State Bar
Section Report
School Law

Newsletter Co-Editors
Leticia McGowan
Ellen Spalding

Summer 2008
Vol. 8, No. 2

To the Members of the School Law Section:

It was a pleasure to see those of you who were able to attend the School Law Retreat at the San Luis Resort in Galveston. The Retreat Program Co-Chairs, Joey Moore and Ellen Spalding did an outstanding job in coordinating fantastic speakers and timely subjects. Planning is underway for the UT School Law Conference in February 2009. Personally, I am already planning for the 2009 School Law Retreat, which will move to the Hill Country Hyatt for 2009 and 2010!

I want to thank Leticia McGowan for her hard work on this excellent newsletter. The newsletter is certainly a valuable resource for Texas school attorneys. In this edition, we have several great articles, including a discussion of student religious expression law by David R. Schleicher, one addressing student-on-student sexual harassment by Mel Waxler, and finally, one on special education immunity issues by Donald G. Henslee, Amanda M. Bigbee, and Heather Rutland. I am also pleased to announce that Ellen Spalding has agreed to co-edit the newsletter with Leticia. If you have ideas for articles that you would like to write, please do not hesitate to contact either Leticia at lmcgowan@dallasisd.org or Ellen at ESpalding@feldmanrogers.com.

A heartfelt thank you is also extended to Shellie Hoffman Crow, our outgoing Section Chair. She has done a tremendous job and it has truly been a pleasure working with Shellie. I am looking forward to a successful 2008-2009 term as Section Chair. If you have any great ideas or suggestions for the School Law Section of the State Bar, feel free to send an e-mail to me at **mbradshaw@feldmanrogers.com**

Sincerely,

Miles T. Bradshaw
Section Chair 2008-2009

STATE BAR OF TEXAS
SCHOOL LAW SECTION OFFICERS 2008-2009

Miles Bradshaw, Chair
Feldman, Rogers, Morris & Grover, L.L.P.
Nacogdoches, Texas 75961
(936) 569-2280
mbradshaw@feldmanrogers.com

Joy Surratt Baskin, Vice Chair
Texas Association of School Boards
P.O. Box 400
Austin, TX 78767
(512) 467-3610
joy.baskin@tasb.org

Shellie Hoffman Crow, Immediate Past Chair
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, TX 78768-2156
(512) 454-6864
scrow@wabsa.com

Elneita Hutchins-Taylor, Chair-Elect
Houston I.S.D.
4400 W. 18th Street
Houston, TX 77092-8501
mbradshaw@feldmanrogers.com
(713) 556-7245
ehutchi1@houstonisd.org

Joey Moore, Treasurer
Texas State Teachers Association
316 W. 12th Street
Austin, TX 78701
476-5355
joeym@tsta.org

EXECUTIVE COUNCIL MEMBERS

THIRD YEAR OF THREE-YEAR TERM:

Anthony Safi
Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C.
P.O. Box 1977
El Paso, TX 79950-1977
(915) 532-2000
safi@mgmsg.com

Donna Derryberry (filling vacancy)
Association of Texas Professional Educators
305 E Huntland Dr Ste 300
Austin, TX, 78752-3792
(512) 467-0071
dderryberry@atpe.org

SECOND YEAR OF THREE-YEAR TERM:

Michael Currie
Texas Classroom Teachers Association
700 Guadalupe
Austin, TX 78701
(512) 477-9415
mcurrie@tcta.org

Jim Whitton
Brackett & Ellis PC
100 Main Street
Fort Worth, TX 76102-3090
(817) 338-1700
jwhitton@belaw.com

FIRST YEAR OF THREE-YEAR TERM:

Juan Cruz
Escamilla & Poneck, Inc.
5219 McPherson Road, Ste. 306
Laredo, TX 78041
(956) 717-1300
jcruz@escamillaponeck.com

Christopher Gilbert
Bracewell & Giuliani, LLP
711 Louisiana St Ste 2300
Houston, TX, 77002-2770
(713) 221-1372
christopher.gilbert@bgllp.com

ONE-YEAR TERM:

Leticia McGowan
Dallas ISD
3700 Ross Avenue, Box 69
Dallas, TX 75204
(972) 925-3250
lmcgowan@dallasisd.org

Ellen Spalding
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Suite 1200
Houston, TX, 77057
(713) 960-6000
ESpalding@feldmanrogers.com

WEBMASTER

Michael Currie
Texas Classroom Teachers Association
700 Guadalupe, Austin, TX 78701
(512) 477-9415
mcurrie@tcta.org

COMING SOON TO A GRADUATION NEAR YOU: SURVIVING THE NEW STUDENT EXPRESSION LAW

By: David R. Schleicher[1]

It's Saturday, June 7, 2008, at a graduation ceremony in Somewhere, Texas. The student religious expression law (H.B. 3678) passed in the last session of the Legislature is about to be put to the test. It soon may become apparent whether former UT (now University of Michigan) constitutional law professor Doug Laycock was correct when he prophesied to *The Texas Observer* that "Schools will get sued." In Somewhere a lawyer is dreaming of taking such a case all the way to the Supreme Court in Washington, D.C., or at least the one in Austin. Elsewhere in Somewhere a superintendent lies awake at night worrying about legal fees.

Most attending the graduation ceremony this Saturday are not aware of the new law, but a few have noticed something different: a disclaimer in the program asserting that the school district has exercised no control over the content of the speeches being given by students. "Oh no," says one parent to another, pointing to the disclaimer, "my daughter Juliet is one of those speakers." "'Oh no' is right," replies the other parent, "my son Romeo is another one of the speakers." Neither parent is aware that their two children were dating each other, nor that Romeo has just dumped Juliet.

Romeo, the Salutatorian, speaks first. "Please bow your head and join me in prayer...Dear Lord Jesus, we ask you to bless this graduation and help those who believe they have been wronged to be mindful that they should judge not lest they be judged and to forgive as they also wish to be forgiven. Thank you for allowing me the honor of being at least the Salutatorian. In Jesus' name I pray. Amen." Warm applause follows, some for the prayer, the rest for the brevity.

Then comes Juliet, Valedictorian of the graduating class. Romeo takes a deep breath and holds it. "I...I have a reading to present," says Juliet, "...and it is from the Sermon on the Mount...it goes like this: 'And when you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by men. I tell you the truth, they have received their reward in full. But when you pray, go into your room, close the door and pray to your Father, who is unseen. Then your Father, who sees what is done in secret, will reward you.'"

A round of briefer but polite applause begins, but is interrupted by Juliet, who is not finished. "Let me also say...I think this planet is going to Hell in a hand basket. Because of the Romeos of the world, driving their Hummers around like there is no tomorrow...the ice caps are melting and you are all going to die." By this time a few boos can be heard and the principal steps in, "Juliet, that is a real good stopping point. It's time you sat down." She begins to resist, but in a single, masterful motion the principal removes Juliet's notes and Juliet from the podium.

On Monday morning, lawyers all over town find their voice and e-mails full of potential plaintiffs. There is the agnostic family that feels Romeo used the government to force them to pray. Juliet has contacted a lawyer to say that her rights were violated by the principal censoring the remainder of her speech. Romeo also has made calls, based on receiving his only grade that was not an "A" (the very "B+" that made him Salutatorian rather than Valedictorian) on a research paper, in Senior AP English, titled "Why the Bible Is the World's Greatest Book."

In spite of removal during the legislative process of a provision that would have eased the awarding of attorney's fees, chances are that someone in Somewhere, Texas is going to head to the courthouse. If there were not enough blood in the water already, there also has been an official, post-legislative-session statement of intent by the bill's lead sponsors--after they concluded that the related model policy by the Texas Association of School Boards would nullify the law's effects.

At its core, one-third of the legal theory behind the law is that if a school is not controlling the content of what students say, then the district cannot be sued over the student who chooses to use his or her turn at the microphone to offer a prayer. Another third is intended to ensure that students are not graded down on assignments on the basis of having included religious content. The third and likely least controversial aspect of the law, which merely duplicates existing federal statutes and court decisions, guarantees that student groups will not be treated less favorably on the basis that the students are gathering for a religious purpose rather than, say, to play chess.

Even the law's detractors seem to begrudgingly admit that it walks the church-state line just finely enough to survive a facial attack on constitutional grounds. That, however, may be of little comfort to the first school district to be dragged into court for how they have implemented the law. Some practical recommendations for avoiding that limelight follow:

(1) Adopt a Model Policy—A district that has not yet done this already is breaking the law. There are good arguments to be made for following TASB's recommendation, while others will want the safety promised by the bill's sponsors to those who adopt the model policy in the legislation: it is the one the Attorney General will defend.

(2) Include the Disclaimer Text in Graduation Programs—Article III of the bill's Model Policy suggests this language:

> The students who will be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages of the students' own choices. The content of each student speaker's message is the private expression of the individual student and does not reflect any position or expression of the school district or the board of trustees, or the district's administration, or employees of the district, or the views of any other graduate. The contents of these messages were prepared by the student volunteers, and the district refrained from any interaction with student speakers regarding the student speakers' viewpoints on permissible subjects.

(3) Do What the Disclaimer Claims You are Doing—As frightening as the thought may seem, the creation of a public forum really should mean what the language of the disclaimer says: no pre-approval of student speeches. As long as the topic is arguably related to the ceremony, schools now should no more expect an advance review of a student's speech

than a school board would have the right to insist that comments to be offered during public comment portions of their meeting be submitted in writing and in advance.

Consider providing a one-page list of guidelines for student speakers to reference as they prepare their comments. You could include the requirement (referenced below) that the student not use "obscene, vulgar, offensively lewd, or indecent speech." Reference also could be made to the fact that students are free to include religious material, to the same extent that they could include non-religious material. To avoid the question of whether the student has used the government to compel participation in a particular religious activity, a student could be advised that while the student may choose to chant, pray, cheer, or condemn with words of his or her own choosing, he or she should respect the free speech rights of those present to remain silent, by not attempting to lead the audience in doing such things.

Some courts have suggested that it is better for prayers which may be offered at a government ceremony—and so possibly mistaken as bearing the government's approval—to be non-proselytizing in content. Unless and until the Supreme Court directs otherwise, though, it is this author's view that steps should be taken to avoid the appearance of approval, such as by not offering the prayers in some circumstances and in others–where offered entirely by choice of the speaker, such as under the new state law–to use disclaimers similar to those in the State's model policy to avoid the appearance of endorsement. For the government to edit the prayer, to ensure it is bland enough not to change anyone's mind, gives rise to both "excessive entanglement" church-state problems and free speech concerns about impermissible regulation by the government based on content.

(4) Consider Fixing the Free–Speech Problem in the Model Policy—The Supreme Court held in *Texas v. Johnson*, 491 U.S. 397 (1989), that when free speech rights apply, they extend even to symbolic communications intended to get set many people's blood a boiling, such as flag burning. Earlier the Supreme Court referred to the prohibition against government officials requiring members of the public to adopt by word or deed a particular view in "politics, nationalism, religion or other matters of opinion" as the most "fixed star in our constitutional constellation." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Yet the Texas Legislature could not resist the urge to pull in the reigns a tad on what many no doubt feared would be a Pandora's Box of teen angst. What about the teen who is a fan of "Death Metal" and wishes to share some lyrics with those listening to morning announcements? Or the marching band member who wishes to open a football game with a poem she has written about how athletes are a drag on the advancement of civilization? Or the teen who wishes to let the graduation audience know what a bunch of losers his parents and teachers were during every single minute of high school? Can the State expand student expression rights while screening these folks out?

Article III of the Model Policy attempts to keep things on topic by requiring that the subject addressed by a student speaker at graduation:

> must be related to the purpose of the graduation ceremony, marking and honoring the occasion, honoring the participants and those in attendance, and the student's perspective on purpose, achievement, life, school, graduation, and looking forward to the future.

Similarly, Article II of the Model Policy, related to ceremonies other than graduation, requires that the subject of student introductions:

> must be related to the purpose of the event and to the purpose of marking the opening of the event, honoring the occasion, the participants, and those in attendance, bringing the audience to order, and focusing the audience on the purpose of the event. The subject must be designated, a student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech.

The restrictions on "obscene, vulgar, offensively lewd, or indecent speech" track language from Supreme Court student speech cases and so pose no problem. But it is quite something else to force a student to "honor the occasion, the participants, and those in attendance," or to make comments at graduation reflecting how he or she is "looking forward to the future." This implies that a student may be allowed to say that the future looks so bright she has to wear shades, but another may not use his speech to say that he believes that the members of the graduating class are headed for ruin because of their pride and greed. A district may not order only happy speeches at graduation, anymore than it could limit public comments at a school board meeting to only those wishing to express their admiration for the board.

The Waco Independent School District, by unanimous vote, addressed these concerns by deleting the "honoring" language in Article II, as well as the "honoring" and "looking forward to the future" language in Article III. A law claiming to expand and protect student expression rights provides no excuse and likely no cover for content-based restrictions. If one is to give teens an open microphone, it can be turned off for the lewd and crude, or what is judged to be advocacy for usage of illegal drugs (e.g., "Bong Hits for Jesus," as in the recent Supreme Court case). But a limited public forum does not permit banning speech on the basis that it will run contrary to public opinion, is blatantly political, or even remarks that are morose and spiteful.

(5) Alert teachers to the no-discrimination for religious content requirement—Consider again Romeo's first-ever school project on the Bible and his first ever grade of a "B+". Much can be done to avoid a lawsuit by including comments explaining why a student received the grade he did. Just as a rejected job applicant is less likely to sue for discrimination if she is informed that the person hired had seven more years of experience, so also Romeo may be less likely to try out the new law in Court if he realizes that his B+ was due to misspelling the words "Bible" and

"Greatest" throughout the paper, or for failing to include an introductory and concluding paragraph. Teachers can be reassured that they are not expected to treat submissions containing religious content any worse or better than those without it, instead applying "ordinary academic standards" just as they would do for a student project reflecting a political view with which the teacher might not agree.

The new student expression law poses some interesting problems. It also risks some audience members getting up and leaving, booing, or worse, at this year's graduation ceremonies. School districts will be telling the audience they are not responsible for what the kids on the program say, but being used to *en loco parentis* may make it hard for a principal to sit on his or her hands while a student speaks against the war at a high school on the edge of a military base or offers a prayer to the Earth Goddess in a town where Friday night football and Sunday morning services are considered equally mandatory for all.

On the other hand, the accommodation of varied religious and political viewpoints, and embrace of free speech rights even when the speaker is burning a flag, never have been easy. But they are nonetheless the sort of things that we can continue to educate our communities have made this country great. With some planning, they also are things that need not get a district into the constitutional law textbooks.

ENDNOTES

1 David Schleicher is an attorney in Waco and serves as the Vice President and an At-Large Member of the Waco School Board. Last year he moderated a debate in Washington, D.C. about the new law, between Liberty Legal Institute attorney Kelly J. Shackelford and ACLU *pro bono* attorney Michael F. Linz.

PLAYING HARDBALL: ADDRESSING STUDENT-ON-STUDENT SEXUAL HARASSMENT ONE DISTRICT'S EXPERIENCE

By: Melvin E. (Mel) Waxler [1]

Clearly, a Title IX lawsuit is not the optimal impetus for evaluating an entity's sexual harassment policies and procedures—or the lack thereof. The experience of the Austin Independent School District in creating and implementing a complete plan of action for prevention of and response to sexual harassment of students or staff serves as a template for other districts to evaluate and adopt or adapt their own policies.

I. Making the Rulebook: Establishing District Policies and Practices.

Austin ISD has worked hard in an attempt to establish clear and direct policies that define the responsibilities of administrators, principals, and instructors with regard to preventing and responding to harassment incidents. Policies have been created that outline the prevention program to be utilized in campuses in Austin ISD, clearly define what harassment is, explain how a student may make a complaint, and guide the response to any such complaints. Austin ISD has also established practices to track harassment complaints over time.

Austin ISD Board Policy clearly defines and prohibits several types of harassment, including sexual harassment, bullying, dating violence, and other prohibited harassment.[2] Austin ISD's Student Freedom From Harassment policies form the basis for a comprehensive plan of prevention of and response to sexual harassment.[3]

Austin ISD policy clearly states that sexual harassment of students constitutes discrimination on the basis of sex, in violation of Title IX.[4] Sexual harassment is further defined in policy as "conduct so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[5] Sexual harassment does not include simple acts of teasing and name-calling among school children, even when the comments target differences in gender.[6]

In addition to legal definitions of sexual harassment, Austin ISD policies provide practical examples of harassment behaviors: "sexual advances; touching intimate body parts or coercing physical contact that is sexual in nature; jokes or conversations of a sexual nature; and other sexually motivated conduct, communications, or contact."[7]

Student handbooks at individual campuses may present students with additional clarifications of sexual harassment (*e.g.*, "unwanted and unwelcome verbal, nonverbal, or physical contact of a sexual nature, by word, gesture, or any other sexual conduct[8]). Student handbooks also present specific information about reporting sexual harassment, and the consequences that may occur if a student sexually harasses another individual.

II. Coaching the Team: Training Employees.

Though Austin ISD has put much effort into establishing clear and responsive policies and rules, they are worth very little if faculty and staff are not knowledgeable about them, and prepared to implement them. Training is one area that is particularly difficult to maintain: faculty and staff at individual campuses must be educated about the requirements of the policies (the behaviors that constitute sexual harassment, how to file a complaint, how complaints should be handled) and how to assist students in recognizing, averting, and coping with harassment behaviors. This education must then be supported and reinforced by follow-up training.

Austin ISD currently trains administrators and counselors separately. Austin ISD's legal department trains administrators, while counselor training is handled under Austin ISD's Student Support Services department. Both counselors and campus instructors may receive information and guidance on policies and procedures from their local administrators (*i.e.*, principals and/or assistant principals).

III. Achieving a No-Hitter: Prevention.

Fundamentally, Austin ISD would prefer to prevent harassment from occurring. To that end, Austin ISD has policies in place to educate students and staff about what harassment is, and to reinforce positive behavior, starting at a young age. Specifically, many programs in place at Austin ISD or run by our partners acknowledge the overlap between bullying and sexual harassment behaviors. Thus, younger children (K-5) are taught about recognizing and dealing with bullying situations. As they mature, usually around sixth grade, the programs begin to teach the children that bullying behaviors with a sexual or gender component are sexual harassment. During middle and high school, programs in use throughout Austin ISD endeavor to teach students acceptable behaviors in, and ways of approaching, various relationships.

Austin ISD campuses use a schoolwide behavior support system, including a principal-established statement of purpose, assessment of campus behavior support needs, set of schoolwide behavioral rules/expectations, and procedures for teaching and encouraging expected behavior and discouraging problem behavior. This system is supplemented by prevention activities developed by campus leadership (Campus Advisory Council, student council, PTA/PTO), and community resources, including a partnership with local non-profit SafePlace, that students are encouraged to access and utilize.

A. Student Code of Conduct.

All students are expected to have knowledge of and abide by the Austin ISD Student Code of Conduct.[9] The Code clearly explains the expectations for student behavior, and the consequences a student can expect to incur for specific misbehaviors, ranging from removal from classroom to placement in a Disciplinary Alternative Education Program (DAEP). The Code also addresses behavior and disciplinary issues related to students with disabilities. Each school year, all students are provided with a copy of the Student Code of Conduct. Students and their parents are asked to sign an acknowledgment that they have received the information in the Code, though failure to do so does not absolve them of responsibility for the information provided by the Code.[10]

B. SafePlace.

Austin ISD has also partnered with local non-profit SafePlace since 1988 to provide school-based programs to students and staff.[11] SafePlace's *Expect Respect* program engages students, school personnel, and parents in promoting safe and healthy relationships and in preventing bullying, sexual harassment, and dating violence. *Expect Respect* has three major program components, each targeting a unique population on campus: (1) school-based support groups for students at increased risk for perpetration and victimization due to previous dating, sexual, or domestic violence; (2) leadership training for students who want to take a leadership role in improving the social climate at their school; and (3) professional training for school personnel and parents.

Support Groups. Support groups are provided at school during the school day for youth who have been involved in abusive dating relationships or who have experienced previous sexual or domestic violence. The goal of this program component is to prevent at-risk youth from becoming victims or perpetrators in their own relationships. Participants can refer themselves, or may be referred by school personnel, parents, or friends. Posters in schools, classroom presentations, and staff trainings are used to make students and staff aware of the programs offered. Girls and boys meet once a week, in single-gender groups with a same-sex facilitator, for 24 weeks. They build trusting relationships, share common experiences and feelings, and learn skills for healthy relationships. The *Expect Respect* group facilitator uses the program's original curriculum *Expect Respect: A Support Group Curriculum for Safe and Healthy Relationships* to guide group sessions. Crisis counseling sessions are also provided, at the request of school personnel, as needed for group members and for students who do not have access to a group at their school.

Youth Leadership Training. Youth leadership training is provided at elementary and secondary schools. Participants in youth leadership training may receive these sessions as part of a class or youth group, usually at the request of a teacher or adult sponsor. Students participate in a series of educational sessions that teach them to be role models and peer educators on issues including bullying, sexual harassment, and dating violence prevention. Following the educational sessions, each group creates its own prevention campaign, often utilizing art, music, theatre techniques, or video to make its message relevant to other youth. In addition to the multi-session youth leadership training, individual educational presentations are provided by request to students in classrooms and other settings.

Professional Training. Professional training is provided for teachers, parents, and community members to enable them to respond effectively to incidents and disclosures of dating violence, sexual harassment, and bullying among students, and to offer strategies for implementing a school-wide prevention program. Teachers at the secondary level learn how to implement *Choose Respect*, a program developed by the U.S. Centers for Disease Control and Prevention in collaboration with SafePlace. *Choose Respect* includes an educational videotape, a teacher's guide, public service announcements, an interactive website, and other materials to help youth make healthy relationship choices.[12] Elementary teachers are introduced to *Quit It!, Bullyproof*, and *Flirting or Hurting*, teachers' guides that address sexual harassment and bullying. Professional training sessions are provided at the request of schools, parent groups, and community organizations; they learn about the training from word of mouth, through the SafePlace website, at professional conferences, and through publications.

The *Expect Respect* program components work together on a campus to create a comprehensive and culturally relevant prevention program. The support groups provide an intensive therapeutic experience to meet the unique needs of youth who have already experienced violence and abuse and are at increased risk for perpetration or victimization in their own relationships. The youth leadership and professional training sessions impact students, school personnel, and parents, building their capacity to respond to and prevent incidents of dating violence, sexual harassment, and bullying, and ultimately increasing positive and pro-social behavior among students.

Expect Respect support groups are currently provided at 17 schools in the Austin area. Approximately 500 students participate in groups or individual counseling sessions each year. Approximately 200 students participate in leadership training and over 2,000 in educational presentations each

year. Approximately 3,000 adults receive training through the *Expect Respect* program each year.

One of the difficulties of providing services like these is finding a way to fund them. The services provided by SafePlace are funded through private and corporate donations and local, state, and federal grants. Austin ISD's partnership with SafePlace also includes direct funding of two counselors, who facilitate 14 *Expect Respect* support groups in Austin ISD schools.

IV. Hits Happen: When Prevention Doesn't Work.

Unfortunately, prevention programs do not always work. When harassment does occur, school districts need to be prepared to properly handle it. Thus, Austin ISD has policies that clearly label unacceptable behavior that is considered harassment, explain how complaints may be made, how they will be investigated and responded to, and, if necessary, how to appeal any decisions that are made. The harassment complaint form is a simple, one-page form to ascertain the basic facts of the allegation that is available through Austin ISD's online policy manual, or from the administrative or counseling offices at all campuses. The complaint form may be submitted to the school's principal or the principal's designee, and may be submitted by a staff member on behalf of a student, in the case of a student who discusses harassment with a staff member but does not wish to report the harassment him or herself.

A. Investigation & Determination.

Once the complaint has been filed, the investigation and responsive actions begin. Austin ISD policy provides information about how an investigation should be conducted, including: (1) officials to whom notice should be provided;[13] (2) when and what kind of notice to provide to parents;[14] (3) confidentiality requirements;[15] (4) responsibilities in conducting an investigation;[16] (5) timeline for completion of investigation;[17] and (6) action necessary to conclude an investigation.[18] Policy also provides that retaliation is strictly prohibited, and that the obligation to conduct an investigation is not satisfied by the fact that a criminal or regulatory investigation is underway.

Austin ISD has also developed a set of altercation response guidelines for administrators for responding to harassment complaints. These guidelines provide clear expectations of the actions to be taken. The checklist includes: (1) separating the alleged offender and target; (2) contacting the School Resource Officer (SRO); (3) conferencing separately with the alleged victim and offender to obtain statements, provide "Notice of Parent and Student Rights", ascertain immediate actions that may be taken to increase safety, and provide references to school counselors as appropriate; (4) investigating further by interviewing witnesses, if any; (5) communicating observations and information with the SRO and principal or designee in an appropriately confidential manner; (6) making a determination, ordinarily within five days; (7) notifying parties; (8) performing any necessary follow-up, including reporting incidents of sexual harassment to Austin ISD's Title IX coordinator; and (9) storing files related to the complaint in a separate, confidential file.

Determinations that may be made include: (1) no finding of inappropriate behavior; (2) a finding that no determination as to behavior may be made, but intervention is justified in the situation; or (3) a finding that an altercation occurred. If the principal or designee determines that harassment did occur, he or she should again conference separately with the victim and offender and their parents or guardians. The purpose of the conference is to determine interventions that offer the best possible outcome for all involved.

FERPA Requirements. Under the federal Family Educational Rights and Privacy Act ("FERPA"), schools may not release or permit the release of educational records, without first obtaining written consent, except in certain specific circumstances.[19] Educational records are records that are maintained by an educational agency or institution or an agent thereof, which contain information directly related to a student.

This means that, generally, schools must be very careful to avoid divulging information about students, including information relating to incidents of sexual harassment. However, schools *may* disclose student information to a law enforcement unit for a law enforcement investigation, and information relating to a student in a health or safety emergency. Thus, appropriate parties may be notified if knowledge of the information is necessary to protect the health or safety of the student or others, or to comply with State criminal law.

In all other circumstances, school personnel must be careful to safeguard the privacy and confidentiality of student records when investigating and responding to allegations of sexual harassment. Also, a student involved in an allegation of sexual harassment has no right to access to the educational records of any student other than him or herself, so it is important that any personnel or volunteers who interact with the students in relation to a sexual harassment incident should be careful to avoid divulging confidential information about any involved student (including witnesses) to any other student.

B. Interventions for Victims.

Interventions offered to victims can include: (1) identifying ways to increase the student's safety while still participating in school and school activities; (2) encouraging the victim to report any further problems; and (3) explaining transfer options.

School Transfers. Under state law, a student may request a transfer as a victim of bullying, or under federal law (No Child Left Behind), if the offense is assaultive in nature, the campus administration must offer a transfer to the student. Transfer options allow the victim to be transferred to another school within the district. Victims may feel safer at a new campus that the offender does not attend, but victims may also be reluctant to leave the familiarity and established circle of friends at their old schools.

Stay Away Agreements. If the victim wishes, a "Stay Away" agreement may be implemented, which requires the named student to "stay away" from the targeted (complaining) student at all times during the school day (including during classes or lunch periods, on school buses, or at bus stops). A "Stay Away" agreement may also require changing either or both of the students' schedules to avoid having them together during the school day.

C. Interventions for Offenders.

Interventions for offenders may include: (1) emphasizing expectations of positive behavior; (2) identifying and implementing disciplinary consequences or other actions that will be taken to prevent further problems; (3) addressing the serious consequences that may result if the offender retaliates against the victim for making the complaint; (4) informing student and parents of any disciplinary action that is taken; (5) increasing supervision of the offender, as necessary; and/or (6) having the student sign a behavior contract.

D. Support Services for Victims & Offenders.

Students—both the victim and the offender—should be made aware of available support services, which may include both on-campus resources (such as access to counseling services through the guidance office or community organizations providing school-based services) and off-campus services (such as community-based social service organizations). The students' access to support during the school day should also be ensured by, for instance, providing business cards of an administrator or counselor to the students, with notes on the back allowing the students to see the administrator or counselor when requested.

IMPACT Teams. Either or both of the students may also be referred to the campus IMPACT Team, if they appear to be at risk of dropping out of school. IMPACT Teams are interdisciplinary, problem-solving groups on every Austin ISD campus that develop and coordinate prevention and intervention services for at-risk students for whom classroom interventions have not been effective. IMPACT Teams also coordinate the delivery of social services to students and their families, and coordinate and/or plan dropout prevention, recovery, and support services and activities for their campus. An IMPACT team includes a campus administrator, the student's parents (if they choose to participate), and other appropriate campus support personnel (nurse, counselor, SRO, teacher representative, etc.). The IMPACT Team creates an Action Plan to address specific concerns, assigns an advocate to the student, meets at least biweekly, and regularly considers the student's progress in relation to the Action Plan timeline.

V. Tagging Them Out: Containment.

After a complaint is investigated, a determination is made, and conferences have been held with the students in question and their parents, the matter is still not finished. Notice of the outcome must be properly provided to the parties, following FERPA guidelines, along with notice that the parties may appeal the decision if they are unhappy with the outcome. Austin ISD policy provides that the student or parent must submit a written complaint, requesting a conference with the Associate Superintendent within 10 days.

The students involved in the complaint also must be monitored to ensure the target's continued safety and the offender's continued compliance with behavioral expectations and with any agreements that were implemented. Any further incidents should be reported and documented, in space provided on the original complaint form.

Finally, all incidents of sexual harassment in Austin ISD are to be reported to the Title IX coordinator via email or memo. A one-page form is provided, which requests basic information on the incident: date, campus, brief description of allegations, date action taken and brief summary of that action, and whether anything remains to be done. This information is gathered and tabulated by the Office of the General Counsel. If trends are noticed, or if it appears that something is odd in the data presented from a campus, the Title IX coordinator can work with the campus' principal to address any problems that might be causing the numbers to rise.

VI. Going to the Big Leagues: Recent Legislative Action.

A number of bills filed at the state and federal levels could potentially affect the way that school districts deal with sexual harassment. Bills relating to bullying and youth violence may also have a positive impact on sexual harassment events in public schools.

Federal Measures. The legislators of the 110th U.S. Congress filed several bills related to sexual harassment, bullying, or youth violence. HR 171 proposed more funding for mental health and student service providers in public schools. The SAVE Act (HR 354) proposed to expand the eligibility requirements for transfers for victims of violence to allow transfers for students who have been victims of violent crimes on school premises, on a school bus, or at a school event; it would also require the counseling or removal of offenders.

The City Youth Violence Recovery Act (HR 854) proposed to create grants for partnerships between state mental health authorities and local public or private entities to prevent or alleviate the effects of youth violence in urban communities with a high or increasing incidence of such violence by providing violence-prevention education, mentoring, counseling, and mental health services to children and adolescents.

Other proposed measures provided for gang prevention and relief (HR 1069), and require alternative learning centers to require students to perform 100 hours of community service to reduce the risk of dropping out and gang violence (HR 1184).

These bills were introduced and referred to committee, but no further action was taken on any of them. Though the majority of bills filed die in committee without ever being passed to the Floor, it remains to be seen if Congress will take action on any of these bills before it adjourns the second session of the 110th Congress (targeted to be in late September 2008).

State Measures. Texas' 80th Legislative Session began January 9, 2007, and adjourned May 28, 2007. Texas legislators filed numerous bills targeting violence in schools during the 80th Texas Legislative Session, but only a few became law. The governor signed HB 2532, addressing the placement of students who are sexual offenders, into law on June 15, 2007.[20] HB 2532 provides that: (1) school districts may expel students who have committed certain offenses, whether on or off campus; (2) school districts must assess the academic growth of students placed in a Disciplinary Alternative Education Placement (DAEP) for 90 days or longer; (3) school districts must remove students reported as registered sex offenders from regular classroom placements (reassignment of students is based, under the law, on the student's status and whether or not the student is under court supervision); (4) superintendents

may provide notice of a student's arrest to employees with direct supervisory responsibility over the student; and (5) superintendents must provide notice to staff who have regular contact that a student is a registered sex offender within 24 hours of receiving notice.[21]

The governor signed HB 121 into law on May 18, 2007.[22] It requires a public school in Texas to create a policy addressing, and attempting to prevent, dating and domestic violence, to be included in the district improvement plan. The policy must include a definition of dating violence that includes "the intentional use of physical, sexual, verbal, or emotional abuse by a person to harm, threaten, intimidate, or control another person in a dating relationship." The policy must also address safety planning, enforcement of protective orders, school-based alternatives to protective orders, staff training, student counseling, and awareness education for students and parents.[23]

VII. Back to the Locker-Room: Pulling It All Together.

In spite of recent legislative activity, the task of ensuring the safety and security of students in schools—in addition to that of ensuring Title IX compliance—continues to belong to local school districts. Straightforward anti-harassment policies, strong procedures, and education and training of staff, students, and community members regarding the causes and mechanisms of abusive and harassing relationships can help school districts to create a learning atmosphere for students that accomplishes both these tasks.

ENDNOTES

1 Mel Waxler is the General Counsel for Austin Independent School District.
2 Austin ISD Board Policy FFH(LOCAL)—STUDENT WELFARE: FREEDOM FROM HARASSMENT [hereinafter FFH(LOCAL)] ("The District prohibits sexual harassment and harassment based on a person's race, color, gender, sexual orientation, national origin, disability, or religion.").
3 Austin ISD Board Policy FFH(LEGAL)—STUDENT WELFARE: FREEDOM FROM HARASSMENT [hereinafter FFH(LEGAL)].
4 *Id*.
5 *Id*. (citing *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 633 (1999)).
6 *Davis*, 526 U.S. at 652.
7 FFH(LOCAL).
8 Wooten Elementary School Parent/Student Handbook, at 8, available at http://www.austinschools.org/campus/wooten/documents/English%20HANDBOOK.pdf.
9 *Austin ISD Student Code of Conduct*, adopted by the Austin ISD Board of Trustees Aug. 5, 1996, last revised Aug. 13, 2007, *available at* http://www.austinisd.org/academics/parentsinfo/conduct_code.
10 *See* TEX. EDUC. CODE § 37.001(d). School districts are required to provide parents with "notice of and information regarding" student codes of conduct, but are not required to obtain acknowledgment of receipt or understanding.
11 More information on SafePlace's School-Based Programs and the *Expect Respect* curriculum is available from SafePlace's Director of School-Based Programs Barri Rosenbluth, at 512-267-SAFE, or http://www.safeplace.org.
12 See the Choose Respect program website at http://www.chooserespect.org.
13 FFH(LOCAL).
14 *Id*.
15 *Id*.
16 *Id*.
17 *Id*.
18 *Id*.
19 20 U.S.C. § 1232g(b). Schools may disclose educational records without consent to: (1) school officials with legitimate educational interest; (2) other schools to which a student is transferring; (3) specified officials for audit or evaluation purposes; (4) appropriate parties in connection with financial aid to a student; (5) organizations conducting certain studies for or on behalf of the school; (6) accrediting organizations; (7) comply with a judicial order or lawfully issued subpoena; (8) appropriate officials in cases of health and safety emergencies; and (9) State and local authorities within a juvenile justice system, pursuant to specific State law. *Id*.
20 H.B. 2532, 80th Leg., R.S. (Tex. 2007). The bill is codified in Chapter 37 of the Texas Education Code.
21 *See id*.
22 H.B. 121, 8th Leg., R.S. (Tex. 2007). The bill is codified at Texas Education Code, § 37.0831.
23 *See id*.

IMMUNITY ISSUES IN SPECIAL EDUCATION

By: Donald G. Henslee, Amanda M. Bigbee, and Heather Rutland[1]

It is important to know under what circumstances, if any, to employ restraints, seclusion, and time-out. Restraints and seclusion, in particular, are sometimes called aversives. These techniques attempt to reduce inappropriate student conduct through planned exposure to aversive stimuli immediately following an instance of inappropriate conduct. The goal of aversives is to rapidly stop a particular instance of behavior and reduce the likelihood of future occurrences. In theory, these techniques are not punishment, but rather a therapeutic technique used to enable special needs students to benefit more fully from their educational program.

Please make no mistake about it—aversives can cause pain, physical discomfort, emotional trauma, and can trigger liability for the teacher and the school district. For these reasons, we caution against the use of aversives in all but the most serious of circumstances. The instances where the some of these techniques may be appropriate include self-injurious behaviors and behaviors that put others at risk of serious bodily injury. Aversives should only be used when all less-restrictive behavioral management techniques have not curbed the behavior. In other words, aversives should be a last resort.

Local policies and state laws and regulations establish the legality of using aversives. Neither the Individuals with Disabilities in Education Act (IDEA) or Section 504 of the Rehabilitation Act expressly address the use of aversives in connection with students with disabilities. The Office of Special Education Programs (OSEP) has specifically stated that the IDEA does not expressly prohibit districts from using aversive behavioral interventions on students with disabilities. *Letter to Trader*, 48 IDELR 47 (OSEP 2006). In fact, under IDEA 2004, disciplinary measures are to be applied to children with disabilities to the same extent they are applied to children

1 Donald G. Henslee is the Founding Partner at Henslee Schwartz LLP. Amanda M. Bigbee and Heather Rutland are Associates at Henslee Schwartz LLP.

without disabilities. 34 C.F.R. §300.530(b)(1). OSEP was careful to emphasize, however, that any use of these types of interventions will need to be written into the student's IEP. Aversives should not be used unless they have been agreed to by the ARD Committee, including the parent or guardian.

School policy on discipline of special education students and the use of aversives will usually be found in the school's policy FOF. Most school policies indicate that any behavior management technique and/or discipline management practice must be implemented in such a way as to protect the health and safety of the student and others. Policy FOF(Legal) goes so far as to state "no discipline management practice may be calculated to inflict injury, cause harm, demean, or deprive the student of basic human necessities."

It is the policy of the state of Texas to treat all students, including students with disabilities who receive special education services, with dignity and respect. *Texas Education Code §37.0021(a)*. When employing aversives, it is important to recognize that students have substantive due process rights under the 14th Amendment to be free from corporal punishment that is brutal or demeaning, and is so disproportionate to the misconduct that it strikes a reasonable person as outrageous, a standard often termed the "shock the conscience" test. *Hall v. Tawney*, 106 LRP 45072, 621 F2d 607 (4th Cir 1980).

The Texas Education Code §37.0021(b) defines restraint, seclusion, and time-out as follows:

(1) "Restraint" means the use of physical force or a mechanical device to significantly restrict the free movement of all or a portion of a student's body.
(2) "Seclusion" means a behavior management technique in which a student is confined in a locked box, locked closet, or locked room that:
    (A) is designed solely to seclude a person; and
    (B) contains less than 50 square feet of space.
(3) "Time-out" means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting:
    (A) that is not locked; and
    (B) from which the exit is not physically blocked by furniture, a closed door held shut from the outside, or another inanimate object.

Seclusion

No school district employee, volunteer, or independent contractor is legally allowed to place a student in seclusion. *Texas Education Code §37.0021(c)*. A student with a disability who receives special education services may not be confined in a locked box, locked closet, or other specially designed locked space as either a discipline management practice or a behavior management technique. *Texas Education Code §37.0021(a)*. The rules regarding seclusion to do not apply to a peace officer, while performing law enforcement duties; juvenile probation, detention, or corrections personnel; or an educational services provider with whom a student is placed by a judicial authority, unless the services are provided in an educational program of a school district. *Texas Education Code §37.0021(c)*.

Confinement

Education Code 37.0021 does not prevent a student's locked, unattended confinement in an emergency situation while awaiting the arrival of law enforcement personnel if:

1. The student possesses a weapon; and
2. The confinement is necessary to prevent the student from causing bodily harm to the student or another person.

Education Code 37.0021(f). For these purposes, "weapon" includes a firearm as defined by Section 46.01(3), Penal Code; an illegal knife as defined by Section 46.01(6), Penal Code, or by local policy; a club as defined by Section 46.01(1), Penal Code; or a weapon listed as a prohibited weapon under Section 46.05, Penal Code.

Restraint

A school employee, volunteer, or independent contractor may use restraint only in an emergency and with the following limitations:

1. Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.
2. Restraint shall be discontinued at the point at which the emergency no longer exists.
3. Restraint shall be implemented in such a way as to protect the health and safety of the student and others.
4. Restraint shall not deprive the student of basic human necessities.

19 TAC 89.1053(c).

"Emergency" means a situation in which a student's behavior poses a threat of:

1. Imminent, serious physical harm to the student or others; or
2. Imminent, serious property destruction.

19 TAC 89.1053(b)(1).

"Restraint" does not include the use of:

1. Physical contact or appropriately prescribed adaptive equipment to promote normative body positioning and/or physical functioning;
2. Limited physical contact with a student to promote safety (e.g., holding a student's hand), prevent a potentially harmful action (e.g., running into a street), teach a skill, or provide comfort;
3. Limited physical contact or appropriately prescribed adaptive equipment to prevent a student from engaging in ongoing, repetitive self-injurious behaviors; or
4. Seat belts and other safety equipment used to secure students during transportation.

19 TAC 89.1053(f).

There are very specific requirements relating to training and documentation relating to the use of restraints that can be found at 19 TAC 89.1053(d)-(e).

Time-Out

Time-out is typically used when necessary to remove students from overly stimulating or provocative situations. Time-out is designed to help students correct the attitude/behavior that has interfered with their ability to remain in class engaged in a positive and productive manner. *Wellesley Pub. Sch.*, 21 IDELR 585 (SEA MA 1994).

A school employee, volunteer, or independent contractor may use time-out with the following limitations.

1. Physical force or threat of physical force shall not be used to place a student in time-out.
2. Time-out may only be used in conjunction with an array of positive behavior intervention strategies and techniques and must be included in the student's IEP and/or BIP if it is utilized on a recurrent basis to increase or decrease targeted behavior.
3. Use of time-out shall not be implemented in a fashion that precludes the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.

19 TAC 89.1053(g).

Please note that the time-out room should have adequate heat, lighting, and ventilation. *See, e.g. Hayes v. Unified Sch. Dist. No. 377*, 559 IDELR 249 (D. Kan. 1987). A student placed in time-out should be permitted to use the bathroom. *See, e.g., Dickens v. Johnson County Bd. Of Educ.*, 651 F. Supp. 155 (E.D. Tenn. 1987). The student should be supervised or monitored while in the time-out location. *See, e.g. Boerne Indep. Sch. Dist.*, 25 IDELR 102 (SEA TX 1996).

There is no hard and fast rule as to the amount of time a time-out can last, unless the ARD committee has written a time limit into a student's IEP. The duration of a time-out should be reasonable in light of factors like the student's age, emotional status, and the reason for placing the student in time-out. The length of time in time-out should be related to the student's need for a "cool down" period. *See, e.g. Orange v. County of Grundy*, 950 F. Supp. 1365 (E.D. Tenn. 1996). As a matter of best practice, the student should remain in the time-out room only until he becomes sufficiently self-controlled to rejoin his classmates.

Time-out can be considered an unreasonable seizure in violation of the Fourth Amendment if the time-out was not justified at its inception or reasonable in scope. The first issue in a Fourth Amendment claim is whether the student was actually "seized" when he was directed to proceed to the time-out area. Second, whether the time-out (or seizure) was reasonable must be determined.

The amount and quality of supervision while a student is in time-out can be the difference when liability is an issue for a district's use of the time-out room. For instance, in *Boerne Independent School District*, 25 IDELR 102 (SEA TX 1996), the hearing officer found that use of time-out was permissible, even over the parent's objections, in large part due to the following finding of fact:

> The time-out room used for [student] is immediately adjacent to her classroom. A teacher or teacher's aide is stationed at the door from the classroom into the time-out room and a door from the time-out room into the hall whenever a student is placed in the time-out room. Often, the door from the classroom into the time-out room remains open. The student is visible whenever she is in the classroom from a window in each of the doors. *Id.*

In Rasmus v. State of Arizona, 24 IDELR 824 (D. Ariz. 1996), the court factored the ability to supervise and observe the student in the time-out room in finding that qualified immunity existed for the school district employee who placed a student in an alternative classroom ("Mr. Rojas never left the alternative classroom during the period of [the student's] confinement. In addition, Mr. Rojas was able to observe [the student] and communicate with him.").

Training regarding the use of time-out for school employees, volunteers, or independent contractors shall be provided according to the requirements set forth at 19 TAC 89.1053(h). Necessary documentation or data collection regarding the use of time-out, if any, must be addressed in the IEP or BIP. The ARD committee must use any collected data to judge the effectiveness of the intervention and provide a basis for making determinations regarding its continued use. *19 TAC 89.1053*

Fourth Amendment Considerations – Unreasonable Seizure

The standard of reasonableness is one that can differ significantly from state to state and county to county. However, there is some commonality among courts as to what constitutes a violation of the constitution, with the test promulgated in *New Jersey v. T.L.O.*, 469 U.S. 325, 106 LRP 2727 (1985) remaining the adopted standard. *New Jersey*, and its progeny have held that a seizure (or time-out) is reasonable in scope "when the measures adopted are reasonably related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.; see also Rasmus v. State of Arizona*, 24 IDELR 824 (D. Ariz. 1996); *Hayes v. Unified Sch. Dist*. No. 377, 599 IDELR 249 (D. Kan. 1987).

The factors considered relevant by the majority of courts are as follows:

1) Nature of the misconduct
2) Location of the time-out room
3) Size of the time-out room
4) Interior of the time-out room
5) Safety considerations
6) Amount of isolation
7) Amount of time spent in time-out room
8) How time was spent during time-out
9) District policy

The Fifth Circuit has found that the right to be free of state-occasioned damage to a person's bodily integrity is protected under the Constitution's Fourteenth Amendment guarantee of due process. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981). The *Shillingford* court stated:

> [W]e must inquire into the amount of force used in relationship to the need presented, the extent of the

> injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, *was grossly disproportionate to the need for action* under the circumstances and was inspired by malice ... so that it ... *shocks the conscience*, it should be redressed under Section 1983. *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (emphasis added) (citations omitted).

Moreover, the court in *Shillingford* required an examination of motive, proportionality of action, and malice, indicating that not every act of "state-occasioned" damage makes for a constitutional tort. For instance, in *Brown v. Ramsey*, 33 IDELR 216 (E.D. Va. 2000), teachers used a restraint method known as a "basket hold" that was performed by "clasping the student at his wrists, crossing his arms in front of his body, and pushing his head into his chest." The Court found that this form of physical restraint did not cause the student any physical injury, nor did the method employed "shock the conscience."

Immunities Provided Under the Education Code

Texas Education Code §22.0511 states that "a professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students." This immunity does not apply to the operation, use, or maintenance of any motor vehicle. To gain the protection afforded by §22.0511, an individual must be able to prove the following facts:

1. He or she is a professional employee of a school district;
2. He or she was acting incident to or within the scope of the duties of the person's position of employment (in other words, you were doing your job);
3. The action complained of involved the exercise of judgment or discretion on the part of the individual (in other words, you had to make a decision—even a small one); and
4. There was no use of excessive force in the discipline of the student or negligence that resulted in bodily injury to the student.

In the event immunity does not apply and you are held liable, Education Code §22.0514 limits the damages that may be awarded against an educator for state claims. If the educator was acting incident to or within the scope of the duties of the employee's position of employment, damages may not exceed $100,000.

Official Immunity

If you are sued in your individual capacity under a state cause of action, such as assault or common law invasion of privacy, you may be entitled to "official immunity." A governmental employee is entitled to official immunity for (1) the performance of discretionary duties, (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith.

An act is discretionary if it involves personal deliberation, decision, and judgment. (As opposed to ministerial actions, which are those "which require obedience to orders or the performance of a duty to which the actor has no choice"). An official acts within the scope of his authority whenever he is discharging the duties generally assigned to him.

When determining if an educator acted in good faith, a court will measure "good faith" against a standard of objective legal reasonableness, without regarding to educator's subjective state of mind. Put more clearly, you act in good faith if a "reasonably prudent" educator in your position could have believed her conduct was lawful in light of clearly established law and the information known at the time. Court's have gone so far as to require individuals suing government officials to prove that "no reasonable person in the Defendant's position could have thought the facts were such that they justified the Defendant's acts."

Qualified Immunity

Qualified immunity is only effective against federal statutory and constitutional claims. *Cantu v. Rocha*, 77 F.3d 795, 805 (5th Cir. 1996). As to such claims, persons are shielded from liability for civil damages if, "as a government official performing discretionary functions ... their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Qualified immunity is designed to protect all but the "plainly incompetent" and those who knowingly violate the law.

The United States Supreme Court in *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) and later Fifth Circuit cases lay out the required multi-part analysis. As the *Siegert* court noted, when a defendant pleads qualified immunity, '"[a court] may appropriately determine, not only the currently applicable law, but whether the law was clearly established at the time an action occurred. ..."' *Id*. at 231, 111 S.Ct. at 1793 (citation omitted). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff [was] 'clearly established' at the time [a] defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Id*. at 232, 111 S.Ct. at 1793. Accordingly, courts must first determine whether "the plaintiff has alleged the violation of a 'clearly established constitutional right' under currently applicable constitutional standards." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). "For a right to be clearly established, there does not have to be a prior case directly on point, but the unlawfulness of the precipitating acts must be apparent" *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).

The Court's second step is to "determine whether [asserted] constitutional right[s] [were] ... clearly established at the time of the alleged violation[s]." *Gunaca v. State of Texas*, 65 F.3d 467, 474 (5th Cir. 1995); *See also Petta v. Rivera*, 143 F.3d 895, 899-900 (5th Cir. 1998). Additionally, courts must consider whether conduct was "objectively reasonable" 'in light of ... legal rules clearly established at [such] time.'" *Hassan*, 55 F.3d at 1079 (citation omitted). Put another way, when an official asserts qualified immunity, "the district court

must determine whether, in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

In assessing whether rights were clear at a prior time, courts must exercise the caution called for in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2a 523 (1987). Specifically, "the right[s] [an] official is alleged to have violated must have been 'clearly established' in a more particularized ... sense: The contours of the right must have been sufficiently clear that a reasonable official would understand that what he was doing violates such rights." *Id*. at 640, 107 S.Ct. at 3039. Hence, an educator may be shielded even if a plaintiff alleges violations of presently and previously recognized rights, so long as "reasonable public officials could differ on the lawfulness of [the educator's] actions." *Hassan*, 55 F.3d at 1079.

This standard requires a two-step analysis: (1) the law governing the educator's conduct clearly established, and (2) under that law, a reasonable educator could have believed the conduct was lawful. *Id*. The determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. *Id*. at 873. Whether the facts alleged could support a reasonable belief that the defendant's conduct was lawful is also a question for the court. *Id*.

If you are sued in your individual capacity under a federal cause of action, such as the IDEA or Section 504, you may be entitled to "qualified immunity." Educators who act within the scope of their discretionary authority and in the course of their official responsibilities are entitled to the defense of qualified immunity, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

In order to establish that an educator is not entitled to qualified immunity, a plaintiff will have to satisfy a three-part test. First, the court will have to determine if the plaintiff has alleged the deprivation of a constitutional or statutory right at all. Second, the court must determine whether that right was clearly established at the time of the alleged violation. Finally, the court must determine whether there is evidence that the educator actually engaged in the conduct that violated the clearly established right. Once the parent establishes all these elements, the court must decide if the conduct was, nonetheless, objectively reasonable.

Paul D. Coverdell Teacher Protection Act

The Paul D. Coverdell Teacher Protection Act, generally, provides liability protection to teachers for injuries to a student which occurred while the teacher was engaged in efforts to control, discipline, expel or suspend a student or maintain order or control in the classroom or school. In other words, this immunity protects educators who are sued after taking some action intended to maintain control of the classroom. This immunity does not apply when:

1. The teacher's conduct violated a Federal or State civil rights law;
2. The teacher's conduct constitutes a crime of violence or act of terrorism for which the defendant has been convicted in any Court;
3. The teacher's conduct constitutes a sexual offense for which the Defendant as been convicted in any Court;
4. The teacher was under the influence of alcohol at the time of the misconduct. *See 20 U.S.C.A. §§6731-6738.*

Working with special education students means there will likely be numerous times when educators will be required to take aversive action in order to maintain control of their classroom. Under the Act, such educators are afforded protection from liability as long as the technique does not rise to a violation of the student's civil rights. Courts have recognized the Fourth Amendment prohibition against unreasonable seizure in a somewhat more "relaxed" manner with regard to student discipline. Consequently, on the whole, the Act provides much less protection than the judicially created constructs of official and qualified immunity.

NOTES

NOTES

STATE BAR OF TEXAS
P.O. Box 12487
Austin, Texas 78711-2487

State Bar
Section Report
School Law