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Newsletter Co-Editors
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Dear School Law Section Members:

Every time I have the chance to visit with school law section colleagues, I am reminded of how lucky I am to be a part of this organization and to serve public schools. With each year, my respect for the work of the section and the work of public educators deepens. I truly believe that our system of public education is unique among the world's educational institutions. Our democracy is both the root and the product of our American vision of free, universal access to quality education. In this time of political and economic uncertainty, when the challenges to our public education system are too numerous and daunting to list, I am prouder than ever to represent public schools and the people who dedicate their lives to building future generations.

In that spirit, I am delighted to say that our section continues its work of providing continuing legal education and opportunities for professional dialogue among lawyers working in the field of public education. This newsletter is one such forum. We owe co-editors Leticia McGowan and Allan Graves a great debt of gratitude for the time they dedicate to bringing us this valuable resource. Please help them continue to offer useful and timely legal information in the newsletter; if you have ideas for future articles, please contact Leticia at **lmcgowan@dallasisd.org** or Allan at **ag@all-lawfirm.com**.

I encourage you to attend the School Law Retreat July 15-16, 2011. The retreat consistently offers excellent CLE and a matchless opportunity to foster personal and professional relationships within the section, but in 2011 there are three more important reasons to attend:

- The 82nd Regular Session of the Texas Legislature has just concluded. We will be eager to discuss the outcomes with our colleagues.
- The retreat will be at the exceptional Hyatt Lost Pines Resort, which offers something for every taste, from outdoor recreation to quiet luxury.
- Most importantly, this is our silver anniversary – the 25th annual School Law Retreat. Don't miss the chance to celebrate this milestone with old and new friends alike.

Thank you for giving me the opportunity to serve the section as this year's chair. Nothing I can do in service as an officer will adequately express my affection for our section.

Joy Surratt Baskin

Joy Baskin
Section Chair 2010-2011

Searches of Cell Phones and Electronic Communication Devices: A Constitutional and Statutory Choking Hazard

By Coby Wilbanks[1]

As cell phones and electronic communication devices become smaller and more powerful, districts are faced with an increasing number of potential legal issues. Districts repeatedly find themselves wrestling with significant issues involving small electronics: a student attempts to text or use a cell phone during a quiz or test; a staff member communicates with students via inappropriate text or picture messages; or a parent insists on disciplining the student body for possession of a compromising picture of her child. A typical response to these and similar situations often includes a search of the device at issue. Educators should conduct such a search with caution as the search could infringe upon a student or staff member's constitutional right to be free from unreasonable searches or violate various federal and state statutes protecting the privacy of electronic communications.

The Constitution and Student Searches

The United States and Texas Constitutions ensure "the people" are protected from unreasonable searches.[2] Courts have readily noted, however, that "preservation of order in the schools allows for closer supervision and control of school children than would otherwise be permitted under the Fourth Amendment."[3] In light of the unique school setting, a school official's allegedly unconstitutional search of a student's cell phone or other electronic device, will most likely be subject to the familiar two-pronged search analysis enunciated in *New Jersey v. T.L.O.*[4]

Applying the familiar *T.L.O.* analysis, a search of a student's electronic device is constitutional if the search was reasonable at its inception and reasonable in scope.[5] Generally, a search is reasonable at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[6] Similarly, a search is typically reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[7]

It should be recognized that few cases have applied the Fourth Amendment search jurisprudence to cell phones in a school setting. Courts are struggling to apply traditional Fourth Amendment jurisprudence and exceptions to the warrant and probable cause requirement to cell phone searches by law enforcement.[8] These challenges in the law enforcement setting stem from various exceptions to the warrant requirement (i.e. search incident to arrest and the search of containers during the stop of a vehicle). Similarly, *T.L.O.* indicates that the school environment is sufficiently unique to create its own exception to the warrant requirement for searches in a school setting.[9] As a result, courts will likely struggle in applying *T.L.O.*'s warrant requirement exception in schools as jurisprudence develops.

The Constitution and Employee Searches

The United States Supreme Court recently considered a Fourth Amendment challenge to a search of a government employee's electronic device. In *City of Ontario v. Quon*, the Supreme Court recognized an exception similar to that of students – that "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable for government employers."[10] Unfortunately, the high court declined to identify a single applicable standard for all searches of government employees.[11]

The City provided Quon, a City police officer, with a pager capable of sending and receiving text messages.[12] Each City pager was allotted a certain number of characters sent or received per month, and any monthly excess resulted in a fee.[13] The City's computer policy specified that "[u]sers should have no expectation of privacy or confidentiality" while using the City computers, network, or email, but did not apply "on its face, to text messaging."[14] At a staff meeting and through a memorandum, the City clearly explained that text messages would be treated as email.[15] Quon soon exceeded the allotted characters for his pager and was reminded by his supervisor that the text messages were "considered email and could be audited."[16] The supervisor also indicated that he had no intention of auditing the messages and "suggested that Quon could reimburse the City for the overage fee rather than have [the supervisor] audit the messages."[17] This arrangement continued until the supervisor became "tired of being a bill collector," and ordered an audit of the messages to determine if the character limit was too low or "if the overages were for personal messages."[18] The audit revealed that the vast majority of Quon's text messages were not work-related, including a number of sexually explicit messages.[19] Quon was "allegedly disciplined," and brought suit under the Stored Communications Act (discussed below) and the Fourth Amendment.[20]

The Court recognized that its previous fractured decision in *O'Connor v. Ortega*[21] resulted in two different standards for Fourth Amendment claims against government employees – the plurality's "operational realities" standard, and Justice Scalia's "regarded as reasonable and normal in the private-employer context" standard.[22] Under the plurality's two-pronged "operational realities" framework, the initial question of whether the employee has a reasonable expectation of privacy is evaluated on a case-by-case basis, and in light of "the operational realities of the workplace."[23] If an employee has a reasonable expectation of privacy, "an employer's intrusion on that expectation for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."[24]

Justice Scalia's approach would begin with the general notion that "the offices of government employees are covered by Fourth Amendment protections."[25] If the search would be "regarded as reasonable and normal in the private-employer context," then the search would not violate the Fourth Amendment. More specifically, "government searches to retrieve work-related materials or to investigate violations of workplace rules," if regarded as reasonable in the private context, would be permissible under the Fourth Amendment.[26]

After noting the uncertain standard for searches of government employees under the Fourth Amendment, the Court glossed over the initial inquiry of whether Quon had a reasonable expectation of privacy in his text messages and assumed a reasonable expectation existed.[27] The Court reasoned that even if making such a determination was the correct analysis, "the Court would have difficulty predicting how employees' privacy expectation will be shaped by those changes of the degree to which society will be prepared to recognize those expectations as reasonable."[28]

Under the assumption of a legitimate expectation of privacy, the Court noted that the search of Quon's text messages was reasonable under the second prong of the *O'Conner* plurality's analysis:

> [W]hen conducted for a noninvestigatory, work-related purpose or for the investigation of work-related misconduct, a government employer's warrantless search is reasonable if it is justified at its inception and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search.[29]

The Court determined the search was for a noninvestigatory work-related purpose and was justified at its inception due to the need to evaluate text message overages.[30] The scope of the search was reasonable since reviewing the transcripts "was an efficient and expedient way" to evaluate overages, and the City only requested two months of messages.[31] The Court additionally, albeit briefly, determined that the search satisfied Justice Scalia's "regarded as reasonable and normal in the private-employer context" for the same reasons.[32]

While the precise standard for evaluating searches by a governmental employer remains in question, a few guidelines from *Quon* can be enumerated:

1. Dual Standards – Practically speaking, the consequence of the *Quon* Court's failure to define a single, appropriate standard is to establish, at least for the foreseeable future, a dual analysis. All Fourth Amendment government employer searches should now be evaluated, at least to some degree, according to both the plurality and Scalia's standards from *O'Connor*.

2. Reasonable Expectation of Privacy – At least under the *O'Connor* plurality approach, an employee must establish a reasonable expectation of privacy. For most situations, however, employers may be well advised to assume such an expectation exists and justify the search under the remaining analysis.

3. Purpose – Regardless of a reasonable expectation of privacy, searches by governmental employers should be conducted only for "noninvestigatory, work-related purposes," or for "investigations of work-related misconduct." Regardless of the analysis selected, searches outside of these work-related purposes may violate the Fourth Amendment.

4. Justified at Inception and Not Excessive in Scope – Considering all the circumstances, government searches of employer's electronic devices should comport with the two-pronged analysis under *T.L.O.*[33] While the Court in *Quon* indicates that such an analysis is proper under the *O'Connor* plurality, such an analysis should be helpful to determine, as under Scalia's alternate approach, whether the search is regarded as reasonable and normal in the private-employer context.

The fact that the pager in *Quon* was employer-issued only adds to the argument that a reasonable expectation of privacy in the contents of a government employee's *personal* cell phone exists. Certainly if an employee has a reasonable expectation of privacy in a government issued device, a personal device should carry a similar, if not greater, expectation of privacy. Even prior to *Quon*, the Fifth Circuit determined that a criminal defendant had a reasonable expectation of privacy in his cell phone call records and text messages despite the fact that the cell phone was employer issued.[34] By comparing a cell phone to a personal computer, this expectation of privacy was later extended to "emails, text messages, call histories, address books, and subscriber numbers" contained in a cell phone.[35] It should be noted that some courts outside the Fifth Circuit have only extended this expectation of privacy to message content and not call histories or logs, reasoning that the dialed phone numbers are voluntarily sent to a third party (the phone company).[36]

Statutory Considerations

Aside from the constitutional issues stemming from searches of student and staff cell phones, two other sources of federal law and their state analogues pose potential hurdles for searches of cell phones and other electronics in both the student or employee context: the Federal Electronic Communications Privacy Act[37] ("ECPA"), and the Federal Stored Communications Act.[38] Interpreting these statutes is not a simple task. Courts themselves have noted that the ECPA "is famous (if not infamous) for its lack of clarity."[39]

The ECPA subjects to federal prosecution or a civil action "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept, any wire, oral, or electronic communication."[40] Considering the Fifth Circuit's narrow definition of "intercept," which does not include the replaying of a recording, but rather requires the contemporaneous acquisition of the communication, the ECPA may not generally be applicable to cell phone searches.[41] The *contemporaneous acquisition* requirement regulates the ECPA to essentially a prohibition against electronic eavesdropping. As a result, the search of a device that involves only previously recorded or past communications is outside the scope of the ECPA. However, this interpretation has been questioned by the Ninth Circuit, noting that the 5th Circuit decision pre-dates the most recent amendments of the ECPA.[42] Additionally, at least one court has determined that a cause of action under the ECPA is available only for the *sender* of the message.[43]

Nonetheless, the ECPA could arguably come into play in the event a school employee views a text message as it is contemporaneously received on a confiscated cell phone, or, as in a Pennsylvania district court case, the employee engages in an instant message dialogue from a student's cell phone while posing as that student.[44]

The more applicable statute appears to be the Federal Stored Communications Act ("SCA").[45] The SCA makes it an offense when one "intentionally [accesses] without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system."[46] The term "electronic communication" is defined broadly as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system."[47]

Traditionally, the SCA (along with its Texas analogue[48]) has had little impact due to the extremely narrow statutory definition of "electronic storage":

> (A) *any temporary*, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of *backup* protection of such communication.[49]

Courts have traditionally interpreted this definition as applying only to the initial temporary storage of an electronic communication (as in prior to the recipient viewing the communication) and not to the recipient's intentional retention of the communication subsequent to receipt of the message.[50] Therefore, an administrator's search of a student or employee cell phone that revealed communications previously reviewed by the recipient would not, under this narrow interpretation, be subject to the SCA. However, unopened or unread communications could remain subject to the SCA. Interestingly, this narrow interpretation, limiting "electronic storage" to unopened communications, has been considered and rejected by the Ninth Circuit.[51]

While a cell phone search that reveals unopened voicemail, email, and text messages appears to fall within the scope of the SCA, it is uncertain whether other cell phone content – such as call logs, contact lists and addresses, pictures taken with the cell phone's camera, and other files and documents fall within the Act. A district court in Pennsylvania concluded that stored voicemail and text messages were covered by the Pennsylvania analogue to the SCA, while the phone number directory and call log fell outside the scope of the statute.[52]

As a result of the narrow definitions and interpretations, the reach of the ECPA and SCA has been severely limited. While the circumstances leading to violations of these statutes may be few and far between, educators could nonetheless run afoul of these provisions in the event of a real-time acquisition of an electronic communication while a student or employee's cell phone is in their possession, or by accessing an unopened text message, voicemail, email or other electronic communication. Conversely, the potential to infringe a student or employee's Fourth Amendment rights may arise in every cell phone search. Additionally, in light of the Supreme Court's recent decision in *Quon*, further constitutional and statutory challenges to searches of electronic devices may be looming on the horizon. Educators are wise to know their boundaries regarding searches of electronic communication devices and proceed with caution.

ENDNOTES

1 Colby Wilbanks is an Associate at Karczewski | Bradshaw L.L.P.
2 U.S. CONST. amend. IV, and TEX. CONST. art. I, § 9.
3 *Flores v. Sch. Bd. of Desoto Parish*, 116 Fed. Appx. 504, 510 (5th Cir. La. 2004).
4 469 U.S. 325, 341 (1985).
5 *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).
6 *Id.*
7 *Id.*
8 *See, U.S. v. Finley,* 477 F.3d 250 (5th Cir. 2007) (no Fourth Amendment violation when cell phone search was analogous to a closed container); State v. Smith, No. 2009-Ohio-6426 (Sup. Ct. Ohio Dec. 15, 2009) (warrantless cell phone search incident to arrest was prohibited by the Fourth Amendment); *U.S. v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1214 (D. Kan. April 23, 2008) (no Fourth Amendment violation of a cell phone search following an arrest due to the diminished privacy expectations of personal property transported in an automobile); and *U.S. v. Park*, No. CR 05-375 SI (N.D. Cal., May 23, 2007) (cell phone search violated the Fourth Amendment when cell phone was likened to a laptop computer.)
9 *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985) ("the warrant requirement, in particular, is unsuited to the school environment.")
10 *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ___, slip op. at 18 (2010).
11 *Id.* at 20.
12 *Id.* at 9.
13 *Id.*
14 *Id.* at 10.
15 *Id.*
16 *Id.* at 11.
17 *Id.* at 12.
18 *Id.*
19 *Id.* at 13.
20 *Id.* at 13-14.
21 480 U.S. 709 (1987).
22 *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ___, slip op. at 32 (2010).
23 *Id.* at 19.
24 *Id.*
25 *Id.*
26 *Id.* at 19-20.
27 *Id.* at 25.
28 *Id.* at 24.
29 *Id.* at 26.
30 *Id.* at 27.
31 *Id.*
32 *Id.* at 32.
33 *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) ("first, one must consider whether the action was justified at its inception, second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.") (citations and quotes omitted)
34 *United States v. Finley*, 477 F.3d 250, 259 (5th Cir.[Tex.] 2007).
35 *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. [Tex.] 2008).; *see also, State v. Smith*, No. 2009-Ohio-6426 (Sup. Ct. Ohio Dec. 15, 2009) ("[A cell phone's] ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.").
36 *U.S. v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1214 (D. Kan. April 23, 2008) (*citing Smith v. Maryland*, 442 U.S. 735 (1979) (there is no reasonable expectation of privacy in a dialed telephone number); *U.S. v. Forrester*, 512 F.3d 500, 503 (9th Cir. 2008) (there is no expectation of privacy in the to/from addresses of email messages or IP address of websites visited.)
37 18 U.S.C. §§ 2510-2522.
38 18 U.S.C. §§ 2701-2712; *see also,* TEX. PENAL CODE § 16.02 ("Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications,"); TEX. CIV. PRAC. & REM. CODE chapt. 123 ("Interception of Communication"); TEX. CODE OF CRIM. PRO. art. 18.20; *and* TEX. PENAL CODE § 16.04 ("Unlawful Access to Stored Communications.")
39 *Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457, 462 (5th Cir. 1994).
40 18 U.S.C. § 2511(a).
41 *United States v. Turk*, 526 F.2d 654, 659 (5th Cir. [Fla.] 1976) (emphasis added).
42 *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035, 1043 (9th Cir. [Cal.] 2001); *see also, United States v. Denman*, 100 F.3d 399, 403 (5th Cir. [Tex.] 1996).
43 *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622 (E.D. Penn. 2006).
44 *Id.*

45 18 U.S.C. §§ 2701-2712.
46 18 U.S.C. § 2701.
47 18 U.S.C. § 2510(12).
48 TEX. CODE OF CRIM. PRO. art. 18.20; *and* TEX. PENAL CODE § 16.04 ("Unlawful Access to Stored Communications."
49 18 U.S.C. § 2510(17) (emphasis added).
50 *See, Steve Jackson Games, Inc. v. U.S. Secret Service*, 36 F.3d 457 (5th Cir. 1994); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004); *Borninski v. Williamson*, No. 3:02-CV-1014-L, 2005 U.S. Dist. LEXIS 9401 (N.D. Tex. – Dallas 2005).
51 *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) (email messages remaining on a server after delivery remain for purposes of backup protection, and, therefore are subject to the SCA under 18 U.S.C. § 2510(17)(B).)
52 *Klump v. Nazareth Area Sch. Dist.*, 425 F. Supp. 2d 622, 634-635 (E.D. Penn. 2006).

An Educator's Use of Physical Force with Students: How Far Is Too Far?[1]

By: Judson C. Gibson[2]

I. INTRODUCTION

In loco parentis literally means "in the place of a parent."[3] In society, as well as in law, it is generally understood that a teacher acts in the place of a parent when a child is at school and can therefore exercise some degree of physical control over the child. This article will explore the early history of the *in loco parentis* principle in Texas law and address the current extent of a professional school district employee's immunity from disciplinary proceedings for the use of physical force with students under section 22.0512 of the Texas Education Code.

II. TEXAS SCHOOL LAW HISTORY: EARLY ROOTS OF THE *IN LOCO PARENTIS* PRINCIPLE

The idea that a teacher has a special relationship with a student, and essentially steps into the shoes of a parent when educating that student, has roots deeply established in Texas law. In one of the earliest cases to apply the principle, the Court of Appeals for the State of Texas[4] held, "Teachers have the right, the same as parents, to prescribe reasonable rules for the government of children under their charge, and to enforce, by moderate restraint and correction, obedience to such rules."[5] Speaking specifically to the use of physical force as punishment, the court stated, "The law confides to teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible unless the punishment inflicted be excessive, or be inflicted merely to gratify their own evil passions." *Id*.

The *Bolding* case is fascinating for several reasons, including the fact that the case sheds light on early schoolhouse practices in Texas. In *Bolding*, a teacher in DeWitt County instructed his pupils to work two math problems for homework. The next day, every student except one had at least attempted the homework. The student told the teacher that he did not want to do any homework. As it turns out, the student had farm chores before and after school to keep him busy, and he resented the intrusion of schoolwork on his home life. Further, the student had to walk to school each day while his two younger siblings rode horses. The teacher decided to give the student another chance, instructing him to work two new math problems for homework or face the consequences of a whipping should he decline.

The following day, the teacher asked the student for his homework. The student admitted he had not done the work but promised to do it during class time if the teacher would allow. The teacher sent another boy to get a quirt—a whip used with horses—for the promised spanking. The boy returned with a light quirt, not sufficient to do the job in the teacher's eyes, and the teacher told him to go get a heavier one. Alas, the boy reported that this was the biggest quirt available on any of the horse saddles outside the schoolhouse. The teacher told the boy to find a tree limb instead, and the boy returned with a live oak switch about three feet in length. Needing to trim off the knots, the teacher asked his students for a knife, and the student who was about to be whipped offered his pocket knife, no doubt thinking to lessen the effect of the impending blows. The teacher trimmed the knots, gave the student back his pocket knife, and then, thinking the point had probably been made, offered the student a third chance to do his homework to avoid punishment.

The student, not recognizing a good opportunity when he saw one, immediately admitted that he would not do the homework no matter how many opportunities he was given. The teacher then commenced with the whipping. However, after the first strike, the student pulled a six-inch butcher knife from his waistband. In the ensuing violent struggle, the student stabbed the teacher in the left shoulder, leaving a serious wound requiring several weeks of recuperation. The teacher also sustained a less serious stab wound in the hip.

The student was convicted of aggravated assault for stabbing the teacher with the intent to murder him. The penalty—a $25 fine and a month in jail. The student was 13 years old at the time and, by all accounts, had been a good boy prior to the stabbing. In making its ruling, the court applied the *in loco parentis* principle with regard to the teacher's authority to spank the child and also noted that the teacher's control over the student indeed extended to the right to require homework.

III. MORE TEXAS SCHOOL LAW HISTORY: THE IMPORTANCE OF DISTINGUISHING MODERATE FORCE FROM EXCESSIVE FORCE

Courts in Texas have long recognized the importance of permitting moderate, but not excessive, physical force in a parent-child relationship and, under the *in loco parentis* principle, a teacher-student relationship. Courts have also recognized the difficulty of establishing any bright-line rule and the necessity of carefully analyzing numerous factors to determine whether the level of physical force in a particular case was excessive. Many of the early cases involved physical punishment as opposed to physical force which was intended to stop

or control, but not punish, a behavior.[6] In *Stanfield v. State*,[7] a case involving a child and his guardian, the court held: "It is true that the law has not laid down any fixed measure of moderation in the lawful correction of a child, nor is it practicable to do so. Whether it is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the child, with all the attending and surrounding circumstances, to be judged of by the jury, under the directions of the court as to the law of the case."

In *Dowlen v. State*,[8] the teacher struck a student with a five-foot bois d'arc switch 22 times for getting into a fight. The court referred to a section of the Penal Code permitting moderate restraint or correction by a teacher over a student. The student's injuries were fairly severe, although apparently not long-term. The teacher was known as a humane man in the community and felt it his duty to discipline the student for fighting. He felt so bad about whipping the boy that he cried while doing it. The court, recognizing the special authority of a teacher over a student, reversed the trial court's conviction for aggravated assault and battery and remanded the case so that the proper factors—age, sex, condition, and disposition of the child, with all the attending and surrounding circumstances—could be applied to determine whether the force used was excessive.

IV. MODERN TIMES: THE CURRENT STATE OF THE LAW GOVERNING THE USE OF PHYSICAL FORCE BY EDUCATORS

Since the 1880's, Texas courts have recognized the rule that a schoolteacher stands *in loco parentis* at the schoolhouse and, as a result, may use reasonable force for the special purpose of controlling, training, and educating students. The modern embodiment of this principle is found in section 9.62 of the Texas Penal Code, which codifies the common law rule, and section 22.0512 of the Texas Education Code, which makes the rule applicable to school district employment matters.

A. Justifications Excluding Criminal Responsibility: Special Relationships

The criminal offense of assault occurs when one intentionally, knowingly, or recklessly causes bodily injury to a person.[9] An assault also occurs when one intentionally or knowingly causes physical contact with a person and knows or should reasonably believe that the person will consider the contact provocative or offensive.[10] Significantly, intent to injure is not a requirement of an assault. Under the statute, especially under the provocative/offensive contact provision, a teacher could conceivably be charged with assault for grabbing a student and pulling him away from a fight; holding a student's arm and escorting him to the office to see the principal; or squeezing a student's shoulder to get his attention. Not surprisingly, the legislature has promulgated a statute to protect a teacher from criminal responsibility in such cases as long as the teacher reasonably believed the force used was necessary to educate the student or maintain discipline.

The current criminal statute governing an educator's use of physical force against a student is found in section 9.62 of the Texas Penal Code:

> *Sec. 9.62. EDUCATOR-STUDENT.*
>
> *The use of force, but not deadly force, against a person is justified:*
>
> *(1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and*
>
> *(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.*

Parents, grandparents, and guardians are similarly protected under Texas law in accordance with section 9.61 of the Texas Penal Code:

> *Sec. 9.61. PARENT-CHILD.*
>
> *(a) The use of force, but not deadly force, against a child younger than 18 years is justified:*
>
> *(1) if the actor is the child's parent or stepparent or is acting in loco parentis to the child; and*
>
> *2) when and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare.*
>
> *(b) For purposes of this section, "in loco parentis" includes grandparent and guardian, any person acting by, through, or under the direction of a court with jurisdiction over the child, and anyone who has express or implied consent of the parent or parents.*

The principle of *in loco parentis* applies to other persons besides teachers. It also applies to a grandparent, a guardian, and any person who has the implied or express consent of one of the child's parents. Although the modern world may be moving in a different direction as to the use of physical force as a tool of punishment or discipline, Texas statutes are founded on the age-old proposition that it takes a village to raise (and sometimes physically correct and/or punish) a child.

The protections found in sections 9.61 and 9.62 of the Texas Penal Code are justifications excluding criminal responsibility. To invoke such a justification for the use of physical force with a child, one must believe that the use of physical force was necessary to punish the child or control, train, or educate the child. A subjective belief that force is necessary is not, standing alone, sufficient to invoke the protection of the law. The person's subjective belief must also be reasonable. There are two important questions to ask when a parent or teacher uses physical force against a child. First, did the parent or teacher believe the force was necessary to punish the child or control, train, or educate the child? Second, would a reasonable person under those same circumstances believe that physical force was necessary to punish the child or control, train, or educate the child?

The Texas Penal Code defines "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor."[11] Determining the reasonableness of an educator's use of physical force is a crucial issue, as illustrated by the discussion of *Papa v. Presidio ISD*.[12] It is also worth emphasizing that the force used must not be deadly force. The Texas Penal Code defines "deadly force" as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury."[13] There is no statutory protection under these provisions for the use of deadly force.

B. Justifications Excluding Tort Liability

Under Texas law, the term "assault" has the same definition in criminal law and tort law. In perhaps the most influential case regarding a Texas educator's use of physical force in the modern era, the Court of Civil Appeals for the Sixth District addressed a case involving a football coach's use of force against a middle school football player during practice.[14] In *Hogenson*, the football coach allegedly struck the boy's football helmet hard enough to cause the boy to fall to the ground. The coach was also alleged to have grabbed the boy's facemask. The student sustained injuries to his neck, arm, and hand, and his condition required a hospital stay of eight days. The coach testified that he was physical with the athlete to fire him up or instill spirit in him. The parents of the child sued for damages. At trial, the jury found for the coach after being incorrectly instructed that "intent to injure" was a requirement of an assault. At trial, the jury also was not properly instructed as to the scope of the coach's legal ability to use physical force to control, train, or educate the child. The appellate court reversed the trial court's judgment and remanded the case for a new trial with correct jury instructions. The *Hogenson* case is a significant case not just for tort law, but also for disciplinary proceedings against educators, as it provides a list of factors to use in determining the reasonableness of the force used by an educator:

- The age, sex and condition of the child;
- The nature of his offense or conduct and his motives;
- The influence of his example upon other students;
- Whether the force was reasonably necessary to compel obedience to a proper command; and
- Whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.[15]

C. Expanding the Protection Under Section 9.62 of the Texas Penal Code and the Common Law to the Employment Context: An Educator's Immunity from Disciplinary Proceedings

In 2003, the Texas Legislature passed Senate Bill 930, which became effective September 1, 2003, and was intended to broaden an educator's protection against civil lawsuits and disciplinary proceedings. A review of the legislative history does not indicate that the bill was controversial. Included were the following specific provisions: a new immunity provision incorporating the federal Paul D. Coverdell Teacher Protection Act of 2001 for public and private school educators; a requirement that a person provide written notice to a professional school employee at least 90 days before the filing of a lawsuit; a provision prohibiting a person from suing a professional employee of a school without first exhausting the local grievance process; a $100,000 cap on damages in a civil lawsuit against an educator; and a provision allowing an educator to recover attorney's fees in civil litigation under some circumstances.[16]

Senate Bill 930 also included a provision making an educator immune from disciplinary proceedings based on use of physical force with a student to the extent such force is protected under section 9.62 of the Penal Code. During the legislative process, an amendment was added permitting a school district to enforce a corporal punishment policy. This immunity provision has been codified at section 22.0512 of the Texas Education Code:

> *Sec. 22.0512. IMMUNITY FROM DISCIPLINARY PROCEEDINGS FOR PROFESSIONAL EMPLOYEES.*
>
> *(a) A professional employee of a school district may not be subject to disciplinary proceedings for the employee's use of physical force against a student to the extent justified under Section 9.62, Penal Code.*
>
> *(b) In this section, "disciplinary proceeding" means:*
>
> > *(1) an action brought by the school district employing a professional employee of a school district to discharge or suspend the employee or terminate or not renew the employee's term contract; or*
> >
> > *(2) an action brought by the State Board for Educator Certification to enforce the educator's code of ethics adopted under Section 21.041(b)(8).*
>
> *(c) This section does not prohibit a school district from:*
>
> > *(1) enforcing a policy relating to corporal punishment; or*
> >
> > *(2) notwithstanding Subsection (a), bringing a disciplinary proceeding against a professional employee of the district who violates the district policy relating to corporal punishment.*

The immunity provided in section 22.0512 of the Texas Education Code applies to disciplinary proceedings brought by the State Board for Educator Certification (SBEC), such as a revocation or suspension of a teaching certificate. It is also reasonable to conclude that SBEC is prohibited from taking any other punitive action against a certificate holder, such as an inscribed reprimand or even a non-inscribed reprimand, as all such actions are reasonably understood to be disciplinary proceedings.

In addition, the immunity provided in section 22.0512 of the Texas Education Code applies to disciplinary proceedings brought by a school district, such as the termination of a con-

tinuing, term, or probationary contract; the nonrenewal of a term or probationary contract; the termination or suspension without pay of an at-will employee; and the suspension without pay of a contract employee.

D. School District Policies Governing the Use of Physical Force

It is not uncommon to find that a school district administrator is quite unaware of the protections provided to an educator by section 22.0512 of the Texas Education Code. For example, the author has witnessed a number of reprimands directing an educator not to ever have any physical contact with a student. Of course, many employees are also not aware of this statutory protection.

On some occasions, one will find that section 9.62 of the Texas Penal Code has been incorporated into a particular school district's policies, usually at FO (LEGAL), addressing Student Discipline. On other occasions, there is no mention at all of section 9.62 in a school district's policy manual. It is even more uncommon, based on a brief survey of Texas school district policy manuals, to find the protections of section 22.0512 of the Texas Education Code fully incorporated into a district's policies. For school district administrators and employees alike, this topic would seem to be fertile ground for further training and perhaps further policy development. It is worth noting that it is common to see policy guidance addressing "physical restraint" under FO (LOCAL); however, physical restraint is merely a subset of the physical force issues that may arise, and the standard policy on physical restraint is not nearly as broad as the protection afforded by the relevant Texas statutes. Therefore, merely permitting physical force if it meets a school district's description of "physical restraint" is not sufficient to honor the breadth of immunity to disciplinary proceedings under Texas law.

V. LEGAL PRACTICE POINTS REGARDING A PROFESSIONAL EMPLOYEE'S USE OF PHYSICAL FORCE IN THE SCHOOL LAW CONTEXT

A. Who Is a "Professional Employee" for Purposes of the Immunity to Disciplinary Proceedings Provided by Texas Law?

The term "professional employee" in section 22.0512 of the Texas Education Code includes the following persons employed by a school district:

- Superintendent;
- Principal;
- Teacher;
- Substitute teacher;
- Supervisor;
- Social worker;
- Counselor;
- Nurse; and
- Teacher's aide.[17]

The term also includes a teacher employed by a company who contracts with the school district to provide services; a student teacher or intern in an education prep program; a bus driver; a school board member; and any school district employee who is required to have a certification and exercise discretion.[18] Whether or not the immunity statute would apply to a charter school employee is beyond the scope of this article.[19]

B. Application of the *Hogenson* Factors to Determine the Reasonableness of the Force

For the purposes of analyzing whether or not an educator's use of force was reasonable in a particular case, and therefore justified, one must look to the influential tort law case of *Hogenson v. Williams* for reliable guidance.[20] The Commissioner of Education has applied many of the legal principles in *Hogenson* to disciplinary proceedings involving educators.

According to *Hogenson*, the "special purpose" of an educator under section 9.62 of the Penal Code is to control, train, or educate the child.[21] Privileged force is any force which the educator "reasonably believes necessary (1) to enforce compliance with a proper command issued for the purpose of controlling, training or educating the child, or (2) to punish the child for prohibited conduct; and in either case, the force or physical contact must be reasonable and not disproportionate to the activity or the offense."[22]

In *Hogenson*, the court also set out the generally accepted factors to consider when determining whether an educator used reasonable force with a student in a particular case:

- The age, sex and condition of the child;
- The nature of his offense or conduct and his motives;
- The influence of his example upon other students;
- Whether the force was reasonably necessary to compel obedience to a proper command; and
- Whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.[23]

C. *Papa v. Presidio ISD*: The Importance of Stepping into the Teacher's Shoes to Analyze the Reasonableness of the Force Used

The key question in many cases is whether the educator *reasonably believed* the level and duration of force were necessary to control, train, or educate his students. As previously indicated, the Texas Penal Code defines "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor."[24] Probably the most well-known and controversial Commissioner's decision involving an educator's use of physical force is *Papa v. Presidio ISD*.[25] The Commissioner found that the school district wrongfully terminated a high school teacher's employment following his use of physical force against a student who was attempting to deface the teacher's own high school yearbook picture. The Commissioner ordered the school district to award the teacher back pay and then to reinstate him to a teaching position or, in lieu of reinstatement, provide one year of future compensation.

The teacher believed that a 14-year old student was attempting to deface the teacher's high school yearbook by

cutting out the teacher's face in a photograph with a bent-open paperclip. The teacher did not issue any verbal command to the student. Instead, he approached the student from behind, grabbed his hands, twisted one of his arms behind his back, and forced him against the wall and out the classroom door. The student's arm was sore but otherwise uninjured.

The Commissioner stated that section 22.0512 of the Texas Education Code "provides a high level of protection for a teacher." He also held that the *Hogenson* factors must be viewed from the teacher's point of view: "The issue is not whether the actions are objectively reasonable but that whether from the point of view of the teacher are the actions reasonable." After determining that the teacher was trying to control the student to prevent property damage, and not trying to punish the student, the Commissioner applied the following test, which relies heavily on the *Hogenson* factors, to determine whether the educator was immune to any disciplinary proceeding:

> Texas Education Code section 22.0512 provides that a teacher may not be subject to disciplinary proceedings for the teacher's use of physical force against a student to the extent justified under Section 9.62, Penal Code. This section of the Penal Code provides that one entrusted with the care, supervision, or administration of a student for a special purpose may use force, but not deadly force, when and to the degree the teacher reasonably believes force is necessary to further the special purpose or to maintain discipline in a group.
>
> Whether force is reasonable under Texas Penal Code section 9.62 is judged from the perspective of the teacher. The factors to be considered are the age, sex and condition of the child, the nature of his offense or conduct and his motives, the influence of his example upon other students, whether the force was reasonably necessary to compel obedience to a proper command, and whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.

In applying the test and analyzing the case, the Commissioner made the following significant observations: the teacher's conduct was designed to "protect the book, remove the instrument of vandalism, and to remove the student from the classroom"; the teacher's use of physical force did not present a likelihood of serious injury to the student; the student suffered only a minor injury as a result of the physical force; the level and duration of force used were reasonable under the circumstances when judged from the teacher's perspective; no prior verbal command was required before the teacher's use of force, especially given the brazenness of the student's act just feet away from the teacher; and, although the use of physical restraint could be considered degrading, the teacher's actions were not intended to degrade the student. The Commissioner specifically rejected the school district's finding that the teacher's conduct violated its corporal punishment policy, once again emphasizing the importance of distinguishing physical punishment from physical control.

The *Papa* case has been the subject of much discussion and debate in the education community. As would be expected, attorneys on the employee side of the bar tend to agree with the outcome of the case, believing that it is appropriate to provide a broad degree of discretion and protection to a teacher who acts in the heat of the moment to physically control a misbehaving student. Attorneys representing school districts often express the opinion that the Commissioner relied too heavily on the teacher's subjective belief that the force was necessary and gave short shrift to the reasonableness requirement.[26] In the author's opinion, the *Papa* case recognizes that there is a reasonableness component to physical force cases, while emphasizing that one must put the proverbial reasonable man or woman in the shoes of the teacher at the very moment of the incident, with all of the attendant circumstances, to perform the required analysis. The case also underlines the importance of deferring to the teacher's judgment in the heat of the moment, a principle that is consistent with the *in loco parentis* tradition under Texas law.

D. *Earthly v. Fort Bend ISD*: Ruling on the Burden of Proof, the Issue of Insubordination, and the Proper Construction of a Remedial Statute

In April 2009, the Commissioner issued another important decision supporting the rights of educators. In *Earthly v. Fort Bend ISD*, the Commissioner overturned the district's termination of the educator's term contract because the educator's use of physical force against a student was protected by section 22.0512 of the Texas Education Code.[27] In this case, the educator (Earthly) was walking his middle school students down the hallway at Willowridge High School when a high school student swung his fist toward one of the middle school students. Earthly blocked the student's fist, pulled him away from the other student by grabbing his backpack, and told him to leave the building. Instead of leaving the building, the student intentionally bumped Earthly and pushed him toward an area outside the range of the surveillance camera in the hallway. Earthly then struggled with the student and restrained the student as the student was physically fighting Earthly. The Commissioner addressed several important points in this case. First, section 22.0512 does not create an affirmative defense that must be proved by the employee. The school district bears the burden of proving that the employee's use of force was unjustified. Second, the statute is a remedial statute to be construed broadly and liberally in favor of the educator. Third, the statute trumps any school district directive or policy that is in conflict with it—here, the school district failed in its attempt to fire the educator for insubordination because the administrative directives to stop the use of physical force were in conflict with the educator's rights under section 22.0512.

E. Punishment Is Different (Sometimes)

The general principle in section 22.0512 of the Texas Education Code is that neither a school district nor SBEC may bring a disciplinary proceeding against a professional employee who uses physical force against a student to the extent justified by section 9.62 of the Texas Penal Code. There is an important exception to this immunity statute however. The statute does not prohibit a school district from bringing a disciplinary proceeding against a professional employee who violates a district's corporal punishment policy. The statute thus raises the critical distinction between physical force used as punishment and physical force not used as punishment, although this distinction is only critical *if the school district actually has a corporal punishment policy that the employee*

has violated. Most school districts address the permissibility of corporal punishment at Board Policy FO (LOCAL).

The Texas Attorney General addressed this specific issue in a 2004 opinion and confirmed, as the plain language of the statute seems to require, that a school district may indeed bring a disciplinary proceeding against a professional employee for violating the district's corporal punishment policy even if the employee's use of force would otherwise be justified under section 9.62 of the Penal Code.[28] The Attorney General emphasized that this exception only applies to physical force used as punishment. It does not apply to physical force that is not intended to control, train, or educate a child. The distinction is crucial, especially since many school districts now have corporal punishment policies severely limiting, or altogether prohibiting, such punishment. According to the Attorney General, corporal punishment is commonly defined as the infliction of bodily pain as a negative consequence of misconduct.[29] The Attorney General pointed out that physical force not intended to punish often occurs in the heat of the moment and responds immediately to the need to control a student, often for the safety of the student or others.[30] The following examples of physical force not intended to punish were provided by the Attorney General: breaking up a fight between students, defending oneself from a student's physical attack (self-defense), and putting a hand on a student's shoulder to keep him in line.[31]

In *Doria v. Stulting*, a tort case for damages, the distinction between punishment and non-punishment was the crucial issue.[32] Although *Doria* involves a civil lawsuit and not a disciplinary proceeding, the court's analysis of this issue is instructive. After warning the student to stop using profane language to no avail, and after verbally directing the student to go to the vice principal's office several times without result, the history teacher grabbed the student's arm and his hair and physically escorted him to the vice principal's office for punishment. The teacher asserted the general immunity statute granting him immunity from liability for any discretionary act within the scope of his employment. That statute, the parents of the student pointed out, contains an exception for excessive force used in the discipline of students, and the parents claimed that the teacher's force was intended to discipline or punish.[33] The court found otherwise, holding that, as a matter of law, the teacher was not trying to "discipline" (the word "discipline" here is given the same meaning as "punish") the student by physically escorting him to the office. The court found that the teacher was trying "to protect the school learning process from disruption by a wrongdoer by physically removing the wrongdoer from the classroom and thereafter escorting the wrongdoer to the public official designated . . . to impose the necessary and proper 'discipline-punishment.'"[34]

F. The Apology Rule

On a number of occasions, the Commissioner has upheld the termination of an educator accused of improperly using physical force on a student based on the fact that the educator apologized for the use of physical force and, therefore, could not have reasonably believed the force to be necessary. In *Johnson v. Kenedy ISD*, the Commissioner upheld the school district's decision to nonrenew a principal's term contract following an incident in which the principal allegedly placed a student in a chokehold and stomped hard on the student's foot with his boot heel, causing the student's foot to be swollen and red.[35] Prior to the principal's use of physical force, the sixth-grade student had "playfully" poked the principal in the stomach and tapped his chin with a tennis racket, upsetting his sunglasses in the process. (Even if the student intended these actions in a playful way, one could see how a principal might find such actions disrespectful and demeaning.) Following the physical altercation, the principal called the student's mother and repeatedly inquired about the student's well-being, allegedly admitting to the mother that he had stomped on the student's foot "really, really hard." He also allegedly apologized for his conduct, saying that it had been a bad week, and he indicated that he did not mean for this to happen. The case involved other performance issues, but on the physical force issue, the Commissioner found that the principal's admission to the mother was sufficient to show that he did not reasonably believe that the force he used was necessary to keep order.

In *Lake v. Dripping Springs ISD*, a case later reversed by the Travis County district court, the Commissioner found that the school district lawfully terminated the employment of an at-will teacher's aide for allegedly pushing a student unnecessarily after the student had already obeyed the aide's verbal command and moved out of her way.[36] The Commissioner relied heavily on the aide's alleged apology to the student and her admission that she had "lost it and shoved a student." He asked, "Why should Petitioner apologize if the student's actions made the use of force necessary?" He concluded that the aide did not believe that force was necessary and therefore she was not protected from discharge under section 22.0512. It is worth noting that the Commissioner found that her insubordination in contacting the student and apologizing, after being told twice by the superintendent not to contact him, was by itself sufficient grounds for termination. The *Lake* case was reversed by a Texas district court in Travis County as being inconsistent with the *Papa* case.

Broadly, from a distance, the apology rule applied in *Lake* and *Johnson* seems to make some sense. In theory, an apology does indicate that one is truly sorry about some particular past conduct and now realizes that the conduct was not necessary or appropriate. In practice, however, the meaning of any apology is, to say the least, complicated. A person may apologize for a variety of different reasons: she is truly sorry; she is truly sorry that she is in trouble, but not sorry for her conduct; she believed her conduct was justifiable at the moment, but in hindsight, she sees a situation could have been handled in a better way; she doesn't believe she did anything wrong, but she is looking to smooth out a personal relationship or a working relationship and believes her apology will help the other person to feel better; she has been told to apologize by some authority figure, such as the superintendent or the principal, and she wants to retain her job.

Applying the apology rule generally to physical force cases would be problematic for many reasons, not least of which is that a person does not necessarily mean she's sorry when she says, "I'm sorry." On a more general note, more and more school district administrators are ordering teachers to apologize to students and parents. Is a coerced apology really an apology at all? The Commissioner has shown a readiness to see any apology as an admission that the educator did not really believe that the force used was reasonably necessary to maintain discipline.

G. Educator-Student Defense Under Section 9.62 Available Only to Those Who Admit to Physical Force

In criminal proceedings, the educator must substantially admit to the use of force against a student before the educator-student defense is available under section 9.62.[37] The *Smith* court acknowledged that admitting conduct does not necessarily mean admitting each and every element of the criminal offense. One must "substantially admit" or "sufficiently admit" to the conduct.

The general principle in *Smith* could be applied to school law in the context of a termination hearing (for a contract employee who has been proposed for termination), a grievance hearing (for a terminated at-will employee), or a proceeding at the State Board for Educator Certification (for a holder of a certificate accused of inappropriate conduct). The educator would probably need to admit to the use of physical force in order to avail himself of the educator-student defense. Denying that force was used at all would likely make the defense unavailable. Here, the lesson may be that the educator might not be able to argue alternative defenses: *e.g.*, I didn't use any physical force against the student, but, even if I did, I am immune to discharge or sanction under section 9.62.

VI. CONCLUSION

The *in loco parentis* principle, codified in section 9.62 of the Texas Penal Code and section 22.0512 of the Texas Education Code, is alive and well in Texas school law, although the distinction between punishment and non-punishment is becoming more critical as school districts increasingly exercise their authority to limit the use of corporal punishment. Determining whether an educator's use of physical force was permissible in a particular situation is a fact-intensive inquiry, and the ultimate administrative law or judicial answer to that question is therefore quite difficult to predict with accuracy. This is especially true given the elusiveness of the theoretical reasonable man or woman and the necessity of placing that reasonable man or woman in the teacher's shoes at the moment of the incident. In all but the most clear-cut cases, attorneys on both sides of the bar would be wise to consider early settlement of a disputed matter for the benefit of their clients prior to time-consuming, expensive, and unpredictable litigation.

ENDNOTES

1 A previous version of this paper was included in the 2009 School Law Conference materials in connection with a point/counterpoint presentation entitled *Torn This Way and That: The Conundrum of Using Physical Force with Students*. Marquette Maresh from Walsh, Anderson, Brown, Gallegos & Green, P.C. was my co-presenter at the conference.

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3 BLACK'S LAW DICTIONARY 542 (abr. 6th ed. 1991).

4 Created by the Constitution of 1876, the Court of Appeals exercised appellate jurisdiction in all criminal cases and some civil cases. TEXAS RULES OF FORM, Texas Law Review, p. 13 (9th ed., 2nd printing, 1998).

5 *Bolding v. State*, 23 Tex. Ct. App. 172, 175, 4 S.W. 579, 580 (Tex. Ct. App. 1887). In subsequent case law, Texas courts sometimes refer to the case as *Balding v. State*.

6 The distinction between punishment and non-punishment has become significant under current law and will be discussed later in this article.

7 43 Tex. 167, 168 (1875).

8 14 Tex. Ct. App. 61 (Tex. Ct. App. 1883).

9 TEX. PEN. CODE § 22.01(a)(1).

10 *Id*. § 22.01(a)(3).

11 TEX. PEN. CODE § 1.07(42).

12 Docket No. 016-R2-0306 (Tex. Comm'r Ed. 2006).

13 TEX. PEN. CODE § 9.01(3).

14 *Hogenson v. Williams*, 542 S.W.2d 456 (Tex. Civ. App.—Texarkana 1976, no writ).

15 *Hogenson*, 542 S.W.2d at 459 (citing RESTATEMENT (SECOND) OF TORTS).

16 SENATE COMM. ON EDUC., BILL ANALYSIS, Tex. S.B. 930, 78th Leg., R.S. (2003).

17 TEX. EDUC. CODE § 22.051(a).

18 *Id*.

19 Charter schools are different in many respects from more traditional public schools. Perhaps most importantly, many of the school laws in the Texas Education Code do not apply to charter schools. A home-rule school district charter is subject to any school law "relating to limitations on liability." TEX. EDUC. CODE § 12.013. As to open-enrollment charter schools, their employees are "immune from liability to the same extent as school district employees." *Id*. § 12.1056. The laws governing a campus charter school do not appear to address this issue at all. Whether the immunity statute (TEX. EDUC. CODE § 22.0512) would be considered a "limitation on liability" for the purposes of an employee of a particular charter school is an open question. The immunity statute at issue deals with disciplinary proceedings rather than the more traditional tort or criminal liability, but one could reasonably argue that it is indeed a type of limitation on an educator's liability.

20 542 S.W.2d 456 (Tex. Civ. App.—Texarkana 1976, no writ).

21 *Hogenson*, 542 S.W.2d at 459-460.

22 *Id*. at 460. Keep in mind, though, that a school district is permitted to enforce a corporal punishment policy under section 22.0512 of the Texas Education Code. So, sometimes, punishment is different.

23 *Id*. at 459 (citing RESTATEMENT (SECOND) OF TORTS).

24 TEX. PEN. CODE § 1.07(42).

25 Docket No. 016-R2-0306 (Tex. Comm'r Ed. 2006). The case was appealed and remanded to the trial court for further proceedings by the Texas Supreme Court. *See Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927 (Tex. 2010).

26 *See* Jim Raup, "Spare the Rod and Spoil the Child: The Use of Physical Force by Public School Employees," TEXAS SCHOOL ADMINISTRATORS' LEGAL DIGEST, at 4-5 (Vol. 24, No. 3, March 2008).

27 Docket No. 040-R2-0209 (Tex. Comm'r Ed. 2009).

28 Op. Tex. Att'y Gen. No. GA-0202 (2004).

29 *Id*. at 3.

30 *Id*.

31 *Id*.

32 888 S.W.2d 563 (Tex. App.—Corpus Christi, 1994, no writ).

33 The current version of the immunity statute is found in section 22.0511 of the Texas Education Code.

34 *Doria*, 888 S.W.2d at 567.

35 Docket No. 060-R1-0608 (Tex. Comm'r Ed. 2008).

36 Docket No. 049-R10-305 (Tex. Comm'r Ed. 2006).

37 *See Smith v. State*, 133 S.W.3d 665 (Tex. App.—Corpus Christi 2003, pet. ref'd) (finding that the defendant was not entitled to a jury instruction on the educator-student defense available under section 9.62 because he denied using physical force against the victims).

The PIA's "10-day Deadline" and the Attorney-Client Privilege after City of Dallas v. Abbott

By: Humberto Aguilera[1]

The Supreme Court of Texas issued its opinion in the case of *City of Dallas v. Greg Abbott*[2] presenting two noteworthy questions relating to the Public Information Act[3], namely: 1) whether the 10-day deadline to request an Attorney General opinion under the Act restarts when a requestor responds to a governmental body's good faith request for clarification or narrowing of an unclear or broad information request; and 2) whether the fact that a document is protected by the attorney-client privilege is a "compelling" reason to overcome the public-information presumption that applies when a governmental body fails to make a timely request.[4] The Court found that the 10-day deadline to submit a request for an attorney general opinion is reset once a governmental body receives a response from the requestor to its request for clarification or narrowing of scope.[5] Under this new time frame, the Court found the request for a ruling by the City of Dallas to be timely and within an exception to required public disclosure.[6] Having found that the City of Dallas's request for an opinion was timely, the Court did not address the issue of whether the fact that a document is protected by the attorney-client privilege is a "compelling" reason to overcome the public-information presumption that applies when a governmental body fails to make a timely request. As such, the Office of the Attorney General maintains its position that such information must be released when a governmental body fails to make a timely request for a decision from his office unless a "compelling" reason is provided.[7]

Background

On May 16, 2002, the City of Dallas received an open records request for various documents relating to the City of Dallas's "Assessment Center Process."[8] On May 22, 2002, the City responded to the request by seeking to clarify whether the requestor sought "information regarding specific assessment centers and if so for what period of time."[9] Section 552.222(b) of the Act permits a governmental body to ask a requestor to clarify or narrow his request when the information being requested is unclear or involves a large amount of information, respectively. Any request for clarification or discussion on how to narrow a request must include a statement that informs the requestor that his underlying open records request will be considered withdrawn if the governmental body does not receive a written response to its request for clarification or discussion by the 61st day after the governmental body sends the written request.[10] Presumably, the City of Dallas met this requirement as this was not an issue raised in the case. On May 28, 2002, six days after the City of Dallas sent its request for clarification, the requestor provided his response.[11] On June 10, 2002, the City submitted a request for an opinion to the Attorney General regarding several documents it considered protected from disclosure by the attorney-client privilege citing TEX. GOV'T CODE § 552.107 in conjunction with TEX. R. EVID. 503(b)(1)).[12]

The Attorney General determined that the City of Dallas' request was untimely.[13] According to the Attorney General, the ten-day clock began to run on May 16, 2002, when the City of Dallas first received the request, was tolled on May 22, 2002, when the City of Dallas sent a request for clarification, and resumed on May 29, 2002, when the City of Dallas received a response to its request for clarification.[14] Using the Attorney General's calculation, the City of Dallas had until June 6, 2002, to request an Attorney General decision but did not submit a request until four days later.[15] As such, the Attorney General determined that the request was untimely.[16] As a result of this determination, a legal presumption arose that the requested information was "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."[17] The Office of the Attorney General has long held that a "compelling reason" to withhold information is demonstrated only if the information is confidential by law–meaning a governmental body is prohibited by law from releasing the information–or if the release of the information implicates third party interests.[18] The Attorney General found that the City of Dallas did not present a compelling reason to overcome the public-information presumption and as such required the City of Dallas to release all information requested. The City of Dallas appealed this decision pursuant to section 552.324 of the Act.

Section 552.301(b) 10-day deadline

Section 552.301(b) of the Act requires that a governmental body ask for an "attorney general's decision [about whether requested information is within an exception to public disclosure] and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request." As discussed above, the Act also permits a governmental body to ask the requestor to clarify his request when it is unclear what information is being requested and/or discuss with the requestor ways the scope of his request may be narrowed when the requestor has requested a large amount of information.[19]

The Act is silent as to how such a letter affects the 10-day deadline imposed by Tex. Gov't Code § 552.301(b). The Attorney General has long held in his open record decisions and letter rulings that a letter seeking clarification and/or discussion on how to narrow a request tolls the 552.301(b) deadline rather than resets it.[20] The Attorney General argued to the Court that "such a construction is necessary to ensure that governmental bodies comply with their duty to respond promptly to requests for public information. If the ten-day period were reset rather than tolled by a clarification request ... governmental bodies could extend the deadline to respond to a public information request indefinitely by repeatedly requesting clarification."[21] The Court acknowledged this concern but noted that a governmental body must act in good faith.[22]

The Court also found that other provisions of the Act weigh in favor of resetting the 10-day deadline once a response has been received regarding a governmental body's request to clarify or narrow.[23] The Court noted that the requirement of section 552.301(b) of the Act to state the applicable exceptions to disclosure within 10 business days presupposes that a governmental body has identified the responsive information.[24] Similarly, the Court noted that if a governmental body

requires a deposit or payment of a bond before copying or preparing documents for inspection, as permitted by section 552.263(a) of the Act, the 10-day deadline imposed by section 552.301 does not commence until payment is received.[25] While acknowledging that these provisions do not specifically address the effect of a letter seeking clarification or discussion under section 552.222(b), the Court noted that the provisions suggest that the Legislature envisioned an orderly process in which both the government body and the requesting party will proceed with a reasonable idea of the burdens and costs each is likely to incur.[26] If the 10-day deadline is merely tolled while a governmental body seeks clarification or discussion to narrow a request, the Court noted that the governmental body will be left with little time to assess applicable exceptions or prepare accurate cost estimates, leaving both parties with less accurate information.[27]

The Court also pointed to Open Records Decision No. 333 issued by the Attorney General more than a decade before the Legislature enacted section 552.222(b). In this decision, the governmental body and the requestor exchanged a series of letters trying to determine exactly what information was being requested. The Attorney General concluded that the letter from the requestor that precisely identified the information sought—not the initial request—was the operative starting date used to determine the ten-day deadline, even though at the time the Act contained no provision allowing a governmental entity to attempt to clarify or narrow a request.[28] The Court determined that it was not unreasonable to assume that the Legislature anticipated that the enactment of section 552.222(b) would have the same effect on the ten-day deadline as the letter clarifying what was being requested in Open Records Decision No. 333.[29] As such, the court ruled that the ten-day period for requesting an Attorney General opinion runs from the date clarification is received from the requestor.[30]

Attorney-Client Privilege

By finding the City of Dallas's request for an opinion timely under section 552.301, the Court declined to rule on the City's alternative argument that the attorney-client privilege is itself sufficiently compelling to overcome the public-information presumption that results when an Attorney General's opinion is not timely requested.[31] By declining to rule on this matter, which was the subject of separate amicus briefs filed by the Texas Association of School Boards and the Texas Association of Counties, the Court enabled the Attorney General to continue enforcing his position that the attorney-client privilege is not sufficient *per se* to overcome the public-information presumption that results when an Attorney General's opinion is not timely requested.[32] In order to withhold information protected by the attorney-client privilege when an Attorney General's opinion is not timely requested, a governmental body must still present to the Attorney General a "compelling reason" to do so, i.e., demonstrate that the governmental body is prohibited by law from releasing the information or that the release of the information implicates third party interests.[33]

ENDNOTES

1 Humberto Aguilera is an Associate at Escamilla, Poneck & Cruz, L.L.P.
2 304 S.W.3d 380 (Tex. 2010).
3 TEX. GOV'T CODE § 552.001 et seq.
4 *City of Dallas v. Abbott*, 304 S.W.3d 380, 381 (Texas 2010).
5 *Id*. at 387.
6 *Id*.
7 *Id*. and Tex. Att'y Gen. Open Records Decision No. 676 (2002).
8 *Abbott*, 304 S.W.3d at 381.
9 *Id*.
10 TEX. GOV'T CODE § 552.222(d), (e).
11 *Abbott*, 304 S.W.3d at 382.
12 *Id*.
13 *Id*.
14 *Id*.
15 *Id*.
16 *Id*.
17 TEX. GOV'T CODE § 552.302.
18 Tex. Att'y Gen. Open Records Decision No. 676 (2002) at 11.
19 TEX. GOV'T CODE § 552.222(b).
20 *See* Tex. Att'y Gen. Open Records Decision No. 663 (1999).
21 *Abbott*, 304 S.W.3d at 384.
22 *Id*.
23 *Id*. at 385.
24 *Id*.
25 *Id*.
26 *Id*.
27 *Id*.
28 *Id*. at 386.
29 *Id*. at 387.
30 *Id*.
31 *Id*.
32 *See* Tex. Att'y Gen Open Records Decision No. 676 (2002).
33 *Id*. at 11.

Executive Officers' Profiles[1]

Chair: Joy Baskin

Family: Husband JJ; sons Ben and Judge

Education: B.A. from Stetson University in DeLand, FL (yes, it was founded with money donated by the hat manufacturer); J.D. from UT Austin

Community/Professional Involvement: Parent chair of our campus advisory committee in Austin ISD; Austin Shakespeare Festival; Covenant Presbyterian Church

Favorite sport(s) team(s): UT football

I knew I wanted to practice school law when: I heard Shellie Hoffman (now Crow) talk about how much she loves it.

If I had $1M to squander, I would: Do I have to squander it? If I really have to squander it, I'd probably travel first class with my whole family plus some personal assistants to chase the boys and keep up with the details.

Best vacation ever: Our honeymoon to Costa Rica.

My favorite indulgence: Going out to watch sports and eat fried bar food with JJ.

Motivation to persist in difficult cases: How much I care about my coworkers and our legal division.

If I were not a lawyer, I would be: A teacher

What others might not know about me: Sadly, I have no secrets.

Interesting jobs prior to becoming a lawyer: Fitness instructor, maid, courier, waitress, law clerk at TASB

Work-life balance advice: A sign on the wall of my office reads, "Having it all doesn't necessarily mean having it all at once."

Chair Elect: Joey Williams Moore

Family: Husband Mark; daughters Ali (6) and Audrey (4).

Education: B.S. from Stephen F. Austin State University; J.D. from Texas Tech University

Community/Professional Involvement: Chair Elect, School Law Section; Troop leader, Girl Scout Troop 88

Favorite sport(s) team(s): I pretty much follow the bandwagon or cheer for the underdog.

I knew I wanted to practice school law when: I got a job at TSTA.

If I had $1M to squander, I would: Travel!

Best vacation ever: Anywhere with sand, sun, my family, and no phone or computers.

My favorite indulgence: Good Tex-Mex cuisine

Motivation to persist in difficult cases: Knowing that I can help people who may be fearful or have very little voice in their situation.

If I were not a lawyer, I would be: unemployed. I have very few other practical skills.

What others might not know about me: I'm left-handed.

Interesting jobs prior to becoming a lawyer: I taught science in my home town of Celeste, Texas, to 6th, 7th, and 8th grades. At the end of the year, I was responsible for taking 50 eight graders on a school bus to NASA on a three-day trip.

Work-life balance advice: Remember what's important in life. No one's last words are ever "I wish I had worked more."

1 In addition to thanking the Executive Officers for indulging our curiosity, the Editors would like to thank Julie Allen Chen for compiling the questions and answers for the profiles. Julie is an Attorney at the Texas State Teachers Association.

Vice Chair: S. Anthony Safi

Family: Wife, Charlotte; three grown children, Robert, Bryan and Caroline

Education: B.A. and J.D. both from the University of Texas at Austin

Community/Professional Involvement: Church of St. Clement, El Paso; 2002–03 Chair, Texas Council of School Attorneys; 2010–11 Vice Chair, State Bar of Texas School Law Section; 1990–96 Member, Governing Council, State Bar of Texas Business Litigation Section; Life Fellow, Texas Bar Foundation; listed in Texas Super Lawyers and Best Lawyers in America; have often spoken at legal seminars in the area of school law

Favorite sport(s) team(s): Football; UT Longhorns Best vacation ever: Safari to South Africa in 1997; other favorites are to the Rocky Mountains in Colorado and Canada

Work-life balance advice: Mind, body and spirit; you cannot neglect any of these three. For those with young children: Quality time spent with them is one of the best life investments you can make.

Treasurer: Michael J. Currie

Family: Wife, Liza, who is a 1st-grade teacher. Sons Nicholas (2nd grade) and Bobby (1st grade).

Education: B.A. in English from the University of Michigan; J.D. from Syracuse University

Community/Professional Involvement: Coach for my sons' soccer and baseball teams. There is nothing like herding a game of 3-year-olds in soccer, especially seeing the first pass in a little kids soccer game that leads to a goooooaaaaallllll!!!!!!!

Favorite sport(s) team(s): Football. Texans for pro football. Michigan for college football. In case you wondering, and I know you were, Michigan has won more games than other college football program and has the best winning percentage all time of any college football program.

I knew I wanted to practice school law when: I got a job at a law firm that specialized in school law.

If I had $1M to squander, I would: I'm going with the classic answer: pay off debts/house/cars. Then probably buy new house/cars. Then max retirements, 529 plans, and then take some crazy, ostentatious vacation and be right back where I started. But man, it would be a great ride!

Best vacation ever: Disney with the family, Vegas with wife and friends.

My favorite indulgence: See Best Vacation ever.

Motivation to persist in difficult cases: I want to win and I hate to lose.

If I were not a lawyer, I would be: An engineer.

W**hat others might not know about me:** Can still solve a Rubik's Cube in less than 2 minutes.

Interesting jobs prior to becoming a lawyer: Worked as a projectionist at a multi-screen movie theatre in high school. Worked as the Party Picture guy in college.

Work-life balance advice: Life first, then work. Be great at your job so you can enjoy your life. Don't neglect your life and don't neglect your job.

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