Civil Rights Act of 1964; 42 U.S.C. § 2000(d)]

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Fifth Circuit addressed language as an impermissible barrier to participation in society in (9). The court upheld an amendment to the Voting Rights Act which addressed concerns about language minorities, the protections they were to receive, and eliminated discrimination against them by prohibiting English-only elections. (10)

Title IX (Education Amendments of 1972, 42 U.S.C. §1681):

Prohibits sexual discrimination in schools which receive federal education funding. Sexual harassment is recognized as a form of sexual discrimination and damages are available for private plaintiffs. Title IX actions MUST be brought against a school district, because individual liability is not available against professional school employees under Title IX. (11) However, the individual educator or student who sexually harasses another may still be criminally liable under the Texas Penal Code or civilly, under the torts assault and battery. In the Gebser case in 1998, (teacher-student relationship) and the Davis case (peer to peer releationship) in 1999, the Supreme Court, set out the requirements for the plaintiff to prove liability on the part of the school district:

1. Someone with authority to correct the problem,
2. Had actual knowledge of the teachers misconduct, and
3. Responded in a way that could be characterized as "deliberately indifferent",
4. Harassment would have to be severe, pervasive, and "objectively offensive."

The Court was clear that liability attaches only if the school district wrongfully ignores the issue. The Court emphasized, moreover, that "damages are not available for simple acts of teasing and name-calling among school children, even where these comments target differences in gender. (12)

Thus, an arguably even higher bar was set for holding a school liable for money damages under Title IX for instances of peer sexual harassment. (13)

§ 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794):

Forbids a person, by reason of a handicap, to be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under" any program receiving federal aid. If a "hostile environment" is created because the harassing conduct is so "severe, persistent, or pervasive that it adversely affects the student's ability to participate in or benefit from the educational program, the student's rights may have been violated.

A district court, on remand, held that CIC (clean intermittent catheterization) for a student with spina bifida was a "related service" under federal law, ordered that the child's education program be modified to include provision of CIC during school hours, and awarded compensatory damages against petitioner school district. The court further held that respondents had proved a violation of 504 of the Rehabilitation Act, and awarded attorney's fees to respondents under 505 of that Act. The Court of Appeals affirmed. (14)

Title II of the Americans with Disabilities Act (28 C.F.R. § 36)

Prohibits discrimination based on a disability by any public accommodation, commercial facility; or private entity, whether or not they receive federal funds, that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. The Americans with Disabilities Act ("ADA") established standards that these facilities are to be designed, constructed, and altered in order to be in compliance. Some situations that would be covered by the ADA, and that may affect educators include:

- Alternative accessible arrangements may include, for example, provision of an examination at an individual's home with a proctor if accessible facilities or equipment are unavailable. Alternative arrangements must provide comparable conditions to those provided for nondisabled individuals.
- Any private entity that offers a course covered by this section must make such modifications to that course as are necessary to ensure that the place and manner in which the course is given are accessible to individuals with disabilities.
- Required modifications may include changes in the length of time permitted for the completion of the course, substitution of specific requirements, or adaptation of the manner in which the course is conducted or course materials are distributed.

Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1401)

Requires states to provide free appropriate public education ("FAPE") to children with handicaps. Texas school districts have the responsibility under the IDEA to ensure that FAPE is available to eligible student with disabilities. Harassment of a student based on their disability may affect the student's ability to benefit from the education program. That would be considered a denial of FAPE under IDEA, Section 504, or Title II of the Americans with Disabilities Act (ADA). Examples of violations include:

- Students shouting "retard" at a student with dyslexia.
- Placing objects in the pathway of a student in a wheelchair.
- A school administrator continually denies a student with a disability lunch privileges, field trips, and assemblies as punishment for missing school in order to receive services related to their disability. (15)

Individual Educator's Defense to Federal Civil Rights Violations

"Qualified good faith immunity" is a viable defense if the educator was "a government official performing discretionary functions." Such individuals are generally shielded from liability as long as their conduct "does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known."

The judge will determine if the constitutional right that is alleged to be violated is "clearly established." Some examples of "clearly established" constitutional rights that a reasonably competent public official should have known governed his/her conduct include a student's right to refuse to salute the American flag or an administrator's right to place her child in private school. (16) An example of what a teacher "should have known about constitutional law" was determined by the Fifth Circuit a case in which a teacher tied a second grader to a chair with a jump rope for two school days and denied the student access to the bathroom. The teacher stated it was an instructional technique and not punishment. The teacher was denied qualified good faith immunity because the teacher should have known the student had a constitutional right not to be restrained in a chair against her will and denied access to the bathroom. (17)

School District's Defense to Federal Rights Violations

The 11th Amendment of the U.S. Constitution shields state institutions like school districts from certain federal lawsuits. However, the Fifth Circuit in 2003 held that "if the involved state agency or department accepts federal financial assistance, it waives its Eleventh Amendment immunity, under § 504 claims, when they accept the federal funds even though the funds are not designated for programs that further the anti-discrimination and rehabilitation goals" of the disabilities law. If school districts accept the federal money, they also accept the responsibility of the obligations of those funds. (18)

IV. TORT LAW IMMUNITY UNDER TEXAS LAW

School Employees Immunity From Liability or "Qualified Immunity"

Texas law shields school districts from liability, therefore injured parties tend to sue school employees, such as teachers and administrators. The Texas Education Code provides "qualified immunity" or conditional immunity from tort liability. A tort is a civil wrong or wrongful act, whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as intentional wrongs which result in harm. Therefore tort law is one of the major areas of law and results in more civil litigation than any other category. Some intentional torts may also be crimes, such as assault, battery, wrongful death, fraud, conversion (a euphemism for theft) and trespass on property. The injured party may sue for money damages in the lawsuit. Defamation, including intentionally telling harmful untruths about another-either by print or broadcast (libel) or orally (slander)-is also a tort. (19)

Fortunately, Texas law also provides for qualified immunity to school employees. Texas Education Code (TEC) § 22.0511(a), states that "A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee." There is an exception to the immunity if the plaintiff can show what the employee has used excessive use of force in disciplining students or has been negligent in disciplining students so as to cause injury.

School Employees and "Official Immunity"

If an educator falls outside the protection of "qualified immunity" granted by the Texas Education Code then the educator may assert "official immunity." This protection applies to governmental employees who are performing discretionary duties in good faith. The Fifth Circuit affirmed the trial's court decision in a case where a coach used excessive force in disciplining a student by making him perform on hundred "up and down exercises" which caused an injury. The court found that the coach was "acting in good faith" even if the exercises caused some pain. (20)

School District Immuntiy From Liability or "Sovereign Immunity"

As a general rule, school districts are considered governmental entities, and therefore are immune from liability due to the doctrine of sovereign immunity. Liability can only be imposed on a school district if it is related to the operation, use, or maintenance of any motor vehicle operated by a school officer or employee within the scope of employment. (21)

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