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Greetings from the chair,

On the eve of what promises to be a banner year for Texas wildflowers I bring you greetings from our state capital. Texas is truly beautiful in the spring.

I have several items of news or updates to share. The first is the Texas School law Section Annual Retreat. It will be held on July 13th and 14th at the Westin La Cantera Resort in San Antonio. This is next to Six Flags Fiesta Texas and we can enjoy their fireworks in the evening. The facility is wonderful with several pools for kids and adults, tennis, golf and many amenities. The program will be interesting and stimulating. Please plan to attend and bring your family.

The School Law Section Annual Meeting will be in conjunction with the State Bar Annual Meeting, as required. We would love to have this at the retreat, but the rules require it at the annual meeting. We are shooting for an 11:00 slot on Friday June 15th. We will vote in the slate of officers for the coming year at that brief meeting. All members of the section are welcome to attend.

For your information, the state bar now has a web portal available to all attorneys. To participate go to www.mytexasbar.com. You can customize it for your particular areas of interest and practice areas. It contains news, real-time stock quotes, lawyer cartoon of the day, free legal research and many other items of interest.

Last but not least, we are soliciting sponsors for our retreat. If any of you have contacts with companies that serve the legal profession, let us know and perhaps we can ask them if they will contribute. Savings would be passed on to the members by reduced registration fees. Call Karen L. Johnson or me if you have ideas.

Have a super spring and see you at the retreat!

Roger Hepworth
Chair

FADE TO GRAY - SUSPICIONLESS DRUG TESTING OF STUDENTS

By Robert J. West[1]
Classroom Teachers Assn.

Modern schools do far more than merely teach students. Districts nourish students, test them for diseases and vaccinate them, test their hearing and vision, and seek to keep them safe from violence and drugs. The hidden nature of illicit drug use challenges school officials to implement effective deterrents. The policies districts adopt frequently permit suspicionless drug testing of students. Although all three branches of government contribute to the effort to make schools safe and drug free, the judicial branch plays a unique role. In deciding challenges to suspicionless drug testing, courts strive to balance a student's right to privacy with a district's attempt to deter drug use through random, suspicionless testing.

In the 1995 landmark case *Vernonia School District 47J v. James Acton*,[2] the United States Supreme Court recognized the difficulty school administrators face in fighting the drug problem and upheld Vernonia's policy requiring all students participating in interscholastic athletics to submit to urinalysis drug testing. The Court upheld the district's right to test athletes, but did not address the question of whether testing other students would violate the Fourth Amendment to the United States Constitution. Two Texas school districts adopted drug-testing policies now under challenge in the courts. This paper discusses the legal background of those cases.

The Fourth Amendment and Suspicionless Drug Testing

The Fourth Amendment, our young Nation's response to the "writs of assistance" used by British soldiers to search colonial homes and property, guarantees that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Starting almost with the Fourth Amendment's inception, courts have created exceptions to its warrant and probable cause mandates. In making exceptions, courts balance individual privacy rights and the government's interest in conducting a search without probable cause or a warrant; i.e., courts seek to identify the point at which the government's search becomes unreasonable and violates the Fourth Amendment. In two important cases, the Supreme Court held that asking an employee to provide a blood or urine sample for drug testing constitutes a search subject to the Fourth Amendment. In both cases, the Court upheld as reasonable the governmental employer's suspicionless and random drug tests. In neither case did the Court require the employer, prior to conducting a test, to show probable cause and obtain a warrant, or to make the lesser showing of an individualized suspicion of drug use.

In 1989, the Supreme Court decided *Skinner v. Railway Labor Executives' Ass'n*,[3] a case of first impression regarding the use of suspicionless drug testing through urinalysis. The Federal Railroad Administration ("FRA") collected evidence of on-the-job use of drugs and alcohol, and that such abuse contributed to several accidents.[4] The FRA policy required drug and alcohol tests of employees after certain kinds of serious accidents. Through testing, the FRA sought to secure evidence relevant to accident investigation and to deter employee alcohol and drug abuse. The Court held that drug testing conducted for administrative, non-law enforcement purposes is a search subject to Fourth Amendment scrutiny. The Court also found that the FRA's interest in maintaining a safe rail system created a special need distinct from normal law enforcement, and that the special need rendered the particular search reasonable.[5] The Court in *Skinner* found a "compelling" governmental interest in testing railroad employees without any showing of individualized suspicion because of the difficulty in determining individualized suspicion in the chaos following an accident, and because operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable."[6]

Regarding privacy intrusions, the Court deemed routine the blood and breath tests described in policy. Regarding the more intrusive urinalysis testing, the Court found it permissible because employees having safety responsibility in a pervasively regulated industry would have a "diminished expectation of privacy."[7] The lower court had rejected urinalysis as too intrusive in part because a blood test can provide evidence of current impairment, but urinalysis reveals only metabolites that indicate some past use. The Supreme Court rejected that approach. It approved urinalysis testing because a test might provide useful information for an accident investigation and may deter drug use.[8]

On the same day the Court decided *Skinner*, it decided *National Treasury Employees Union v. Von Raab*,[9] involving suspicionless drug-testing policies adopted by the United States Customs Service ("USCS"). In this case, the Commissioner of Customs described the Service as "largely drug-free." The USCS policy did not require proof of an accident or other incident in which drug or alcohol use could have played a role, and also did not require individualized suspicion. The USCS policy required urinalysis drug screening of applicants for positions in drug interdiction, and for positions where the employee might carry a firearm or handle "classified" materials. The Customs Service implemented the policy because agents came into direct contact with drug trafficking and drug traffickers, and because it could not tolerate employees using illegal drugs.[10]

The Supreme Court held for several reasons that the policy adopted by the USCS did not violate the Fourth Amendment[11] requirement for reasonableness. The Supreme Court termed the USCS the "first line of defense" against the importation of drugs, one of the greatest problems affecting the health and well being of our society.[12] In furtherance of its mission, the USCS needed employees of unimpeachable integrity and good judgment who could avoid the temptation of a bribe or the lure of illicit drugs. The Court said that the Nation's interest in protecting itself "could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics" and

went on to say "[a] drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals."[13] The Court weighed these interests against the privacy expectations of Customs Service employees and concluded that just by the nature of the work, employees in safety-sensitive positions have a diminished privacy expectation.[14]

The Supreme Court's *Skinner* and *Von Raab* decisions laid the groundwork for the proposition that under the Fourth Amendment, schools can, in certain circumstances, reasonably search students through the use of suspicionless drug testing. The Court found a compelling interest to avoid the danger of drug use in the workplace. Perhaps more importantly for schools, the Court found compelling the employers' efforts to deter drug use. The Court found a lessened degree of privacy expectation in heavily regulated, safety-sensitive endeavors. The Court found the law enforcement need for probable cause and a warrant issued by a neutral magistrate overcome by policies that narrowly delimit the group subject to testing and the reasons triggering testing, and by the employees' advance notice of testing. The Supreme Court in light of all relevant factors found that the government's special need for testing overcame individual privacy expectations and permitted suspicionless drug testing including urinalysis.

Suspicionless Drug Testing in Schools-The Vernonia Decision

Beginning in the mid 1980s, school personnel in the small, logging town of Vernonia, Oregon noticed an increase in drug use and classroom discipline problems.[15] School officials investigated and uncovered wide spread student drug use. One group of students called themselves the "drug cartel." Student athletes were believed to be involved in this group. School officials observed students openly using drugs at a café across from the high school. A large number of athletes appeared to be involved in this drug culture. Despite attempts to deter drug use through classes, speakers, presentations, and drug-sniffing dogs, drug use and the drug climate persisted; students were in rebellion and school administrators were "at their wits end."[16]

In 1989, the Vernonia School Board adopted a policy requiring all students in athletics to consent to urinalysis both before trying out for a team and then on a random selection basis during the season. School officials would keep confidential the identity of any student who tested positive, would notify parents of students testing positive, and would encourage counseling.[17] Seventh grade student James Acton wanted to play football, but declined to sign a testing consent form. When the District refused to let him try out, he sued asserting that Vernonia's policy violated his right to be free from unreasonable searches under the Fourth Amendment.[18]

The Supreme Court in *Vernonia*[19] employed a three-prong test comprising the student's privacy expectation,[20] the intrusiveness of the search,[21] and the nature and immediacy of the governmental need for the test.[22] With regard to the first prong, the Court found that students in general have a lesser expectation of privacy than adults. Schools in their custodial and tutelary relationship with minors not only regulate students to control their behavior, they also require physical examinations, assess student health, and vaccinate students. The Court then noted that student athletes in particular experience diminished privacy expectations because they submit to physical examinations before playing and dress in open locker rooms.[23] With regard to the second prong, the Court found urinalysis minimally intrusive because the policy contained safeguards that allowed little encroachment on student privacy when providing the specimen and protected the confidentiality of the test information.[24] As to the immediacy and need for testing, the Court found that drug use poses a heightened risk of physiological damage to children, and that current or past drug use by athletes increases the risk of injury.[25]

Focusing on the "special needs" of public schools, the inherent "custodial and tutelary" power schools exercise over students, and the diminished expectation of privacy, the Court in *Vernonia* upheld the school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics.[26] The Court rejected the lower court's reliance on the school's compelling interest, the analytical element almost dispositive in *Von Raab*. Putting this element of the test in its proper context, the Court said:

> It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.[27]

The Court concluded that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs … or deterring drug use by engineers and trainmen…." The Court "caution[ed] against assuming that suspicionless drug testing will readily pass constitutional muster in other contexts," identifying as "the most significant element" in its decision the fact that the policy was implemented under the government's responsibilities as "guardian and tutor of children entrusted to its care."[28] The Court did not address the question of whether districts could, on the same basis, test students other than athletes and whether a student drug-testing policy adopted without proof of a severe drug problem would violate the Fourth Amendment. It is to the decisions of other jurisdictions we turn before examining the Texas cases.

Seventh Circuit Takes a Stand

Before the Supreme Court decided *Vernonia*, the Seventh Circuit in *Schaill v. Tippecanoe Co. School Corp*,[29] adopted a random, suspicionless, drug-testing program to protect the health and safety of athletes and cheerleaders. The Seventh Circuit suggested that it would not extend this program beyond the narrowly defined group, indicating such searches may be improper "of band members or the chess team."[30] After *Vernonia*, the court changed its approach and expanded the scope of testing in a case brought against the Board of

Education for Rush County Schools in Indiana. The Rush County Board adopted a drug-testing policy because it believed a drug problem existed in its high school. The policy subjected all students participating in extracurricular activities to urinalysis testing for drugs, alcohol and tobacco. Four students and their parents challenged the policy on Fourth Amendment grounds.

In *Todd v. Rush County Schools*,[31] the Seventh Circuit upheld the district's policy that tested all students participating in any extracurricular activity. The court, relying on *Vernonia*, concluded that since the Board had responsibility for the health, safety and welfare of its students, it could require drug testing.[32] The court found drug testing not unreasonable because of the drug abuse taking place at school,[33] and cited two other important reasons in upholding the Board's drug-testing policy. First, students participating in extracurricular activities enjoyed positions of "enhanced prestige and status in the community," which the court characterized as a privilege.[34] Second, the court recognized that the Board acted out of a genuine concern over drug abuse in its schools, and not by a desire to act as law enforcement and punish students.[35]

The Seventh Circuit, however, did not extend *Vernonia* beyond extracurricular activities. In *Willis v. Anderson Community School Corporation*,[36] the court struck down an expanded drug-testing policy. The Anderson Board adopted a policy similar to that of Rush County Schools, but it also required any student expelled for more than three days to provide a negative drug test before returning to school. James Willis, a student at Anderson schools refused to submit to urinalysis after a five-day suspension for fighting. Willis filed suit after the school suspended him a second time for refusing testing.

The court ruled that Willis's privacy interest outweighed the district's purported need to drug test expelled students.[37] The court found that unlike students who voluntarily participate in extracurricular activities, a student unable to attend school due to a disciplinary suspension has a greater expectation of privacy. Given the greater privacy expectation, the court employed a more basic Fourth Amendment analysis. Following the Supreme Court's decision in *New Jersey v. T.L.O.*[38], the court required the district to establish its policy's reasonableness by proving an individualized suspicion. The court found that the school did not successfully demonstrate a strong enough relationship between the reason for the disciplinary action (fighting) and illegal drug use "to support a conclusive presumption of reasonable suspicion" that warranted testing. The court ruled Anderson's drug-testing policy unconstitutional because the district could not establish a nexus between fighting and drug use.[39] The court rejected a generalized policy requiring the drug testing of any student returning to school from a suspension unrelated to illegal drug use.[40]

The Eighth Circuit's Moot Decision

In 1999, the Eighth Circuit Court of Appeals decided *Miller v. Wilkes*.[41] In this case, the drug- testing policy adopted by an Arkansas school district required students participating in extracurricular activities to consent to random drug testing. The district could not make a "compelling governmental interest" argument because the district failed to produce any evidence of a significant drug or alcohol problem.[42] The court though took judicial notice of the serious social problems associated with drug and alcohol abuse in every part of the country and upheld the policy. The court explained that "…it is in the public interest to endeavor to avert the potential for damage, both to students who abuse and to those students, teachers, family members, and others collaterally affected by the abuse, before the problem gains a foothold."[43] Therefore, the mere potential for harm by students using drugs justified a suspicionless drug- testing policy. Ultimately, the Court vacated its decision as moot because the student graduated who challenged the drug-testing policy.[44]

The Tenth Circuit is Deciding

The Board of Education for the Tecumseh School District in Oklahoma implemented a policy requiring all high school students wishing to participate in any extracurricular activity to submit to involuntary drug testing. Several students challenged the policy because it did not require any individualized evidence or suspicion that the tested student had taken an illegal drug. In *Earls v. Board of Education of Tecumseh*,[45] the district court found that the district satisfied the "special needs" exception to the Fourth Amendment. The ACLU, representing the plaintiffs, has appealed the decision to the Tenth Circuit; the court has not reached a decision.

The Colorado Supreme Court's Ruling and Other State Cases

The Colorado Supreme Court addressed the issue of drug testing students participating in extra-curricular activities in a case styled *Trinidad Sch. Dist. No. 1. v. Lopez*.[46] The District implemented a policy similar to those challenged in *Vernonia* and *Rush County* which called for students in grades six through twelve to submit to urinalysis drug testing before participating in extracurricular activities. Carlos Lopez, a band student, challenged the policy alleging a Fourth Amendment violation.[47] The Colorado Supreme Court recognized a "special need" as did the Supreme Court in *Vernonia*, but distinguished *Vernonia* for two reasons. The court did not accept the district's assumption that the level of drug use among students in extracurricular activities equated to that of the entire student body.[48] Moreover, the court found the policy unconstitutional because the policy applied to students who participated in extracurricular activities not on a voluntary basis, but as a requirement of an academic class such as marching band. The court, therefore, held the district's policy unconstitutional.[49] Of note, the court found that students participating in extracurricular activities had a lowered expectation of privacy merely because they participated in gym class.[50]

Recently several state courts have struck down suspicionless student drug testing as violative of state constitutional provisions paralleling the Fourth Amendment. In *Theodore v. Delaware Valley School District*,[51] the Pennsylvania Court ruled that Pennsylvania's Fourth Amendment provide more protection than the Fourth Amendment to the U.S. Constitution and that student drug-testing through urinalysis violated students' Pennsylvania Fourth Amendment rights. A New Jersey court reached the same conclusion in *Joye et al. v. Hunterdon Central Regional High School Board of Education*.[52] The plaintiffs in a case recently filed in Oregon styled *Weber v. Oakridge*

School District[53] make the same assertion regarding Oregon's Fourth Amendment.

What About the Fifth Circuit?

The Fifth Circuit has treated the drug testing of employees and the drug testing of students differently. A Fifth Circuit decision to approve employee drug testing was itself upheld in the Supreme Court's *Von Raab* decision. In 1989, the same year the Supreme Court decided *Von Raab*, a U.S. District Judge in the Southern District of Texas struck down a policy requiring urinalysis drug testing of all students in extracurricular activities. In *Brooks v. East Chambers Consol. Indep. Sch. Dist.*,[54] the court held that the policy violated the students' Fourth Amendment rights. In a rare move, the Fifth Circuit affirmed the trial court's opinion without issuing its own. Although after *Brooks* the Fifth Circuit has decided cases involving suspicionless drug testing of employees, no court has decided a case involving student drug testing and no court has mentioned *Brooks*. The Fifth Circuit has not yet indicated whether it would decide the issue of suspicionless drug testing of students on facts similar to those in *Brooks* differently in light of *Vernonia*.

In one of the two cases involving employee drug testing, *Aubrey v. Sch. Bd. of Lafayette Parish*,[55] the Fifth Circuit recognized that some circumstances or "special needs" justify random drug testing. The court in *Aubrey* found that the district's special need outweighed the employee's privacy interest.[56] The court indicated that in the workplace, operational realities make testing reasonable in some circumstances, and that the need to protect children, our most important resource, motivated the district. Its operational realities led the district to adopt a policy providing for testing elementary school employees who interact regularly with students and use hazardous substances, operate potentially dangerous equipment, or otherwise pose any threat or danger to students.[57] The court found a similarity with *Vernonia* in that "the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[58]

The *Aubrey* court found a safety-sensitive component to a custodial position. The district then could justify random drug testing because the employee worked with a large number of children, and "the presence of someone using illegal drugs increases the likelihood that children will have an open avenue to obtain the drugs."[59] The court described a showing of drug use in schools as having persuasive value, but the requirement of such evidence as not mandatory. Ultimately, the Court in *Aubrey* found privacy intrusions reasonable in light of the operational realities of the workplace, and because the policy prevented the exercise of intrusive searches in an arbitrary and oppressive manner.[60]

In contrast to *Aubrey*, the Fifth Circuit struck down a drug-testing policy implemented by the Orleans Parish School Board. In U*nited Teachers of New Orleans v. Orleans Parish Sch. Bd.*,[61] the school board adopted a policy requiring employees and teachers involved in an accident at school to submit to a drug test.[62] The Fifth Circuit held that the policy violated the Fourth Amendment because there was no special needs exception to the requirement of individualized suspicion. "There is an insufficient nexus between suffering an injury at work and drug impairment."[63] The school district did not show a need for drug testing in response to an identified problem of drug use by employees or teachers. The court said that the district's general interest in drug-free schools, while admirable, did not establish a need sufficient to overcome the privacy interests of the individual employees. "As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities." According to the court, the district's "[f]ailure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in *Von Raab*."[64]

Again, in neither case did the court cite to the *Brooks* decision involving student testing. Since the Fifth Circuit affirmed the *Brooks* decision without delivering an opinion, it has not addressed suspicionless drug testing as it applies to students. The Fifth Circuit may soon have that opportunity.

On the Gray Horizon

Recently, federal judges in separate divisions of the Northern District of Texas struck down two different school districts' drug-testing policies. Last November, in a case styled *Gardner v. Tulia Ind. School. Dist.*,[65] a U.S. District Judge in the Amarillo division of the Northern District of Texas applied the *Brooks* decision as the law of the Fifth Circuit. The judge ruled unconstitutional Tulia Independent School District's policy for drug testing all students participating in extracurricular activities. In March 2001, a Federal Judge in the Lubbock division of the Northern District of Texas in a case styled *Tannahill v. Lockney Independent School District*[66] found that the district's policy violated the student's Fourth Amendment rights because it required suspicionless and random testing of all students in grades seven through twelve. The court in *Lockney* also relied on the *Brooks* decision.

Despite dissimilar facts, the courts reached the same decision. In *Tulia*, the district did not present evidence of a serious drug problem. Conversely, the drug-testing policy adopted by the Board of Trustees for Lockney ISD addressed a serious drug problem in the town. Lockney is a small town of approximately 2300 people located in the Panhandle just up the road from Tulia. The town experienced a severe drug problem culminating in multiple arrests for possession and intent to distribute cocaine and methamphetamines. During the criminal trials, the citizens learned that students had purchased some of the drugs. After careful planning and several meetings to discuss the policy, the Board of Trustees adopted a student drug-testing policy that called for all seventh through twelfth grade students to submit to urinalysis. As a penalty, those who refused testing could not participate in extracurricular activities.[67]

The community showed overwhelming support and many wore t-shirts to Board meetings that read "Lockney ISD's drug-testing policy. We asked for it, the Board delivered, and we are grateful." One parent, however, was unwilling to consent to have his son drug tested. The ACLU, on behalf of the Tannahills, filed suit to challenge Lockney ISD's policy. Although community support does not appear in the Fourth Amendment analysis of suspicionless testing in school cases,

the Supreme Court in *Vernonia* stated in its conclusion: "We find insufficient basis to contradict the judgment of *Vernonia*'s parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances."

The trial court in *Brooks* found that the district had stated a less compelling governmental interest than had the employers in *Skinner* and *Von Raab*.[68] The Supreme Court took a position in *Vernonia*. The Court held that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs…or deterring drug use by engineers and trainmen."[69] *Vernonia* appears to have overruled *Brooks*. The Tulia Board of Trustees decided to appeal the decision of the trial court, and the case is now pending in the Fifth Circuit. The Lockney Board of Trustees, as of this writing, has not yet decided to appeal the trial court decision. Regardless of whether the Lockney Board decides to appeal the decision in a case involving a policy providing for the drug testing of all students in five grades, the Fifth Circuit may address the question of whether the *Brooks* decision remains good law in light of *Vernonia*. The Fifth Circuit will also have the opportunity to address the holdings in *United Teachers of New Orleans v. Orleans Parish Sch. Bd.* and those from other circuits which suggest a need to show a nexus between the conduct of the targeted groups or the use of drugs by the targeted group and the government's need to test the targeted group.

Conclusion

School districts have a difficult task educating students in today's environment, particularly due to the prevalent use of drugs and alcohol by students. The Courts have recognized and will continue to recognize the difficulty teachers and administrators have in maintaining a safe drug free learning environment. Because of the questions unanswered by the Supreme Court regarding student drug testing and the differences among the circuit court decisions, the Supreme Court will likely revisit this issue. The Supreme Court may then provide a more expansive precedent regarding student drug testing or perhaps provide us with a lighter shade of gray.

ENDNOTES

1 The author would like to recognize and thank Ms. Sue M. Lee, an Associate Attorney with Henslee, Fowler, Hepworth & Schwartz for her help and support in producing this article.

2 *Vernonia Sch. Dist.47J v. Acton*, 515 U.S 646, 115 S.Ct. 2386 (1995)

3 *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 102 (1989)

4 *Skinner*, 489 U.S at 606-07

5 *Id.* at 617-20

6 *Id.* at 628

7 *Id.* at 627

8 *Id.* at 632

9 *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989)

10 *Id.* at 660

11 *Id.* at 664

12 *Id.* at 668

13 *Id.* at 674

14 *Id.* at 672

15 *Acton v. Vernonia Sch. Dist. 47J*, 796 F.Supp. 1354, 1356 (D.Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 515 U.S. 646 (1995)

16 *Id.* at 1357

17 *Id.* at 1358

18 *Id.* at 1356

19 *Vernonia Sch. Dist.47J v. Acton*, 515 U.S 646, 115 S.Ct. 2386 (1995)

20 *Vernonia*, 515 U.S at 654

21 *Id.* at 658

22 *Id.* at 660

23 *Id.* at 657

24 *Id.* at 658

25 *Id.* at 661

26 *Ibid.*

27 *Id.* at 664-65

28 *Id.* at 665

29 *Schaill v. Tippecanoe Co. School Corp*., 864 F.2d 1309 (7th Cir. 1988)

30 *Id.*, at 1319

31 *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), cert. den., 119 S.Ct. 68 (1998)

32 *Id.* at 985-87

33 *Id.* at 986-87

34 *Id.* at 986

35 *Ibid.*

36 *Willis v. Anderson Community School Corporation*, 158 F.3d 415 (7th Cir. 1998) *cert. denied*, 526 U.S. 1019 (1999)

37 *Id.* at 423

38 *Id.* at 420; *New Jersey v. T.L.O*., 469 U.S. 325 (1985)

39 Willis, 158 F.3d at 417

40 *Id.* at 420-21

41 Miller v. Wilkes, 172 F.3d 574 (8th Cir.), vacated as moot, 172 F.3d 582 (8th Cir. 1999)

42 *Miller*, 172 F.3d at 580

43 *Id.* at 580-81

44 *Id.* at 582

45 *Earls v. Board of Education of Tecumseh*, 115 F. Supp.2d 1281 (W.D. Okla. 2000)

46 *Trinidad Sch. Dist. No.1. v. Lopez*, 963 P2d 1095 (Colo. 1998) (en banc)

47 *Trinidad Sch. Dist. No.1*, 963 P2d at 1096-97

48 *Id.* at 1109

49 *Id.* at 1110

50 *Id.* at 1107

51 *Theodore v. Delaware Valley School District*, 761 A2d. 652 (Pa. Cmwlth. 2000)

52 *Joye et al. v. Hunterdon Central Regional High School Board of Education*, Docket No. HNT-C-14301-00, Superior Court of New Jersey, Somerset County (court granted Plaintiff's request for preliminary injunction).

53 Randi Bjonstad, *Lawsuit Challenges Drug Tests by School*, The Register-Guard (Oregon), January 23, 2001

54 *Brooks v. East Chambers Consol. Indep. Sch. Dist*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991)

55 *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998)

56 *Aubrey*, 148 F.3d. at 564

57 *Id.* at 565

58 *Id.* at 564

59 *Id.* at 564, n. 32

60 *Id.* at 565

61 *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998)

62 *Id.* at 855

63 *Id.* at 856

64 *Id.* at 856-57

65 *Gardner v. Tulia Indep. School Dist.*, No. 2:97-CV-020-J, slip op. (N.D. Tex. Nov.30, 2000)

66 *Tannahill v. Lockney Independent School District*, Case No. 5-00CV0073-C, slip op. (N.D. Tex. March 1, 2001)

67 Kane, Linda *Lockney ISD Votes to Uphold Disputed Drug Testing Policy*, Lubbock Avalanche, March 24, 2000; Yardley, Jim *Family in Texas Challenges Mandatory Drug Test*, New York Times, April 17, 2000

68 *Brooks*, 730 F. Supp. at 766

69 *Vernonia*, 515 U.S. 661

77TH LEGISLATIVE SESSION UPDATE

by Debra M. Esterak

The 77th Texas Legislative Session convened January ninth and, if the bills filed thus far are any indication, education is once again a very popular topic among lawmakers. Below is a listing of bills that may be of interest to the school law community. It is by no means exhaustive and lawmakers can continue filing bills until March 9. These and other bills can be tracked via the internet at www.capitol.state.tx.us.

Personnel Issues

HB 12 Ehrhardt / et al.
Relating to a statewide group insurance program for employees and retirees of school districts.

HB 23 Corte
Relating to personal leave for public school employees who are assaulted at work.

HB 50 Chavez
Relating to a state funding allotment for health insurance and other health care benefits for public school employees.

HB 106 Gutierrez
Relating to restricting written reports required of public school classroom teachers.

HB 201 Seaman
Relating to certain information that school districts must provide to teachers and administrators.

HB 326 Gallego
Relating to a statewide group insurance program for employees and retirees of school districts.

HB 361 Wise
Relating to criminal history records of and disclosure of certain conduct by employees, volunteers, and prospective employees and volunteers of certain educational entities.

HB 403 Giddings
Relating to creating the offense of improper sexual relations between employees of a public or private primary or secondary school and certain students.

HB 421 Wise
Relating to notice by school districts to district employees concerning social security benefits.

HB 447 Lewis, Glenn
Relating to discipline of public school students.

HB 500 Grusendorf
Relating to public education.

HB 523 Tillery
Relating to a statewide group insurance program for school district employees and retirees.

HB 575 Green
Relating to the creation and operation of a statewide risk pool to provide health benefits coverage to active employees of school districts.

HB 625 Gallego
Relating to a statewide group insurance program for employees and retirees of school districts.

HB 668 Maxey
Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity.

HB 723 Turner, Sylvester
Relating to an allotment to school districts for use by teachers in purchasing supplies used in classroom teaching.

HB 729 Gutierrez
Relating to compensation for public school classroom teachers and full-time public school librarians, counselors, and nurses for additional days of service.

HB 758 Coleman
Relating to the right of an employee to time off from work to participated in certain activities of the employee's child.

HB 798 Gallego
Relating to the terms of an employment contract of a political subdivision.

HB 809 McReynolds
Relating to the use of public school educator's days of service for which instruction is not required.

HB 813 Coleman
Relating to the prohibition of certain discrimination based on sexual orientation.

HB 816 Maxey
Relating to the prohibition of employment discrimination by state agencies on the basis of sexual orientation or gender identity.

HB 830 Salinas
Relating to time management and required service for classroom teachers.

HB 856 Dutton
Relating to the right of an employee to time off from work to participate in certain school activities of the employees child.

HB 881 Delisi
Relating to allowing certain retirees of the Teacher Retirement System to be employed as classroom teachers without losing retirement benefits.

HB 989 Dutton
Relating to the right of an employee to inspect the employee's personnel records.

HB 1082 Thompson
Relating to a prohibition on employment discrimination in compensation.

HB 1143 Grusendorf
Relating to public school teachers.

HB 1169 Wilson
Relating to the residency of certain public school teachers.

HB 1188 Telford
Relating to the rights of a public school teacher who is assaulted during the performance of the teacher's regular duties.

HB 1207 Brimer
Relating to notice and protest rights of certain reimbursing employers under the unemployment compensation system.

HB 1248 Tillery
Relating to a public school prescription drug benefit plan.

HB 1249 Dutton
Relating to certain information provided to public school employees whose employment is terminated.

HB 1290 Garcia
Relating to jury service.

HB 1298 Reyna, Art
Relating to the punishment of certain assaults committed against employees of primary or secondary schools.

HB 1321 Brimer
Relating to the eligibility of substitute teachers for unemployment compensation benefits.

HB 1329 Lewis, Ron
Relating to the code of ethics for public school educators.

HB 1344 Tillery
Relating to reports and other written information required to be provided by public school classroom teachers.

HB 1345 Tillery
Relating to collective bargaining by employees of local governments.

HB 1513 Delisi
Relating to the establishment of a defined contribution health care benefits programs for employees of public school districts.

HB 1525 Garcia
Relating to teacher certification of certain persons holding advanced degrees issued by institutions in foreign countries.

HB 1528 Bailey
Relating to prohibiting collective bargaining between the state or a political subdivision of the state and certain labor organizations representing public employees that advocate the right to strike.

HB 1568 Grusendorf
Relating to employment contract requirements for certain public school principals.

HB 1626 Grusendorf
Relating to the rulemaking authority of the State Board of Educator Certification.

HB 1627 Grusendorf
Relating to improvement of the mathematics skills of public school students.

HB 1647 Delisi
Relating to creation of a program that provides incentives for teachers to acquire additional teaching knowledge and skills.

HB 1675 Burnam
Relating to the establishment of a minimum wage for public employees.

HB 1721 Martinez Fischer
Relating to certification examinations for educators outside the state.

HB 1798 Hochberg
Relating to the rights and benefits of non-contract employees in school districts having an enrollment of at least 100,000 students.

HB 1846 McReynolds
Relating to the minimum salary schedule for certain professional public school employees.

HJ 46 Alexander
Relating to dedicating one-fourth of any revenue derived from an increase in the rate of the gasoline tax to funding group health benefits for active employees of school districts.

SB 26 Shapiro
Relating to restaffing certain low-performing schools.

SB 104 Van de Putte
Relating to requiring continuing education for teachers in the detection of child abuse and neglect.

SB 127 Staples
Relating to a statewide group insurance program for employees and retirees of school districts.

SB 132 Wentworth
Relating to access to criminal history record information concerning volunteers with certain programs providing activities to children.

SB 135 Carona
Relating to a statewide group insurance program for employees and retirees of school districts.

SB 158 Truan
Relating to counseling public school students regarding higher education.

SB 178 Armbrister
Relating to a statewide group insurance program for employees and retirees of certain public schools.

SB 207 Bivins
Relating to the selection of a hearing examiner in a teacher suspension or contract termination hearing.

SB 230 Harris
Relating to the transfer of funds to optional retirement programs for certain employees of public schools.

SB 388 Bivins
Relating to employment contract requirements for certain public school principals.

SB 389 Shapleigh
Relating to the establishment and funding of a statewide group insurance program for employees and retirees of certain public schools.

SB 473 Bernsen
Relating to a statewide group insurance program for active and retired school district employees.

SB 518 Lucio
Relating to public school counselors.

SB 655 Staples
Relating to minimum salaries for public classroom teachers, librarians, counselors, and nurses.

SB 729 Barrientos
Relating to collective bargaining by employees of local governments.

SJR1 Madla
Proposing a constitutional amendment to permit a public school teacher or faculty member of a public institution of higher education to serve as a member of the legislature.

SJR 14 Shapleigh
Relating to the distributions from the permanent school fund to the available school fund and to the school employees primary health coverage fund.

SJR 19 Ellis, Rodney
Relating to the use of income and appreciation of the permanent school fund.

Student Issues

HB 14 Corte
Relating to the expulsion of students for assault of school employees.

HB 88 King, Phil
Relating to recitation of the pledge of allegiance by public school students.

HB 171 Lewis, Glenn
Relating to the prosecution of and the punishment for certain offenses involving damage or destruction of property.

HB 193 Burnam
Relating to creating the offense of unlawful possession of certain firearms by a minor.

HB 208 Longoria
Relating to counseling for parents of certain public school students who are at risk of dropping out of school.

HB 209 Longoria
Relating to creating the offense of unlawful possession of certain firearms by a minor.

HB 275 Berman
Relating to the punishment for assaults committed against certain sports officials.

HB 301 Burnam
Relating to a requirement that certain school districts establish programs to reduce truancy.

HB 422 Tillery
Relating to the rights and responsibilities of parents of public school students.

HB 425 Tillery
Relating to a parent's access to any school district videotape in which the parent's child appears.

HB 427 Morrison
Relating to compulsory school attendance.

HB 447 Lewis, Glenn
Relating to discipline of public school students.

HB 669 Wilson
Relating to the suspension of a student from participation in extracurricular activities.

HB 692 Hochberg
Relating to prohibiting the seclusion of students.

HB 810 McReynolds
Relating to the penalties for making a false bomb threat and committing an offense involving a hoax bomb.

HB 814 Coleman
Relating to local school health education advisory councils and to health education instruction in public schools.

HB 874 Dutton
Relating to the authority of a juvenile justice alternative education program to obtain a waiver regarding required days of operation.

HB 880 Delisi
Relating to the student code of conduct for public school students and to discipline management techniques that a public school teacher may use.

HB 1088 Grusendorf
Relating to the placement in an alternative education program or expulsion of a public school student who makes a false alarm or report or a terroristic threat.

HB 1095 Dutton
Relating to procedures and standards for providing health care services in public schools.

HB 1150 Raymond
Relating to mandatory kindergarten attendance in public schools.

HB 1294 Garcia
Relating to public school prekindergarten programs.

HB 1462 Maxey
Relating to outreach activities under the Summer Food Service Program.

HB 1489 Hochberg
Relating to University Interscholastic League rules relating to student eligibility for participation in academic competitions.

HB 1549 Lewis, Glenn
Relating to the sealing of files and records of a person prosecuted for failure to attend school.

HB 1553 Reyna, Art
Relating to supervision of public school students pending placement in an alternative education program.

HB 1688 McClendon
Relating to the possession and self-administration of prescription asthma medicine by public school students while on school property or at a school-related event or activity.

SB 103 Nelson
Relating to the prosecution of and the punishment for certain offenses involving damage or destruction of property.

SB 189 Lindsay
Relating to the authority of a juvenile justice alternative education program to obtain a waiver regarding required days of operation.

SB 206 Bivins
Relating to the transfer of and funding for public school students who are the victims of certain criminal offenses.

SB 402 Zaffirini
Relating to the possession of carrying of weapons on certain premises associated with a school or educational institution.

SB 479 Van de Putte
Relating to procedures and standards for providing health care services in public schools.

SB 580 Van de Putte
Relating to local school health education advisory councils and to health education instruction in public schools.

SB 592 Lindsay
Relating to public school prekindergarten programs

SB 596 Duncan
Relating to prekindergarten programs for public school students.

SB 702 West, Royce
Relating to compensatory, intensive, and accelerated education in public schools.

SB 704 West, Royce
Relating to school district dress code.

Admission & Attendance

HB 40 McClendon
Relating to the first instructional day of a school year for public school students.

HB 301 Burnam
Relating to a requirement that certain school districts establish programs to reduce truancy.

HB 380 Garcia
Relating to public school class sizes.

HB 427 Morrison
Relating to compulsory school attendance.

HB 457 Clark
Relating to the computation of dropout rates for purposes of public school accountability.

HB 580 Pickett
Relating to annual audits of school dropout records.

HB 605 George
Relating to prekindergarten programs for public school students.

HB 1240 Wilson
Relating to creation of a public education voucher pilot program for certain children

SB 30 Zaffirini
Relating to mandatory kindergarten attendance in public schools.

SB 108 Lucio
Relating to the first and final days of instruction of a school year for public school students and to the first day of instruction of the first term of summer session for students at general academic teaching institutions.

SB 172 Wentworth
Relating to eligibility for public prekindergarten classes.

SB 206 Bivins
Relating to the transfer of and funding for public school students who are the victims of certain criminal offenses.

SB 213 Bernsen
Relating to the compulsory school attendance age and to the age of children for whom public school kindergarten must be provided.

SB 705 West, Royce
Relating to attending school.

Curriculum & Instruction

HB 86 King, Phil
Relating to character education programs in public schools.

HB 112 Rangel / et al.
Relating to curriculum requirements for admission to general academic teaching institutions and for high school graduation.

HB 127 West, George "Buddy" / et al.
Relating to recitation of the Declaration of Independence by public school students.

HB 226 Wise
Relating to a safety education component of the public school enrichment curriculum.

HB 443 Madden
Relating to notification to parents of certain circumstances at a public school campus or district.

HB 449 Woolley
Relating to personal finance education as a requirement for graduation from public high school.

HB 574 Green
Relating to the study of the Declaration of Independence and the United States Constitution in public schools.

HB 807 Janek
Relating to high school diplomas for certain veterans.

HB 814 Coleman
Relating to local school health education advisory councils and to health education instruction in public schools.

HB 865 Dutton
Relating to the establishment of basic skills academies in certain school districts.

HB 1646 Delisi
Relating to certain restrictions concerning statewide assessment of academic skills of public school students.

SB 82 Madla
Relating to courses offered by a public junior college for joint high school and junior college credit.

SB 130 Cain
Relating to character education in primary and secondary schools.

SB 210 Bivins
Relating to eligibility under the Early High School Graduation Scholarship program.

SB 265 Ogden
Relating to school district high school equivalency examination programs.

SB 266 Ogden
Relating to an optional flexible year program for public school students who would not otherwise be promoted.

SB 385 Bivins
Relating to the curriculum requirements for graduation from public high school.

SB 387 Bivins
Relating to high school diplomas for certain veterans.

SB 755 Bivins
Relating to administration of certain state assessment instruments to public schools.

Special Education

HB 406 Denny
Relating to funding of special education programs under the public school finance system.

HB 1292 Garcia
Relating to size limits for special education classes in public schools.

HB 1427 Hochberg
Relating to funding for extraordinary special education expenses.

HB 1438 Olivo
Relating to minimum salaries for interpreters employed in public schools to provide interpreting services to students who are deaf or hard of hearing.

SB 176 Zaffirini
Relating to a parent's ability to waive translation of the special education plan for the parent's child.

SB 543 Nelson
Relating to funding of special education programs under the public school finance system.

Bilingual Education

HB 379 Garcia
Relating to the funding allotment for bilingual education programs in public schools.

HB 1374 Oliveira
Relating to assessment of academic skills of public school students of limited English proficiency.

HB 1787 Gallego
Relating to the assessment of academic skills of students of limited English proficiency.

SB 467 Zaffirini
Relating to dual language immersion programs in certain public schools.

SB 676 Zaffirini
Relating to assessment of academic skills of certain students of limited English proficiency.

Home Schooling

HB 286 King, Phil
Relating to the admission to institutions of higher education of students with nontraditional secondary educations.

HB 1407 McCall/et al.
Relating to participation in school district services and activities by home-schooled students.

Private Schools

HB 386 Nixon, Joe
Relating to participation by private school students in University Interscholastic League sponsored activities.

HB 571 Green
Relating to concurrent enrollment agreements between junior colleges and private high schools.

Charter Schools

HB 423 Tillery
Relating to the applicability of municipal zoning ordinances to open-enrollment charter schools.

HB 972 Grusendorf
Relating to charter schools and services provided to charter schools by regional education service centers.

School Districts

HB 75 Garcia
Relating to public school campus report cards.

HB 110 Oliveira
Relating to wage rates paid by or on behalf of school districts on public works projects.

HB 231 Hilderbran
Relating to authorizing the board of trustees of an independent school district to donate certain surplus district property to a municipality, county, or nonprofit organization in order to preserve the property.

HB 285 King, Phil
Relating to the authority of a county or school district to sell land to certain organizations that provide low-income housing or promote revitalization of the land.

HB 311 Flores
Relating to the authority of a school district to select a sole broker of record for the purpose of purchasing insurance.

HB 357 Wise
Relating to grounds for special accreditation investigations of school districts.

HB 395 Wise
Relating to the safety of school district playgrounds.

HB 422 Tillery
Relating to the rights and responsibilities of parents of public school students.

HB 425 Tillery
Relating to a parent's access to any school district videotape in which the parent's child appears.

HB 443 Madden
Relating to notification to parents of certain circumstances at a public school campus or district.

HB 1142 Dutton
Relating to organization of certain school districts.

HB 1144 Grusendorf
Relating to public school accountability.

HB 1149 Martinez Fischer
Relating to the authority of a peace officer commissioned by school district to enforce certain traffic laws in a school crossing zones.

HB 1293 Garcia
Relating to closing certain low-performing schools.

HB 1296 Ehrhardt
Relating to a prohibition of discrimination by public educational institutions.

HB 1311 Salinas
Relating to air-conditioning of certain school buses.

HB 1335 Wilson
Relating to the liability of school districts and school district employees for certain conduct of employees that come in contact with students

HB 1411 Walker
Relating to the procurement methods a political subdivision or a related entity may use.

HB 1488 Kitchen
Relating to the issuance of bonds by school districts for the purchase of school buses.

HB 1804 Salinas
Relating to a database of information on the performance of students attending public schools and institutions of higher education.

HJR19 Hilderbran
Proposing a constitutional amendment authorizing the legislature to authorize the board of trustees of an independent school district to donate certain surplus district property of historical significance in order to preserve the property.

SB 26 Shapiro
Relating to restaffing certain low-performing schools.

SB 116 Wentworth
Relating to authorizing the board of trustees of an independent school district to donate certain surplus district property to a municipality, county, or nonprofit organization in order to preserve the property.

SB 202 Duncan
Relating to the liability for performing certain services under interlocal contracts.

SB 208 Bivins
Relating to reporting the academic performance of public high school graduates in institutions of higher education.

SB 264 Ogden
Relating to alcohol-free school zones.

SB 510 Armbrister
Relating to the procurement methods a political subdivisions or a related entity may use.

SJR2 Wentworth
Proposing a constitutional amendment authorizing the legislature to authorize the board of trustees of an independent school district to donate certain surplus district property of historical significance in order to preserve the property.

Elections

HB 145 Pickett / et al.
Relating to the recall of a member of the board of trustees of an independent school district.

HB 328 Gallego
Relating to single-member trustee districts for certain school districts.

HJR16 Pickett
Proposing a constitutional amendment authorizing elections for the
Recall of independent school district trustees.

SB 166 Madla
Relating to single-member trustee districts for certain school districts.

Facilities

HB 322 Tillery
Relating to murder committed in certain places associated with a school or educational institution as a capital offense.

HB 517 Turner, Bob
Relating to testing natural gas piping in certain school facilities.

SB 461 Duncan
Relating to requirements applicable to renovation of public school facilities financed with state assistance.

Finance

HB 50 Chavez
Relating to a state funding allotment for health insurance and other health care benefits for public school employees.

HB 316 Keel
Relating to the basic allotment under the Foundation School Program for mid-sized school districts.

HB 379 Garcia
Relating to the funding allotment for bilingual education programs in public schools.

HB 406 Denny
Relating to funding of special education programs under the public school finance system.

HB 448 Oliveira
Relating to reimbursement for the costs of transportation of a student to a magnet school.

HB 603 George
Relating to the treatment for school finance purposes of school district optional homestead exemptions.

HB 604 George
Relating to the small and mid-sized district adjustment under the public school finance system.

HB 934 Solis, Jim
Relating to eligibility of school districts for state assistance with payment of existing debt.

SB 20 Shapiro
Relating to the treatment for school finance purposes of school district optional homestead exemptions.

SB 28 Shapiro
Relating to the equalized wealth level under the public school finance system.

SB 146 Wentworth
Relating to the basic allotment under the Foundation School Program for mid-sized school districts.

SB 218 Shapiro
Relating to a financial accountability rating system for school districts.

Governance

HB 35 McClendon.
Relating to the meeting of a governmental body held by videoconference call.

HB 40 McClendon.
Relating to the first instructional day of a school year for public school students.

HB 145 Pickett
Relating to the recall of a member of the board of trustees of an independent school district.

HB 662 Allen
Relating to Internet access to certain public information regarding juvenile sex offenders.

HB 894 Hinojosa
Relating to requiring certain governmental bodies to consistently post notice of an open meeting at the same designated location.

HB 1021 Clark
Relating to consultations between a governmental body and its attorney.

HB 1074 Farabee.
Relating to the requirements for a meeting of a governmental body held by videoconference call.

HB 1282 Wise
Relating to the application of the nepotism prohibitions to employment of certain individuals.

HB 1817 Dunnam
Relating to the planning and decision making process of school districts.

HB 1827 Tillery
Relating to the boundaries of school districts located in home-rule municipalities.

SB 212 Lucio
Relating to abolishing the office of commissioner of education, creating the education commission, and transferring the powers and duties of the commissioner of education to the education commission.

SB 695 Wentworth
Relating to consultations between a governmental body and its attorney.

SB 745 Shapleigh
Relating to sanctions that may be imposed on certain school districts.

Junior College Districts

HB 47 McClendon
Relating to the automatic admission of certain undergraduate transfer student.

HB 528 Bailey
Relating to the tuition charged certain foreign students attending a public junior college.

HB 1145 Menendez
Relating to courses offered by a public college for joint high school and junior college credit.

HB 1465 Kitchen
Relating to the authority of a public junior college to set reduced tuition rates.

HB 1754 Gutierrez

Relating to the effect of redistricting by a junior college district on the terms of the current members of the district's board of trustees.

SB 82 Madla

Relating to courses offered by a public junior college for joint high school and junior college credit.

SB 733 Shapleigh

Relating to the tuition charged certain foreign students attending a public junior college in a county bordering Mexico.

SB 741 Barrientos

Relating to the authority of a public junior college to set reduced tuition rates.

ARTICLE FOR TEXAS SCHOOL LAW NEWSLETTER

A Summary of Proposed Amendments to the Commissioner's Rules Pertaining to Special Education Services

by Christopher P. Borreca
Bracewell & Patterson, L.L.P.

The Individuals with Disabilities Education Act (IDEA) was amended in 1997 by Congress. These amendments triggered many changes in the federal regulations pertaining to the education of students with disabilities. The regulations were published in final form in March of 1999. As a result of these changes at the federal level, the operating guidelines for providing special education services in Texas were in need of review and modification. The Texas Education Agency initiated a series of stakeholder meetings during 1999 and 2000 in order to solicit input from all interested parties, including parents, advocates, school districts, and other state and local agencies.

Probably the most controversial issue in the proposed amendments relates to the repeal of 19 TAC § 89.1095 and the proposed new § 89.1096, relating to dual enrollment. Section 89.1095 required school districts to serve students with disabilities placed in private schools by their parents if the student was dually enrolled in a school district and private school. When the IDEA was amended, federal law limited the service that schools and states are obligated to provide the students placed in private schools by their parents. The proposed new rule addresses those federal regulations and limits dual enrollment to only those students aged 3 to 4.

The proposed rules also incorporate several required action steps as dictated by amendments to the Texas Education Code in 1999. These amendments relate to training of surrogate and foster parents as well as the transfer of assistive technology devices. Additional changes include the restructuring of the age ranges and graduation requirements in 19 TAC § 89.1035 and § 89.1070 to more closely align with federal regulation, revisions to the eligibility criteria in 19 TAC § 89.1040 to allow for non-categorical eligibility for students up to the age of 9, clarification that a district may recess an ARD committee meeting for reasons other than disagreement of the parent and also provisions related to interventions and sanctions by the Texas Education Agency.

Several significant changes were proposed related to the due process procedures. First, the proposed rules limit requests for due process hearings to facts alleged to have occurred not more than 1 year prior to the date that the request was received by TEA or since the date of the last ARD committee meeting, whichever period is longer. In no event, however, can that time extend beyond 2 years from the date of the filing of the due process hearing. Since ARD committee meetings are required to be held at least annually, this proposed change should confine disputes to matters occurring within the year preceding the date a parent files a request for a due process hearing. If a district fails to hold an annual ARD committee meeting, an up to two year statute of limitations may apply.

Second, the proposed rules allow the parent or the school district to require the special education due process hearing officer make a finding as to whether either party unreasonably protracted the final resolution of the issues in controversy in the hearing. In making this finding, the hearing officer must consider the opportunity each parent had to resolve the complaint prior to the hearing, including each party's good faith participation in an ARD committee called for the purpose of resolving the issues involved in the complaint. It is believed this change would allow districts and parents to settle disputes earlier in the dispute resolution process because it removes the financial incentive the parents' attorney has if the matter is resolved in the parents' favor after a due process hearing officer rather than before.

Third, the proposed rules require that the special education due process hearing officer hold a prehearing conference and the conference be recorded. Currently, hearing officers are not required to record conferences. Thus, districts often face due process hearings where the issues in dispute are ill-defined. Consequently, school districts must prepare for a wider range of the issues that actually surface during the hearing. This rule change will greatly assist the hearing officer, the school district and the parent in defining the issues to be addressed during the due process hearing, and the record will serve to remind the parties of those issues if a dispute about them arises at the hearing.

Finally, the proposed rules provide a mechanism for discouraging strategic withdrawals of due process complaints shortly before they are scheduled for a hearing. Currently, many school districts prepare for hearings only to have the matter dismissed by the parent's attorney on or after the deadline to disclose documents and witnesses to the other party. The parent's attorney then refiles the same matter shortly thereafter. This causes the district to incur repetitious and unnecessary legal fees. The proposed rule changes would discourage this tactic.

The Texas Counsel of Administrators of Special Education (TCASE) commented on several areas proposed in the new rules. These comments from TCASE are represented in Exhibit A to this Article.

The proposed rules are expected to be approved by the Commissioner this Spring.

Texas Council of Administrators of Special Education
Comments Regarding Proposed Commissioner Rules

SECTION	COMMENTS
Eligibilty Criteria 89.1040 (13)	The non-categorical eligibility should be limited to 3 - 5 year olds as under previous rule. The language proposed by TEA is substantially different than the federal language and is more vague and more subjective.
Rights of Parents to Request ARD Committee Meetings 89.1045	This section should be changed to reflect the U.S. Department of Education's comments to the federal regulations. Suggested language is as follows: When the school district believes that the frequency or nature of the parent's requests for ARD Committee meetings are unreasonable, the District may refuse to conduct the ARD Committee meeting and will inform the parents of their right to request a due process hearing.
Procedures for Surrogate Parents 89.1047	Clarification is needed to determine TEA's responsibility in developing training materials. Also, if a school district already trains surrogates, can this requirement be waived for those previously trained?
Parental Rights Regarding Adult Students 89.1049	This rule should be changed to allow for parental rights to transfer to adult students. The rule as written discriminates against all disabled students by assuming none are competent to handle their own educational affairs once they reach 18. It is clear that state law allows for the transfer of rights at age 18. It is also clear that the federal regulations require an affirmative act by the state to transfer the rights under IDEA. The Commissioner has authority by rule to transfer such rights. The federal regulations at 34 C.F.R. 300.517 provide that "a state" may determine that rights given to parents under IDEA transfer to students once they reach the age of majority under state law. Use of the term "state" does not require an act by the Legislature. Federal regulation 300.7(b) uses similar language when it provides that "the State and LEA" may use the noncategorical label for some children. Even though the same term, the "state," is used in this federal regulation, the Commissioner, by rule, has added the noncategorical label to § 89.1040. By rule, the Commission can determine that IDEA rights will pass to students who reach the age of majority. The Commissioner has created additional rights for 18 year old students under 89.1085(d), 89.1050(h)(6), as well as 89.1056 (b)(2). These proposed rules show that the Commissioner clearly accepts the role of adult students functioning and operating separately from parents in other portions of the Commissioner's Rules. This rule should be specific and certain that rights under the IDEA transfer at the age of 18.

The ARD Committee 89.1050(f)	The changes in this rule regarding timelines to hold an ARD Committee meeting will work a hardship for school districts in regard to transfer students. We note that the proposed rule represents a much more restrictive timeframe than even an initial referral. The previous language of 89.1050(e) should be reinstated. Accordingly, the language should be changed to read that a "second ARD Committee Meeting shall be held within 30 school days from the first ARD Committee meeting to finalize or develop a new IEP based on assessment data."
Content of the IEP 89.1055(b)	This rule should be clarified that the goals and objectives for ESY services are to be those contained in the child's current year IEP that need to be maintained, not new goals or objectives to be developed specifically for ESY services. To develop new goals would contradict the very purpose of extended school year services.
ESY Services 89.1065(4)(B)	It is recommended that (4)(b) be eliminated. The requirement as stated is vague, unnecessary, and ill-defined.
Interventions and Sanctions 89.1076	The sanctions and interventions provided for in (3), (7) and (9) exceed the scope of the complaints process and / or overlap in the due process system. In accordance with federal regulation, complaints which are properly the subject of a due process hearing should be heard through the due process hearing officer and not through the complaint process. To implement the entire list of possible interventions and sanctions would render a relatively useless role to the due process hearings as they currently stand.
Dual Enrollment 89.1096	This rule should be eliminated in its entirety. The federal statute and federal regulations address the responsibilities of school districts to private school children for whom a free, appropriate public education is available. This rule creates an additional obligation on school districts not required by IDEA. The rule works a financial and administrative hardship on school districts and creates confusion regarding transportation of dually enrolled students. The TEA should develop procedures and guidance to implement the federal standard regarding obligations to parentally-placed private school students.
Due Process Hearings 89.1151	School districts strongly endorse the one year statute of limitations identified in this section.

Request for Hearing 89.1165(b)	The following sentence should be added at the end of 89.1165(b): "If such clarification does not occur, the hearing officer shall dismiss the complaint without prejudice to refiling."
Prehearing Procedures 89.1180	Sections (g) and (h) should be clarified to require specific disclosure of witnesses and exhibits. Parties should not be able to avoid these obligations by simply designating the exhibits and witnesses identified by the opposing party. Subsection (h) should further be clarified that parties who fail to disclose by the disclosure deadline date, either witnesses or exhibits, will not be permitted to call the witnesses or introduce the documentary evidence which was disclosed by the opposing party in a timely fashion. Section (b) should require a written transcript of all prehearing conferences, not simply a tape recording.
Hearing 89.1185(k)	The rule should be changed to allow posthearing briefs upon the discretionary order of the hearing officer, whether or not issues are unsettled or novel.
89.1185(q)	This rule goes beyond the requirements of 300.514(c) and will work a hardship upon any school district choosing to appeal a special education hearing officer's decision. The requirement to implement adverse decisions within ten days is unwarranted, especially in regard to reimbursement issues.

A REFRESHER ON LEGAL ISSUES REGARDING CORPORAL PUNISHMENT

By Chris G. Elizalde
Associate Executive Director
Texas Assn. of Schools Boards

If corporal punishment in schools used to be trendy, it certainly isn't now.

In the early days of public schools, paddling on the student's bottom or raps on the student's knuckles with a ruler appeared to be the traditional discipline of choice, with few guidelines and certainly without major concerns about legal issues. Parents were often supportive of the use of this discipline technique. That all changed in the early 1970s, with the advent of civil rights claims in various aspects of public schools. While Texas courts generally continue to uphold the use of corporal punishment, school districts and school officials find that its use carries a price—the risk of legal challenges in the form of formal complaints and grievances, as well as criminal or civil claims in state and federal courts. Today, parents often view school officials as responsible for what they see as abuse or assault.

Most often the reference to corporal punishment in policy and practice means swats on a student's bottom, but the courts usually analyze any type of student discipline involving physical contact or physical force as a corporal punishment claim. This article focuses on the state and federal law issues related to physical contact against students for disciplinary purposes by school employees. (It does not address the issue related to special education students whose individual education plans (IEP) provide for more specific restrictions.) The law regarding corporal punishment has not changed in recent years; parents' attitudes toward it have.

The applicable rules about physical force against students

The U.S. Supreme Court in 1977 concluded that the U.S. Constitution's Eighth Amendment prohibition against "cruel and unusual punishment" did not apply to a student's corporal punishment claim. Since then, it has been clear that corporal punishment and other disciplinary methods in public schools generally are not, in and of themselves, the bases for federal claims, but rather should be reviewed under state law. (The notable exception is a set of narrow civil rights claims, discussed below.) In some states, corporal punishment has been prohibited entirely by the state legislature, but that is not the case in Texas.

The Supreme Court's foray into corporal punishment issues was based on a suit brought by two high school students subjected to corporal punishment at school. The Court ruled that (1) the prohibition against "cruel and unusual punishment" applies only in criminal cases, not school discipline cases, and (2) the federal due process clause does not require notice and a hearing prior to corporal punishment, since no property right was involved, and (3) state law safeguards, such as criminal law prohibitions against assault and related charges, adequately protect against excessive force and the indiscriminate use of corporal punishment. *Ingraham v. Wright*, 97 S. Ct. 1401 (1977). Texas, for example, provides for civil and criminal penalties against individual public school employees and volunteers when they use excessive force or negligence in imposing student discipline, as discussed below.

Importance of local policies

Because no state law dictates specific rules and guidelines for corporal punishment, it is critical that local school boards establish their own in board policy. Such policies are critical to ensuring consistency, providing guidance to school staff, and protecting the school district and staff against corporal punishment-related claims. School officials must both (1) strictly follow the local policies related to corporal punishment, and (2) exert reasonable force when implementing corporal punishment. See, *Hogenson v. Williams*, 642 S.W.2d 456 (Tex. Civ. App.-Texarkana 1986, *no writ*). For instance, although parental permission is not required by law, sometimes it is required by local policy. See, *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971, *aff'd*, 458 F.2d 1360 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 463 (1972); *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 96 S. Ct. 210 (1975).

Local school district policies also can help protect employees when they are sued by students in claims involving excessive force or negligence in the assessment of corporal punishment or other physical force in discipline. Policies provide valuable guidelines to educators, such as those commonly found in local policies throughout Texas. (TASB Policy Service provides a sample of such a policy, which virtually all Texas districts have adopted with a few variations.) The most common restrictions include requiring that the discipline be (1) imposed out of the view of other students, (2) by an administrator or other person not involved in the student's infraction, and (3) with an adult witness present.

Failure to comply with local policies or the absence of policies altogether is often at the heart of the frustration and anger felt by parents seeking some recourse on behalf of their children who have been spanked or otherwise disciplined at school. Moreover, where an employee complies with policy, the district is more likely to support the employee financially to defend legal claims, even those filed against the employee individually. Failure to comply with local policies in the implementation of discipline may force the district to require the employee himself or herself to defend the lawsuit or other claim.

Civil claims against professional employees

In civil cases brought by students and parents, a professional school employee is enjoys a great deal of protection from personal liability for injury under Texas law. The employee is not personally liable for any act that (1) is incident to or within the scope of duties of the employee's position, and (2) involves the exercise of judgment or discretion by the employee. The exception to this general rule creates a huge opportunity for plaintiffs: in circumstances in which a professional

employee uses excessive force or negligence in discipline resulting in bodily injury to students, the employee may be personally liable. Tex. Educ. Code Section 22.051(a). The liability of professional employees is limited to certain acts incident to their discipline of students, rather than general acts of negligence that might result in bodily injury. *Barr v. Bernhard*, 562 S.W.2d 844 (Tex. 1978).

A "professional employee" for purposes of this immunity statute includes a superintendent, principal, teacher's aide, supervisor, counselor, certified bus driver, and any other person whose employment requires certification and an exercise of discretion. Student teachers share the same immunity. Tex. Educ. Code Section 22.051. School district volunteers are immune from civil liability for services rendered on the district premises to the same extent as professional school employees, except in cases of intentional misconduct or gross negligence. Tex. Educ. Code Section 22.053.

Corporal punishment cases often will include a claim of excessive force or negligence in discipline. In making a determination of whether excessive force was used, the courts have established several factors to consider: (1) the student's age, sex, and condition; (2) the nature of the offense or conduct and his or her motives; (3) the influence of the student's example upon others at school; (4) whether the force was reasonably necessary to compel obedience to a proper command; and (5) whether the force was disproportionate to the offense, was unnecessarily degrading, or was likely to cause serious injury. *Hogenson v. Williams*, 542 S.W. 2d 456 (Tex. App.—Texarkana 1976, *no writ*).

Where the law provides immunity from liability, typically a motion for summary judgment potentially can dispose of the case. In reviewing such a motion in the corporal punishment context, however, as the court considers the facts in the light most favorable to the student who allegedly suffered injury, it is often not difficult to defeat the summary judgment motion and move toward trial. At trial, a jury may decide the facts, such as whether the employee did what he or she is accused of, whether the physical force used in the discipline was excessive, or whether the discipline was negligently imposed. Where the employee is accused of engaging in negligence or excessive force, the factual disputes make it unlikely the case will be resolved without trial.

One example in which a trial was ordered was a case involving the injury and hospitalization of a seventh grade student after an incident during football practice at school. The coach allegedly had hit the side of the student's helmet with such force that he had fallen to the ground; then he had grabbed the face mask to pull the student back up to his feet. The coach was at least twice the size of the student, who suffered vertebrae damage as a result of the incident. The court reversed the trial court, ordering a trial to determine whether the coach's use of force was excessive. In doing so, the court ruled that the student was not required to prove intentional harm in order to prevail on his claim. For purposes of imposing personal liability, it was sufficient that the educator "recklessly" (i.e., with conscious disregard of a substantial and unjustifiable risk that harm would occur) caused injury to the child. *Hogenson v. Williams*, 542 S.W.2d 456 (Tex. App.- Texarkana 1976, no writ).

In another case, a junior high student was subjected to the ire of two coaches who expressed dissatisfaction with the student's efforts in school and in his sport. The coaches allegedly threatened to hang him and shoot him with a starter pistol. Although the allegations did not involve the types of physical force usually associated with corporal punishment, the court analyzed the incident much like a corporal punishment case. The court concluded that holding a student in a headlock and placing a starter pistol to his head could be considered excessive force, as could grabbing a student and pretending to hang him with an extension cord. The coaches filed a summary judgment motion claiming immunity under state and federal law. However, the motion was denied, triggering the possibility of a personal liability verdict at trial. *Spacek v. Charles*, 928 S.W.2d 88 (Tex. App.-Houston 1996, *writ dismissed woj*).

Another case involved an incident outside of school time but related to the employee's position as a school employee. Several students were playing football on a high school practice field one Sunday. Coaches attending a meeting nearby asked the students to leave, but they refused. In response, one coach allegedly shouted obscenities and struck a student in the mouth, knocking out a few of the student's teeth. The trial court initially granted a motion for summary judgment in favor of the coach, but the court of appeals reversed, determining that a fact issue still existed as to whether the coach's actions involved the use of excessive force. *O'Haver v. Blair*, 619 S.W.2d 467 (Tex. App.-Houston 1981, *no writ*).

Criminal laws concerning use of force

Several criminal statutes apply to the use of physical force against students. Educators are protected from frivolous criminal complaints brought by parents and students through language in Texas Penal Code, Section 9.62, which provides:

> 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.

This provision serves as a defense for an educator confronted with a criminal complaint filed by a parent or student. "Reasonable belief" is based on an objective "reasonable person" standard, as opposed to the subjective views of the individual actor. Thus, the focus is on what force an "ordinary and prudent man in the same circumstances" would believe was reasonable, a fact question. Tex. Penal Code Section 1.07(a).

Adding confusion for many school administrators, however, is Texas Penal Code Section 22.01, the criminal assault provision that defines "assault" as follows:

> A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another …(2) intentionally or knowingly threatens another with imminent bodily injury…or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Thus, there is a tension in the Penal Code between the educator's authority to use the force necessary to maintain order, and an individual's right to accuse the educator of assault. Nothing in law can prevent an individual from filing a criminal complaint, of course, and most often the question of whether to proceed with criminal prosecution lies with the local prosecutor. Once the decision has been made to proceed with a criminal complaint against an educator, however, the educator must defend himself or herself through the legal system. Although at times the local school board determines that paying for the defense of the educator in these circumstances is warranted, oftentimes it falls on the educator individually to pay for that defense.

One case from another state provides an example of how a criminal assault charge may be used against an educator who uses physical force to discipline. The case involved Melvin Hoover, an administrator supervising bus runs at a school. As he was walking, he heard a student shout, "Hey, Melvie!" Apparently finding the comment impertinent, the administrator grabbed the student by the lapel, forcibly took him into a vacant art room, shook him, and verbally admonished him. Testimony about the extent of the physical contact was disputed, but it was undisputed that the student was not injured to the extent that he missed school. Evidence about a minor eye injury was inconclusive. Some testimony indicated that the student's eye had been injured as he came into contact with the doorway in the struggle. Other testimony indicated he had been involved in an incident with another boy the same day, which could have resulted in the injury. *State v. Hoover*, 450 N.E. 2d 7 10 (Ohio App. 1982). Criminal assault charges were brought against the administrator, and he was convicted. On appeal, the court reversed, concluding that the evidence was insufficient to support the jury verdict.

Child abuse under the Family Code

Occasionally, a parent or student will claim that the physical force used in discipline constitutes child abuse under Texas Family Code Section 34.012. Parents and students may report physical punishment or contact by school staff to state child protective services pursuant to this provision or file civil lawsuits based on alleged child abuse. Furthermore, the state can bring criminal charges against a person suspected of child abuse. In one case, parents took two children who had been paddled at school to a child welfare office to report suspected child abuse by school staff. Social workers at that office photographed the children and told the parents of their conclusion that the situation indeed constituted child abuse. However, criminal prosecution did not follow. Instead, the parents filed a lawsuit for civil rights violations, in which they were unsuccessful. Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988).

Failure to intervene

Under current law, there is no legal duty to intervene in a corporal punishment situation, but an employee's failure to intervene still may trigger a lawsuit by a student or parent. For example, a teacher found herself in the position of having to defend a "failure to intervene" claim related to a special education student. The case involved parents who alleged that their son was subjected to excessive corporal punishment at the hands of the principal. School officials had admitted paddling the student three times on the buttocks as punishment for disruptive behavior during class, a punishment that comported with school policy. About three weeks before the incident, the parents had signed a special education authorization form providing, among other things, that school officials could administer three paddle swats to the child for misbehavior. Nevertheless, the parents filed a lawsuit with state and federal claims against the principal, teacher, superintendent, trustees, and school district. The federal trial court disposed of the federal claims through summary judgment and dismissal, but retained the excessive force claim against the principal in his individual capacity under state law.

On appeal, the parents argued that the teacher had a duty under state law to intervene in the "disciplinary activities of fellow educators if and when the punishment became 'excessive.'" The appeals court stated that "no such duty to intervene … exists under Texas law, and we decline the invitation to impose new duties under the state's tort law." *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990). Thus, the teacher was not held liable for failing to intervene to prevent the student's injuries.

Physical removal from class

If it is clear that potential liability can result when an individual metes out discipline, what about the situation where the teacher makes physical contact with a student not to discipline but to remove him to maintain order? Campus principals in particular often face difficult circumstances in trying to calm down a violent or disruptive student. A Texas appeals court has addressed this question. The case involved a teacher who injured a student when he forcibly removed the disruptive student from a classroom and escorted him to the vice-principal's office by grabbing his arm and hair. The teacher had been trying unsuccessfully to maintain order and correct the student. The parents sued the teacher for injuries the student allegedly suffered. The court granted immunity from liability because the teacher was found not to have been imposing discipline during the confrontation. The court determined that the teacher had acted reasonably. The teacher had only physically removed the wrongdoer and escorted him to the official designated to impose punishment. The teacher's actions did not constitute discipline; thus, the teacher was immune from liability under Texas Education Code Section 22.051. *Doria v. Stulting*, 888 S.W.2d 563 (Tex. App.—Corpus Christi 1994, *no writ*).

Failure to discipline or supervise

Another claim sometimes brought against an individual employee is an alleged failure to discipline or failure properly to supervise students when physical injury is at the hands of a third person. State law is clear, however, that as a general rule, a professional employee is not liable for the actions of others. The Texas Supreme Court and appeals courts throughout the state have granted immunity to school employees and refused to impose individual liability in a variety of cases where third parties have caused injury to students. For example, after a student was either hit or pushed by another student, his family sued two teachers (1) for failing to send the child to the school nurse or to the principal, and (2) for failing to take corrective action against the other student. The court granted immunity to the school officials under the Education Code. *Davis v. Gonzales*, 931 S.W.2d 15 (Tex. App.—Corpus Christi 1996, *writ denied*).

In similar case, a student with cerebral palsy was injured when she was pushed by another student into a stack of chairs while the classroom briefly was left unsupervised, but the

teacher was found not personally liable for the injuries. *Hopkins v. Spring ISD*, 706 S.W.2d 325 (Tex. App.—Houston 1986), *aff'd*, 736 S.W.2d 617 (Tex. 1987). Another teacher was found not liable when a student was struck in the eye by an object shot by another student. *Diggs v. Bates*, 667 S.W.2d 916 (Tex. App.—Dallas 1984, *writ ref'd n.re*.). Further, a teacher who placed a teacher's aide in charge at recess was not liable when a child fell and fractured several vertebrae. *Schumate v. Thompson*, 580 S.W.2d 47 (Tex. Civ. App.—Houston 1979, writ ref'd n.re.)

Financial assistance for educators in defending claims

The Texas Tort Claims Act, which permits limited school district liability for personal injury cases, specifies that it does not apply to a claim "arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities." Tex.Civ.Prac.& Rem.Code Section 101.057. Thus, the public school districts themselves cannot be held liable under state law for personal injuries caused by their educator/employee's negligence or excessive use of force in punishing a student. If an employee fails to comply with local policies pertaining to discipline or uses excessive force, the school district may require the accused employee to defend himself or herself without financial help from the employing district. When civil liability is found against an individual educator, a school district may pay actual damages, court costs, and attorneys' fees awarded against an employee for negligence if the damages result from an act or omission of the employee in the course and scope of employment. Tex.Civ.Prac.& Rem.Code Section 102.002.

Texas Civil Practice and Remedies Code Section 102.002, however, precludes a local government from paying damages awarded against an employee that arise from causes of action for official misconduct, a willing or wrongful act or omission, or an act or omission constituting gross negligence. When a claim is brought against an educator based on allegations of improper corporal punishment, this provision must be ordered to determine whether the employee's actions would prevent the district from legally spending public funds to assist the employee. If such assistance to the educator is determined to be appropriate (such as where the district determines the employee followed board policy), the district's payment of damages is limited to $100,000 to any one person or $300,000 for any single occurrence in the case of personal injury or death, and $10,000 for any single occurrence of property damage. Tex. Civ. Prac. & Rem. Code Section 102.003.

Federal liability for physical force against students

Although ordinary discipline cases generally do not constitute federal claims, under some circumstances they may be considered federal civil rights violations. Section 1983 of the federal civil statutes provides that any state actor who, acting under color of state law, custom, regulation, or usage, deprives an individual of a federal constitutional or statutory right, is liable for money damages to that injured individual. 42 U.S.C. Section 1983. Persons "acting under color of law" include public employees, such as school employees. *Monell v. New York City Dept. of Social Services*, 98 S. Ct. 2018 (1978). To be actionable under Section 1983, a harmful action must be committed under color of state law, i.e., with governmental authority. The plaintiff must show that the school district has deprived him or her of a particular federal constitutional or statutory right. For a school trustee or school employee to be liable, he or she must have deprived the plaintiff of protected rights or must have inadequately supervised a subordinate who violated the plaintiff's rights under color of state law.

While it is difficult to make a valid civil rights case against an individual for his own act of improper discipline, it is even more difficult to make a valid case against an individual school official for the acts of a subordinate. A school official may be held personally liable for the acts of a subordinate who deprives a student of constitutional rights if the supervisor shows deliberate indifference to the violation of a student's rights. Deliberate indifference is a higher standard of liability than even gross negligence. See, *Doe v. Taylor ISD*, 15 F.3d 443, 450 (5th Cir. 1993) (en banc), *cert. denied sub nom*., *Lankford v. Doe*, 115 S. Ct. 70 (1994). For example, the failure to follow a district's handbook procedures for investigating complaints does not, by itself, amount to deliberate indifference. *Hagan v. Houston ISD*, 51 F.3d 48 (5th Cir. 1995). Further, individual school professional employees are not necessarily liable for civil rights actions under Section 1983 for breaching a state law duty to report suspected child abuse. *Doe v. Rains County ISD*, 66 F.3d 1402 (5th Cir. 1995).

A qualified immunity or "good faith" defense is available to a school employee sued in his or her individual capacity. School employees are immune from suit under the doctrine of qualified immunity unless their conduct violates clearly established rights of which a reasonable person would have known. Qualified immunity is an affirmative defense that must be raised by an individual school employee; the defense is not available to the school district. See, *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). Several civil rights cases illustrate the use of the qualified immunity defense. In one federal appeals court case, parents had sued a teacher, principal, and assistant principal for paddling or allowing the paddling of a student whose parents claimed to have objected to corporal punishment. In finding qualified immunity, the court stated, "Assuming, for purposes of analysis, that [the teacher] did violate [the student's] constitutional rights—and perhaps those of his parents as well—we are not persuaded that the rights in question were so clearly established as constitutional rights that a reasonable teacher in the teacher's position would have had to realize that a violation of the Code of Conduct would violate the United States Constitution as well." *Saylor v. Board of Education of Harlan County, Ky.*, 118 F.3d 507 (6th Cir. 1997).

A similar result was reached where a student sued a teacher under Section 1983 for allegedly piercing the girl's upper arm with a straight pin. The court concluded that in order to prevail, the plaintiff must "prove not only that the teacher did indeed stick her with a pin but also that she did so in order to deprive her of some independently protected constitutional right." *Brooks v. School Board of the City of Richmond, Va.*, 569 F. Supp. 1534, 1538 (E.D. Va. 1983).

The Fifth Circuit Court of Appeals has held that the use of corporal punishment in public schools can be a civil rights violation, i.e., a deprivation of substantive as opposed to procedural due process rights, when it is arbitrary, capricious, or

wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. *Woodard v. Los Fresnos ISD*,732 F.2d 1243 (5th Cir. 1984). In the *Woodard* case, a student was paddled despite the lack of parental consent to the paddling, which was required by local regulations. However, that fact alone was insufficient to establish violation of a clearly established right.

Perhaps the most egregious set of allegations in a school discipline civil rights case was one in which a teacher was accused of tying a student to a chair for nearly two days without restroom breaks. The court held that such action would violate the student's clearly established right to be free from this type of bodily restraint. The teacher was not entitled to summary judgment based on qualified immunity under federal law. *Jefferson v. Ysleta ISD*, 817 F.2d 303 (5th Cir. 1987). The court concluded that proof of actual physical injury was not required in order to maintain a constitutional claim. The court rejected the qualified immunity defense based on the student's alleged injuries of humiliation, mental anguish, and inability to study.

Occasionally, what begins as a simple discipline claim becomes something much different. A case in point: A teacher, coffee mug in hand, came upon two students scuffling in the hall. She allegedly hit one child on the head with her coffee mug but not the other. The one who was hit on the head, an African-American, claimed racial discrimination. The court denied qualified immunity for the teacher, and a trial was ordered for trial on the discrimination claim. *Coleman v. Franklin Parish School Board*, 702 F. 2d 74 (5th Cir. 1983). Thus, educators should be aware of the potential federal civil rights liability that could arise from a seemingly straight-forward discipline case.

Sanctions against employees engaged in improper discipline

As with any misconduct by a school employee, violation of corporal punishment and other discipline policies may form the basis for an employee's reprimand, suspension, termination at the end of the contract term (nonrenewal), or termination during the contract term (discharge), depending on the seriousness of the offense. (For TASB Policy Service members, discipline and corporal punishment guidelines are specified in the Policy FO series.) This is true even if it is determined from a legal perspective that the employee is not personally liable to the student. Contract nonrenewal or termination at the expiration of the contract must be based on policy reasons, such as failure to follow directives or policies, failure to correct deficiencies pointed out to the employee, unethical or unprofessional conduct, and others. *See*, Tex.Educ.Code Section 21.203. (TASB Policy Service members can find such policies at Policy DFBB, Legal and Local).

Depending on the nature and severity of the policy violation, the contract employee could be discharged for good cause during the contract term based on violation of corporal punishment or other discipline policies under Texas Education Code Chapter 21. In fact, the Commissioner of Education has upheld an employee's termination for the use of excessive force and repeated violation of corporal punishment policy. The case later was upheld on appeal to the Austin Court of Appeals. *Burton v. Kirby*, 775 S.W.2d 834 (Tex. App.—Austin 1989, *no writ*). Although the *Burton* case precedes the most recent recodification of the Education Code, its principles still apply.

In another case, a teacher's contract was terminated for slapping a student across the face. A welt on the boy's face was still visible the next day. The teacher refused to assure school officials that this type of incident would not be repeated in the future. District policy specified that corporal punishment was to be administered "only as a last resort and in the presence of an adult witness," policy requirements the teacher had violated. *Mathis v. Angleton ISD*, TEA Dkt. No. 146[2]-RI -780 (Comm'r of Educ. May 1982). Thus, the teacher was terminated for good cause.

It is important to review the entire context in any given situation, however, as sometimes a different result is reached, such as where an isolated incident has occurred. In one such case, a teacher's termination was reversed by the Commissioner of Education on appeal, as the teacher was able to prove that her behavior was one single problematic incident in an otherwise stellar career. The circumstances were very different from those present in the *Burton* and *Mathis* cases, including the teacher's previous exemplary performance, commendations for past disciplinary methods, the student's history of uncontrollable behavior when paddling was attempted, and lack of sanctions against the principal, who also had been involved in the incident. *Short v. Rains ISD*, TEA Dkt. No. 214-R2-386 (Comm'r of Educ. Feb. 1987).

The Code of Ethics and Standard Practices for Texas Educators provides guidance regarding professional conduct, and it, too, can be the foundation for adverse action against an employee. It provides, among other things, that (1) "The educator shall deal considerately and justly with each student and shall seek to resolve problems including discipline according to law and school board policy," and (2) "The educator shall not intentionally expose the student to disparagement." 19 Tex. Admin. Code Section 247.2. As with any employment concern, compliance with both board policy and the Code of Ethics can help an educator avoid adverse employment action and successfully defend student discipline claims.

Conclusion

Although state and federal law on corporal punishment and other physical force issues favor school officials and employees, often the claims are difficult to defend. Corporal punishment cases are each unique in their fact patterns, and it is difficult to predict how a situation will appear to a jury long after the incident has occurred. State and federal immunity laws are designed to protect school employees from frivolous claims, but they come with key exceptions, such that potential personal liability may follow where excessive force or civil rights is an issue. Even where personal liability against the professional educator does not result from a student's claim of excessive force or other corporal punishment impropriety, the school district nevertheless is authorized to take adverse action against the educator when local policies or procedures are violated. For the educator, the best advice is to ensure that at all times any punishment of students involving physical force follows applicable district policies and procedures.

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