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School Law

Newsletter Co-Editors
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To The Members of the School Law Section:

Greetings School Law Section Members! The beginning of a new decade will surely bring new challenges to the school law bar that will require us to provide creative solutions for our clients. During the coming decade, we can anticipate that there will be federal and state initiatives to reform education, especially at the K-12 level. In addition to the traditional school law issues that we must address, it will be incumbent on us to be prepared to address the legal implications of these reform initiatives.

The strengths of this organization are that it serves as (1) a vehicle to provide quality programming through the summer retreat and our participation in planning the University of Texas School Law Conference ("UT Conference"); (2) a mechanism to share information through the newsletter and other communications; and (3) a conduit for networking opportunities for our membership. In that vein, it was great to be with all of you who attended the 2009 School Law Retreat at the Hill Country Hyatt in Austin last summer. Congratulations to Miles Bradshaw, Immediate Past Chair, and the 2008-2009 officers for planning a fantastic retreat. I have personally grown as a member of CSA as a result of Miles' leadership.

Planning is well underway for the 2010 School Law Retreat, which will return to the Hill Country Hyatt location. Based on feedback received, the new location was a big hit with members, family and friends! If you have any new suggestions for our social events, i.e. the Friday night dinner and the golf tournament, please send me an e-mail and let me know.

I would also like to extend a big "Texas thank you" to Leticia McGowan for her efforts to ensure that the newsletter provides relevant and timely information. The newsletter serves as valuable resource for our members. We all appreciate the dedication Leticia provides in bringing us this information. I know that Allan Graves our new co-editor will be a valuable partner to Leticia. If you have ideas for articles that you would like to submit, please do not hesitate to contact either Leticia at lmcgowan@dallasisd.org or Allan at ag@all-lawfirm.com.

I am excited to serve as your Section Chair this year and I look forward to collaborating with you in making this a successful term. If you have any ideas and/or suggestions, please feel free to send an e-mail to me at ehutchi1@houston.org.

Sincerely,

Elneita Hutchins-Taylor
Section Chair 2009-2010

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Discrimination Claims Post-Ledbetter Act

By Juan J. Cruz,
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On Thursday, January 29, 2009, President Barack Obama signed his first piece of legislation into law, the "Lilly Ledbetter Fair Pay Act of 2009," which effectively changes the landscape of certain discrimination claims.[1] The "Ledbetter Act" applies retroactively as of May 28, 2007, (the day the *Ledbetter* decision, cited below, was issued by the Supreme Court) and applies to all claims of discriminatory compensation pending on or after that date. The purpose of the Ledbetter Act is to "amend Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the American with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes."[2] Under the Ledbetter Act, a person may file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days (or 300 days in states such as Texas that have their own anti-discrimination statutes) of any of the following:

- "when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- when the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice."[3]

The United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which was overturned by the Ledbetter Act, is instructive regarding the important implications of the Ledbetter Act with regard to discrimination claims.

The Ledbetter Case

Lilly Ledbetter ("Ms. Ledbetter") worked for Goodyear Tire and Rubber Company ("Goodyear") in an Alabama plant from 1979 through 1998. Goodyear had a practice of giving or denying pay raises to its salaried employees based on the employee's performance evaluations. Ms. Ledbetter's EEOC complaint against Goodyear was principally related to her allegations of misconduct by one single Goodyear supervisor, who, according to Ms. Ledbetter, retaliated against her when she rejected his sexual advances during the early 1980's. According to Ms. Ledbetter, the Goodyear supervisor falsified deficiency reports about her work in the mid-1990's, all of which formed the principal basis of Ms. Ledbetter's performance evaluation in 1997. These acts laid the groundwork for Ms. Ledbetter's lawsuit against Goodyear in which she asserted, among other causes of action, a sex discrimination complaint under Title VII of the Civil Rights Act of 1964 alleging that, "several supervisors had in the past given her poor evaluations because of her sex; that as a result, her pay had not increased as much as it would have if she had been evaluated fairly; that those past pay decisions affected the amount of her pay throughout her employment; and that by the end of her employment, she was earning significantly less than her male colleagues." In March of 1998, Ms. Ledbetter submitted a questionnaire to the Equal Employment Opportunity Commission followed by a formal charge of discrimination in July of 1998. Ms. Ledbetter's claims were based on the fact that, had discrimination not occurred in the past, the paychecks issued during the statute of limitations period would have been larger and/or a raise requested in 1998 (within the statute of limitations period) would have been granted. Ms. Ledbetter's arguments were rejected by the lower courts.

By the time Ms. Ledbetter's case reached the United States Supreme Court ("the Court"), the central issue in the case had become, "whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period."[4] The Court again held that for purposes of filing a charge with the EEOC in Title VII cases, the filing period begins when the discriminatory decision is made, and not when the Plaintiff is later affected by such discriminatory decision or when the Plaintiff actually discovers the discriminatory decision. Ms. Ledbetter's opposing argument was that the Court should consider each paycheck given to her during her EEOC charging period (the 180-day period preceding the filing of her EEOC questionnaire), as a separate act of discrimination thereby allowing her to bring her claims. In the alternative, Ms. Ledbetter argued that the Court should consider that a 1998 decision by Goodyear denying her a raise qualified as Title VII discrimination because of the disparities from prior years upon which the pay raise denial was based.

The Court rejected all of Ms. Ledbetter's arguments stating, "current effects alone cannot breathe life into prior, uncharged discrimination. . . Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her. She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure."[5] In its rationale, the Court relied upon prior precedent, finding that the EEOC deadline "protects employers from the burden of defending claims arising from employment decisions that are long past."[6] While the Court recognized that the EEOC deadlines are short, it found that such short deadlines "reflect[ ] Congress' strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation."[7]

In further justification for its holding, the Court analyzed a disparate-treatment claim, stating that the two elements of such a claim are: (1) an employment practice, and (2) discriminatory intent. However, Ms. Ledbetter never argued that the Goodyear decision-makers acted with actual discriminatory

intent when they issued her checks during the EEOC charging period or when they denied her the raise in 1998. The alleged discriminatory acts all happened well outside the statute of limitations. The Court responded to these facts by stating, "[i]n a case such as this in which the plaintiff's claim concerns the denial of raises, the employer's challenged acts (the decisions not to increase the employee's pay at the times in question) will almost always be documented and will typically not even be in dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment claims, much if not all of the evidence of intent is circumstantial."[8] In Ms. Ledbetter's case, the fact that the supervisor in question had passed away at the time of trial underscored the Court's insistence that deadlines imposed by the EEOC process are important to prevent "tardy lawsuits."[9]

The Ledbetter Act overturns this decision by specifically allowing a person to file a charge with the EEOC within 180 days (or 300 days in states such as Texas that have their own anti-discrimination statutes) of when "a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted; when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or *when the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice*."[10]

Effect of the Ledbetter Act

Some argue that the Ledbetter Act will have the effect of increasing the number of discrimination lawsuits that are brought against employers because, every time an employee is issued a paycheck, the door to a potential trip to the courthouse is opened. Moreover, scrupulous plaintiffs may find that delaying a charge may actually reap greater benefits, by allowing them to take advantage of the employer's stale or, worse yet, non-existent evidence given the lapse of time. According to the *New York Times*, the National Association of Manufacturers opposed the Ledbetter legislation stating that it would "open the floodgates to unwarranted litigation against employers at a time when businesses are struggling to retain and create jobs."[11] However, in spite of the Ledbetter Act, which overturned the Court's decision in *Ledbetter*, a much-anticipated decision by the Court in *AT & T Corp. v. Hulteen*[12] may narrow the application of the Ledbetter Act. In the *AT & T Corp*. case, the Court determined that the Ledbetter Act was not applicable because AT & T's decision to deny Hulteen credit for maternity leave she took in 1968, which affected her employee pension benefits, was not made in a discriminatory fashion and preceded the Pregnancy Discrimination Act of 1978. How courts around the country reconcile the Court's decision in *Hulteen* with the Ledbetter Act remains to be seen.

Of particular concern to employers is the Ledbetter Act's affect on the American with Disabilities Act ("ADA") complaints given the broader scope of protection for "disabled" individuals under the ADA. It is expected that the Amendments to the ADA, effective as of January 1, 2009, will spur "reasonable accommodation" litigation given that there will be more employees entitled to protection under the ADA who may request accommodations that employers may or may not determine to be reasonable. The Ledbetter Act deprives employers of a statute of limitations defense during and, maybe, after the employee's term of employment against these claims. Although the Ledbetter Act restricts a plaintiff to recover back pay for up to two years preceding the filing of the charge, a prudent employer should also keep in mind that a prevailing plaintiff may also recover punitive and compensatory damages (emotional distress) and attorney's fees in discrimination cases.

Recommendations

- The best course of action for employers to take to avoid discrimination claims whose statute of limitations are extended by virtue of the Ledbetter Act is to ensure that employment decisions related to compensation are always justified and documented. Documentation is even more important to a discrimination defense for employers in these situations to be able to defend themselves before the EEOC or a court of law because an employer may not have the future benefit of the testimony of a retired, or in some cases, deceased administrator.
- Employers that are awarding employees raises based upon merit should ensure that the ultimate decision makers receive proper training and be expected to adequately justify their compensation decisions in writing via objective standards.
- Employers should also conduct an internal or external audit review of the years of service credit awarded to employees upon commencement of their employment, which affects their employees' current compensation, to ensure that no disparate impact on any individual employee or a group of employees exists.
- It is also recommended that employers have their compensation plan/structure reviewed to determine if pay inequity issues exist and, if so, consider possible restructuring of such plans to prevent successful discrimination complaints in the future.
- Records should be kept until the requisite statute of limitations periods runs from the time that the final compensation is issued. In addition to complying with the Local Government Records Act and the retention schedules promulgated by the State Library and Archives Commission, school districts should consider retaining records relating to changes of compensation, and more particularly, preserve records that would help the district defend it against discrimination complaints.

ENDNOTES

1 P. L. 111-2, 123 Stat. 5, amending 42 U.S.C. Section 2000e-5 (e).
2 *Id*.
3 U.S. Equal Employment Opportunity Commission, *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009*, Feb. 11, 2009.
4 *Id*. at 623.
5 *Id*. At 628, 629.
6 *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L.Ed. 2d 431 (1980).
7 *Ledbetter, supra*, at 630-631.
8 *Id*. at 631.
9 *Id*. at 632.
10 U.S. Equal Employment Opportunity Commission, *Notice Concerning the Lilly Ledbetter Fair Pay Act of 2009, Feb. 11, 2009. Emphasis added*.
11 *New York Times*, Jan. 9, 2009, Author: Robert Pear.
12 *AT & T v. Hulteen,* 129 S. Ct. 1962, 173 L.Ed. 2d 898 (2009).

"My appraisal stinks!" and other frequently asked questions about the Professional Development Appraisal System (PDAS)

By: Julie Chen Allen,
Texas State Teachers Association

Observe. Score. Document. For the most part, the task of evaluating our Texas teachers appears deceptively simple. As expected, however, uniform evaluation standards are nearly impossible to ensure due to the dynamic nature of professional service trades; therefore, work performance will always be a fruitful source of disputes between the appraiser and the appraised. Below are some of the most common questions (dare I say complaints?) from teachers about the PDAS.

1. "Does everyone have to do this?"
Yes and no. Since the start of the 1997-98 school year, any teacher employed by a school district who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting must be appraised *either* using the PDAS *or* using a locally developed and board-approved alternative appraisal system.[1] Under either process, teachers whose most recent appraisals resulted in all Proficient ratings, without any area of deficiency, may agree in writing to less-than-annual appraisals.[2] However, teachers on such less-than-annual waivers must still be appraised at least once in each five (5)-year period.[3]

2. "How is the PDAS scored?"
In form, the PDAS contains 51 evaluation criteria (each criterion detailing a professional skill or characteristic) that are categorized into eight groups, each known as a "domain."[4] During the appraisal period, the appraiser must evaluate and document teacher performance specifically related to these eight domain groups, scoring each domain independently.[5]

The appraiser assigns one of four ratings (Exceeds Expectations (EE), Proficient (P), Below Expectations (BE), or Unsatisfactory (U)) to each of the 51 criteria based on supporting data.[6] Each of the ratings corresponds to a numerical score, which are then combined for a total score. That total score determines whether a teacher is rated EE, P, BE or U for that entire domain. For matters of real consequence, the PDAS considers the domain, not individual criteria, to be an area of proficiency or deficiency.[7]

Miller v. Clyde ISD: The Commissioner of Education (hereinafter "Commissioner") makes clear that in scoring each domain, all of the data generated in the appraisal process must be considered by the appraiser. The requirement that each domain must be scored independently does not mean that one event can only impact one domain. Instead, a single event can have relevance to multiple domains.[8]

3. "I didn't get any kind of notice!"
Advance notice of an observation is not required.[9] However, some school districts will provide for advance notice under their local board policy.

4. "Am I supposed to get any documentation supporting the ratings?"
Yes. In determining each rating, appraisers must consider all data generated in the appraisal process, including observations, the Teacher Self-Report Form, and other documented sources.[10] If any third-party information or cumulative data is to be used to influence the final summative report, the appraiser is responsible for documenting such data.[11] Black's Law Dictionary defines "document" as an action "to support with records, instruments, or other evidentiary authorities" or "to record; to create a written record of."[12] Thus, verbal warnings alone will not suffice.

Koehler v. La Grange ISD: The PDAS is designed to ensure that the basis of appraisal ratings will be documented. There is no provision for undocumented incidents to form the basis of an appraisal rating. The specific requirements for third-party information do not indicate that informal observations by the appraiser need not be documented. The requirement that incidents must be documented ensures that everyone knows what is being alleged. It helps to limit confusion as to what is at issue. The requirement that a teacher be timely notified serves several purposes. If a teacher has done something wrong, this will help the teacher avoid that behavior in the future. By giving the teacher prompt notification, the teacher has an opportunity to question the allegations. If incidents that occurred early in the school year are brought up in the summative annual appraisal report, the teacher may not recall what is being alleged. This would deprive the teacher of a fair opportunity to rebut the allegations. A failure to timely provide documentation to a teacher is a serious failing.[13]

Garza v. McAllen ISD: The basis of any appraisal rating is to be found in formal observations, the teacher's self-report, and cumulative data. This ensures that a teacher has a fair opportunity to contest the allegations. If there is no documented support for a rating, the rating is invalid.[14]

5. What is considered cumulative data?
Usually any information not personally observed by an appraiser. This might include information reported to the appraiser by co-workers, parents, students, community members, other administrators, and so on. Any third-party information from a source other than the teacher's supervisor that the appraiser wishes to include as cumulative data must be (1) verified and (2) documented in writing by the appraiser.[15]

Solis v. Pasadena ISD: Cumulative data is something in addition to a formal classroom observation and is third-party information.[16]

6. "Can we throw it out?"
Maybe. Documentation used to influence a teacher's appraisal must meet the following criteria:

1. Timeliness - In *Fowler v. La Porte ISD* and *Solis v. Pasadena ISD*, the Commissioner reaffirmed the appraiser's duty to share documentation affecting a teacher's appraisal within ten working days of the appraiser's knowledge of the occurrence.[17] In *Durand v. Hillsboro ISD*, the Commissioner limited the scope of use for documents from a previous

school year, prohibiting their use as documentation of deficiencies for a current school year's appraisal. [18]

2. Sufficiency - In *Miller v. Clyde ISD*, the Commissioner ruled that a rating meets the substantial evidence threshold if there is "more than a scintilla of evidence."[19] However, if there is no documentation for a rating, the rating cannot stand.[20] The Commissioner reconfirmed this ruling in *Garza v. McAllen ISD*, reiterating that part of the appraisal may be invalidated if there is no documented support for a particular rating.[21]

3. Verification - In *Miller*, the Commissioner found that a teacher's own rebuttal statement acknowledging occurrence of an alleged incident suffices as verification of the allegation. A teacher cannot treat her rebuttal as completely destroying the evidentiary value of an appraiser's memo.[22] A teacher may disagree with the appraiser's conclusions, but the appraiser verified the conclusions by issuing the teacher a memo.[23]

4. Form - Cumulative data, in addition to observations recorded in writing, must be documented in writing.[24]

7. "But I wasn't even teaching …or even on campus!"
It may not matter. While most off the clock behavior cannot be considered as part of an evaluation, teachers may still be appraised on any observable, job-related behavior.[25] In the eyes of the Commissioner, an educator in the State of Texas is required by law to possess a high degree of character and integrity as a person, not simply during the times he performs as an educator.[26] Therefore, not only may teachers be appraised on off-campus behaviors that are observable and job-related, such behavior may lead to loss of employment.[27]

De Leon v. Marathon ISD: Just because one is off the clock does not mean that one's behavior cannot be considered.[28] In this case, a number of factors indicated that the dispute was work related: (1) the dispute was a school related activity; (2) the dispute was with a school employee; and, (3) the dispute involved rude conduct to a superior.[29]

8. "I teach French and sponsor yearbook…on what am I appraised?"
French. Whenever possible, appraisals must be based on the teacher's performance in fields and teaching assignments for which he or she is certified.[30] If a teacher is assigned to an extracurricular activity or assignment additional to classroom teaching duties, the teacher can only be appraised on the basis of classroom teaching performance — not performance in connection with the extracurricular activities.[31]

9. "Will the Superintendent/School Board/Commissioner of Education change my ratings if I file a grievance?"
No. If there is at least some supporting documentation for a rating, any change made to the rating is at the discretion of the appraiser. The very, very (…very) longstanding tenet held by the Commissioner is that a ruling body should not substitute its judgment for that of a trained appraiser. Therefore, the Commissioner will not change an original rating – or allow a local school board to change an original rating – absent a finding on substantial evidence of arbitrary, capricious or bad-faith action.[32] Having said that, however, ratings have consistently been invalidated where there is no documentation at all.[33]

10. "Why is my appraiser in here again?!"
They are, because they can. Many teachers mistakenly believe they are only observed once a year. In fact, the PDAS appraisal period covers every day a teacher is on contract.[34] The only "black-out" periods when observations may not be conducted are (1) within the first three weeks after the completion of PDAS orientation, which cannot be provided later than the final day of the first three weeks of school;[35] and (2) the last day of instruction before any school holiday.[36] Local school boards may also enact other restrictions on observations. Otherwise, there are no prohibitions against collecting cumulative data throughout the rest of the appraisal period.

On the other hand, additional walkthrough observations and cumulative data are not mandatory and will not invalidate an appraisal if not conducted.[37]

11. "I just got my summative – is it too late?!"

Maybe. Unless the teacher waives the timeline, summative conferences are required to be held at least 15 working days before the last day of instruction, and the summative report to be given to the teacher at least five working days before the summative conference.[38] Practically speaking, teachers should expect a summative report to be issued 20 days before the last day of instruction. Summative reports received after the last day of school may be invalidated as it deprives a teacher of the opportunity to request a second evaluation.[39] The fact that a teacher could have made an earlier request for a second appraisal does not mean that the request for a second appraisal is foreclosed upon receipt of the [second] written summative appraisal report.[40]

Koehler v. La Grange ISD: The purpose of receiving the report in advance is so that a teacher will have time to prepare for the conference. The purpose of not presenting the summative annual appraisal report during the last fifteen days of instruction is that a summative annual appraisal conference cannot be held during the last fifteen days of instruction, unless there is a waiver.[41]

Fowler v. La Porte ISD: If documentation was not collected after the initial summative conference, another summative conference is not required.[42] If a teacher requests a second appraisal under Tex. Admin. Code §§150.1005(c)-(g), the second appraisal need not meet the same summative timelines governed by Tex. Admin. Code §§150.1003(h) and (i).

12. "My appraisal stinks, what can I do?"
In short, a teacher may respond to an undesirable appraisal in the following manner:
(a) asking the appraiser to consider additional information provided by the teacher to increase the rating, usually through an informal conference;
(b) writing a rebuttal statement within ten working days to be attached to the evaluation (an extension of five working days may be granted by the appraiser);[43]
(c) requesting a second appraisal by another appraiser; or [44]
(d) filing a grievance to challenge the validity of ratings.[45]

The remedy for an invalidated appraisal or rating is to declare it null and void.[46]

13. "Can they put me on that…whatsit thingamajig?!"

A Teacher In Need of Assistance (commonly known as a "TINA")? Under the right circumstances: yes. Under the PDAS, appraisers are required to designate teachers who receive either one or more unsatisfactory domains or two or more below-expectation domains on their evaluation as a "TINA."[47] Once designated, the teacher must be consulted in the development of an intervention plan, the components of which are intended to help the teacher improve upon alleged deficiencies.[48] Beware, however, that an appraiser may still place a teacher on an intervention plan where there is documentation that would potentially produce an evaluation rating of Below Expectation or Unsatisfactory – regardless of whether a formal appraisal occurred.[49] The recurring theme here, again, is the existence of proper "documentation."

On a side note, educators have historically and colloquially interchanged the terms "growth plan" and "Teacher In Need of Assistance," as has the Commissioner of Education in various decisions (citations omitted). Arguably, however, a formal intervention plan must meet all requirements of the statutory form and substance whereas any omission of technical components reduces it to an informal growth plan. Ultimately, teachers are encouraged to follow all forms of supervisory directives, even if they disagree with the circumstances giving rise to the intervention plan.

14. "What if my district doesn't use the PDAS – can they make their own rules?"

No and yes. Under the Texas Education Code §21.352, a school district not using the PDAS must have an alternative appraisal process developed by the district- and campus-level committees and board-approved, containing criteria based on observable, job-related behavior, such as teachers' implementation of discipline management procedures and the performance of students.[50] An alternative process must also provide for: (1) appraisals at least once a year; (2) if less-than-annual appraisals then no less than once in each five-year period; (3) maintenance of the evaluation in personnel files; (4) a copy of the appraisal given to teacher upon its completion; and (5) a second evaluation by a different appraiser or a rebuttal statement to be attached to the evaluations.[51] Under a permissive interpretation of Texas Education Code §21.352, school districts can establish other appraisal rules not prohibited by law so long as mandatory components have been included.

ENDNOTES

1 Tex. Educ. Code 21.352 (Thomson-West 2007).
2 19 Tex. Admin. Code 150.1003(l) (Thomson-West 2007).
3 Tex. Educ. Code 21.352(c) (Thomson-West 2007).
4 Tex. Educ. Code 21.351(d) (Thomson-West 2007) and Tex. Admin. Code 150.1002(b) (Thomson-West 2007).
5 19 Tex. Admin. Code 150.1003(e) (Thomson-West 2007).
6 Teacher Manual, Professional Development and Appraisal System, revised 2005; http://www5.esc13.net/pdas/docs/PDASTeacherManual.pdf.
7 19 Tex. Admin. Code 150.1003(l)(3) (Thomson-West 2007).
8 *Miller v. Clyde Indep. Sch. Dist.*, Docket No. 096-R10-702 (Comm'r Educ. 2004).
9 Tex. Educ. Code 21.351(d) (Thomson-West 2007).
10 19 Tex. Admin. Code 150.1002(c) (Thomson-West 2007).
11 19 Tex. Admin. Code 150.1003(f) (Thomson-West 2007).
12 Black's Law Dictionary, 9th Deluxe Ed. (Thomson-West 2009).
13 *Koehler v. La Grange Indep. Sch. Dist.*, Docket No. 092-R10-801 (Comm'r Educ. 2002).
14 *Garza v. McAllen Indep. Sch. Dist.*, Docket No. 018-R10-1106 (Comm'r Educ. 2009), citing Koehler v. La Grange Indep. Sch. Dist., Docket No. 092-R10-801 (Comm'r Educ. 2002).
15 19 Tex. Admin. Code 150.1003(f) (Thomson-West 2007).
16 *Solis v. Pasadena Indep. Sch. Dist.*, Docket No. 003-R10-900 (Comm'r Educ. 2002).
17 *Fowler v. La Porte Indep. Sch. Dist.*, Docket No. 014-R10-998 (Comm'r Educ. 1999); *Solis v. Pasadena Indep. Sch. Dist.*, Docket No. 003-R10-900 (Comm'r Educ. 2002); TEX. ADMIN. CODE §§150.1003(b)(2) and (f) (Thomson-West 2007).
18 *Durand v. Hillsboro Indep. Sch. Dist.*, Docket No. 056-R10-1198 (Comm'r Educ. 1998).
19 *Miller v. Clyde Indep. Sch. Dist.*, Docket No. 096-R10-702 (Comm'r Educ. 2004).
20 *Id*.
21 *Garza v. McAllen Indep. Sch. Dist.*, Docket No. 018-R10-1106 (Comm'r Educ. 2009).
22 *Miller v. Clyde Indep. Sch. Dist.*, Docket No. 096-R10-702 (Comm'r Educ. 2004).
23 *Id*.
24 19 Tex. Admin. Codes 150.1002 and 150.1003 (Thomson-West 2007).
25 *DeLeon v. Narathon Indep. Sch. Dist.*, Docket No. 006-R10-999 (Comm'r Educ. 2001).
26 *Holland v. Dallas Indep. Sch. Dist.*, Docket No. 473-R2-795 (Comm'r Educ. 1996).
27 *See also Humphrey v. Westwood Indep. Sch. Dist.*, Docket No. 476-R2-795 (Comm'r Educ. 1996) (citing good cause for termination where employee's actions had a tendency to injure the employer's business or financial interest) and *Parker v. Dallas Indep. Sch. Dist.* (noting teachers are role models and are expected to retain their moral authority).
28 *DeLeon v. Narathon Indep. Sch. Dist.*, Docket No. 006-R10-999 (Comm'r Educ. 2001).
29 *Id*.
30 19 Tex. Admin. Code 150.1003(a) (Thomson-West 2007).
31 Tex. Educ. Code 21.353 (Thomson-West 2007).
32 *Blaylock v. Carrollton-Farmers Branch Indep. Sch. Dist.*, Docket No. 245-R3-486 (Comm'r Educ. 1987); *Etzel v. Galveston Indep. Sch. Dist.*, Docket No. 231-R9-885 (Comm'r Educ. 1987); *Falvey v. Alief Indep. Sch. Dist.*, Docket No. 113-R3-1185 (Comm'r Educ. 1988); *Sherill v. Raymondville Indep. Sch. Dist.*, Docket No. 043-R10-1087 (Comm'r Educ. 1988); *Parkinson v. Alief Indep. Sch. Dist.*, Docket No. 257-R10-491 (Comm'r 1992); *Navarro v. Ysleta Indep. Sch. Dist.*, Docket No. 007-R8-988 (Comm'r Educ. 1991); and *Isbell v. Alvord Indep. Sch. Dist.*, Docket No. 016-R10-988 (Comm'r 1991).
33 *See Miller v. Clyde Indep. Sch. Dist.*, Docket No. 096-R10-702 (Comm'r Educ. 2004) and *Garza v. McAllen Indep. Sch. Dist.*, Docket No. 018-R10-1106 (Comm'r Educ. 2009).
34 19 Tex. Admin. Code 150.1003(d) (Thomson-West 2007).
35 19 Tex. Admin. Code §§150.1003(d) and 150.1007(a) (Thomson-West 2007).
36 19 Tex. Admin. Code 150.1003(d)(4) (Thomson-West 2007).
37 *Michael v. Houston Indep. Sch. Dist.*, Docket No. 012-R10-1000 (Comm'r Educ. 2002) (finding no abuse of discretion on the part of the appraiser in not conducting additional walk-throughs).
38 19 Tex. Admin. Code 150.1003(h) (Thomson-West 2007).
39 *Adams v. Groesbeck Indep. Sch. Dist.*, Docket No. 068-R10-1198 (Comm'r Educ. 1999).
40 *Id*.
41 *Koehler v. La Grange Indep. Sch. Dist.*, Docket No. 092-R10-801 (Comm'r Educ. 2002).
42 *Fowler v. La Porte Indep. Sch. Dist.*, Docket No. 014-R10-998 (Comm'r Educ. 1999).
43 19 Tex. Admin. Code 150.1005(a) and (b) (Thomson-West 2007).
44 19 Tex. Admin. Code 150.1005(d) (Thomson-West 2007).
45 19 Tex. Admin. Code 150.1005(g) (Thomson-West 2007).
46 *Durand v. Hillsboro Indep. Sch. Dist.*, Docket No. 056-R10-1198 (Comm'r Educ. 1998), citing *DeLeon v. Marathon Indep. Sch. Dist.*, Docket No. 006-R10-999 (Comm'r Educ. 2001).
47 19 Tex. Admin. Code 150.1004 (a) (Thomson-West 2007).
48 19 Tex. Admin. Code 150.1004 (b) (Thomson-West 2007).
49 19 Tex. Admin. Code 150.1004 (f) (Thomson-West 2007).
50 Some current alternative appraisal systems being used in Texas, for example, include those in the Klein (KPDAS), Houston (MPDAS), and Cypress-Fairbanks (CFPDAS) independent school districts.
51 Tex. Educ. Code 21.352(c) (Thomson-West 2007).

Which Speech is Free Speech: Disciplining the Off-Campus Cyber Misconduct of Students and Employees

By: Karla Schultz[1]
Walsh, Anderson, Brown, Aldridge & Gallegos

U.S. Supreme Court Justice John Roberts recently said that school officials should not be looking to the Supreme Court to set school rules, only to clarify them. A "whole list of regulations from the Supreme Court … would be bad," Roberts added.[2] But when it comes to the thorny issue of when student and employee off-campus cyber misconduct can properly be disciplined, school officials might be forgiven for thinking that a "whole set of regulations" from the courts might be a good thing.[3] Over the past decade, the courts have had an unfortunate habit of issuing what appear, at least on their face, to be somewhat conflicting rulings. The Supreme Court has yet to rule on the issue at all, likewise for the Fifth Circuit. But while the body of case law on the student and staff off-campus cyber misconduct may not always be consistent, certain guiding principles do emerge that can inform the decisions of school administrators, and the school attorneys who advise them.

Students: Material or Substantial Disruption

We are all familiar with *Tinker's* teaching that students do not hold unfettered free speech rights, on or off-campus. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Under the *Tinker* standard (as affirmed and expanded by *Frederick v. Morse*, 551 U.S. 393 (2007)) student speech will not be protected by the First Amendment: 1) where the speech is vulgar, sexually-explicit, lewd, or encourages drug use; and/or 2) where the student expression materially or substantially disrupts the normal operations of school or the rights of other students or teachers, or where the school administration has reasonable cause to believe the expression would cause a material and substantial disruption of school operations. It is the second prong of the *Tinker* standard that is the key to whether a student's off-campus cyber conduct may be subject to discipline by school officials.

In general, if the student's off-campus conduct could be said to constitute a "material or substantial" disruption of or interference with school operations, then it may be properly subject to school disciplinary rules, consistent with district policy and any Student Code of Conduct. If there is no such disruption, no reasonable cause to believe there will be a disruption, or if the school itself causes the disruption, then the student's off-campus conduct may not be punished by school officials. There must be a "nexus" between the school and student's off-campus conduct; an administrator's discomfort or annoyance with the expression is not sufficient. Two recent cases, both on appeal in their respective circuits, are illustrative.

J.S. v. Blue Mountain Sch. Dist., 2008 WL 4279517 (M.D. Pa. 2008), centers on an issue increasingly common in school districts: students who create fictitious online profiles of school personnel. J.S. was a middle school student who created, from her home, a fake MySpace profile of her principal. Though the profile did not use the principal's name, it did identify him as a principal and the photograph used on the site had been obtained by J.S. from the school district's website. The principal's bogus online profile depicted him as a bisexual pedophile and sex addict, and said his interests included "… f***ing in my office, hitting on students and their parents." When school administrators discovered that J.S. created the fake profile, she received a 10-day out-of-school suspension for making of false accusations against school staff members and for violating the district's computer use policy by using copyrighted material without permission. J.S. sued arguing that the principal's MySpace profile was non-threatening, non-obscene, and a parody. Furthermore, she added, there was no disruption of classes or of school administration.

The court concluded that even if J.S.'s speech did not cause any on-campus disruption, her speech was akin to the lewd and vulgar speech that the U.S. Supreme Court ruled in *Bethel School District v. Fraser*, 478 U.S. 675 (1986) was not protected by the First Amendment. Harkening back to the material and substantial disruption standard, the court created a *Tinker/Bethel* hybrid and concluded that the totality of facts demonstrated "the lewd and vulgar off-campus speech had an effect on-campus." J.S. has appealed to the Third Circuit.

Doninger v. Neihoff, 514 F.Supp.2d 199 (D.Conn. 2007) is another case in point. There, a member of the student council, Avery Doniger, and her fellow class leaders were in a dispute with the school officials over the scheduling of a band concert. Doniger and her compatriots first hacked into one of the student's father's email account and sent mass emails about the dispute. Later, Doniger posted her own public message to classmates and the community on a social networking website. In the message, Doniger used vulgar terms to describe the school officials and encouraged students and parents to contact the Superintendent in order to "piss her off more." Both the email and the online posting resulted in a flood of emails and calls to the district. In fact, thanks to the permanency of online postings, emails and calls kept coming in even after the concert took place. Once Doniger's cyber message was discovered, she was disqualified from running for senior class secretary because the administration determined that her conduct did not display the qualities of civility and citizenship the school expected from its class leaders. She sued seeking a preliminary injunction to order school officials either to hold a new election allowing her to run for class secretary or to install her as an additional senior class secretary. The lower court denied the injunction, and the Second Circuit upheld that ruling, remanding back to district court for a finding on the merits.

At trial, the district court disagreed with the school district that it could regulate a student's offensive off-campus speech so long as the district was aware of it, but the court did find that the student's speech was "purposely designed by [her] to come onto the campus." The online postings were about school events, they were misleading, and they encouraged the readers to take action toward the school district. Therefore, said the court, it was reasonably foreseeable to officials that the online speech would substantially disrupt the school environment. Also important to the court was the fact that the student's only consequence was disqualification from running

for a voluntary extracurricular position. According to the court, it is "not clear that participation in extracurricular activities should be considered a right at all," especially in the case of a class officer who was engaging in an online campaign aimed against school administrators. Avery Doniger appealed the lower court's decision, and the Second Circuit, which has heard oral arguments, has not yet issued a ruling.

While these two cases are fairly representative of the approach taken by courts when analyzing district discipline of student off-campus misconduct, it is not necessarily the case that the district always prevails. For example, the case of *Layshock v. Hermitage School District*, 496 F.Supp.2d 587 (W.D.Pa. 2007) is also awaiting a decision in an appeal to the Third Circuit. In that case, the district court found there was no substantial disruption caused by a student's fake MySpace profiles of principals because no classes were cancelled, no widespread disorder occurred, and there was no violence. Similarly, a Missouri federal district court ruled over ten years ago in *Beussink v. Woodland R-IV School District*, 30 F. Supp.2d 1175 (E.D. Mo. 1998), that a web site created by a student on his home computer did not cause any "material and substantial interference" at school even though it vulgarly criticized the school administration and recommended that visitors to the site voice their opinions to the principal. That court also cautioned that the mere fact that school officials were upset by the student's website did not justify discipline. Nevertheless, applying a robust substantial and material disruption test to the facts of your district's case should go a long way toward ensuring that a court would find in the district's favor, should the administration's actions be challenged.

Employees: Two Part Test

When it comes to employees' after-hours use of their own technology, the school's ability to take disciplinary measures may be more limited, depending on the circumstances. Unlike underage students, adults generally enjoy the right to full expression of their constitutional rights, at least when speaking as a citizen. But since those adults are also public employees, there are circumstances under which a school district will have a broader disciplinary reach. This combination of factors means that the legal standard for determining what off-campus employee conduct can be regulated is more complicated. Typically, the courts have used a two-part test when analyzing the off-campus free speech rights of school employees.

Part one of the test asks whether the employee is speaking in his or her capacity as a public employee or as a private citizen. This prong is taken from the Supreme Court's *Garcetti* decision. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). As the court said there, if the employee is speaking as a public employee, the district may properly discipline any misconduct. Applying *Garcetti*, the lower courts have said when public employees make statements pursuant to their official duties, whether on or off-campus, they are not speaking as citizens for purposes of the First Amendment and their communications may be properly subject to employer discipline. Those courts have observed that public employees are in a unique trusted position, and government employers could not efficiently provide public services without a "significant degree of control over their employees' words and actions." But where the employee is speaking as a citizen, the second part of the test kicks in.

Where the employee is speaking as a citizen, the second prong requires a determination of whether or not the employee is speaking on a private matter or a matter of public concern. Generally, off-duty, cyber conduct of an employee that is personal in nature, is unrelated to the employee's position, and causes no detriment to the school district will likely be protected under the First Amendment, assuming the conduct is legal.

But even where the employee is speaking as a private citizen on a matter of public concern, he or she can still sometimes be disciplined under the *Pickering* balancing test. *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968). Applying *Pickering* to the employee's speech, a court will weigh "the interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employee." If the employee's cyber speech can be shown or presumed to have impeded proper performance of his or her daily responsibilities, or to have interfered with the regular operation of the schools generally, the employee may be subject to district discipline. Again, some sample case law illustrates.

In *Almontaser v. New York City Dept. of Educ.*, 519 F.3d 505 (2nd Cir. 2008), a principal with the New York City schools had led the development of a public high school offering classes in Arab language and culture, and aimed at fostering multicultural understanding and preparing students for careers in international affairs and diplomacy. The *New York Post* ran a story stating that the principal was involved with an organization selling t-shirts that supposedly "glorify[ied] Palestinian terror." When a reporter from the newspaper contacted her, the principal did not want to be interviewed. However, the district's press officer instructed her to be interviewed, but not to address the t-shirts. In the article, the employee was identified as the principal of the Arab culture school and the reporter claimed she made statements about the t-shirts that were "a defense of violence against Israel." After the head of the school district publicly said the principal would not be considered for a certain job, she sued claiming her First Amendment rights had been violated. The court disagreed and said that her statements to the newspaper "were manifestly made in her official capacity" and the content of her comments fell outside of what she was instructed to say. Therefore, said the court, her speech was not constitutionally protected.

An unpublished decision from the Ninth Circuit recently upheld summary judgment in favor of a school district that disciplined an employee who aired online her complaints about her school district and some of its personnel. *Richerson v. Beckon*, 2009 WL 1975436 (9th Cir. 2009). In that case, Richerson, an employee who served as a curriculum specialist and instructional coach, was reassigned to be a classroom teacher after the district became aware of her public blog which contained "several highly personal and vituperative comments about her employers, union representatives, and fellow teachers." As the court observed, those individuals were not identified by name, but "many were easily identifiable by the description of their positions or their personal attributes." After they learned of the blog, other teachers and employees refused to work with Richerson. On the grounds that "her blog had fatally undermined her ability to enter into trusting relationships as an instructional coach," Richerson's supervisor transferred her to a teaching position. In analyzing Richerson's

claim that the transfer violated her First Amendment rights, the court wrote that "a public employee's speech [which] touches on matters of public concern is a 'necessary, but not a sufficient condition of constitutional protection.'" Turning to the *Pickering* balancing test, the Ninth Circuit observed that Richerson's online speech "had a significantly deleterious effect" on co-worker relations, employee relationships based on loyalty and confidentiality, and on Richerson's own performance of her duties. Richerson's supervisor could make a "reasonable prediction" of workplace disruption. Therefore, held the court, "the legitimate administrative interests of the School District outweighed Richerson's First Amendment interests in not being transferred because of her speech."

In contrast, another case from the Ninth Circuit offers a reminder that an employee's off-campus speech, even when using employer-provided equipment, may not always be disciplined. *Quon v. Arch Wireless Operating*, 554 F.3d 769 (9th Cir. 2008). In that case, a city issued to employees pagers with text-messaging capabilities. The city's official policy prohibited use of city computers for anything but business purposes, said employees' use of city computers might be monitored, and that employees had no privacy expectations in email messages sent or received on the city equipment issued to them. Though the policy did not specifically mention pagers, employees were notified verbally that pager messages would be considered email under the official policy. But the city also had an unwritten, informal "policy" allowing employees to pay any overage charges for text messaging that exceeded the monthly allotment. If the employee refused to pay the overage, text messages would be inspected to determine whether the texts were for business or personal use. One officer, Officer Quon always paid his overages, but the city requested the records of his texts. Quon filed suit against the city claiming the search was unconstitutional. The Ninth Circuit Court of Appeals agreed, writing that the informal practice allowing payment of overage charges essentially waived the official policy. The case is now on appeal to the Supreme Court.

Conclusion

Texas courts have yet to take up in any meaningful way the issue of a school district's ability to discipline student and staff off-campus cyber misconduct,[4] but case law in the area of student and employee cyber misconduct continues to rapidly evolve. As the judge in the *Doniger* case observed, "off-campus speech can become on-campus speech with the click of a mouse." So far, the lower federal courts have applied the *Tinker* material and substantial disruption standard to student off-campus cyber misconduct, concluding that authority to discipline student off-campus speech cannot logically exceed that for on-campus speech. As for employee off-campus cyber misconduct, the courts have generally looked first to whether the employee is speaking in the role of an employee or citizen (*Garcetti*), and if it is the latter, applied the *Pickering* balancing test. Using these legal starting points as guideposts can aid school lawyers in advising school district clients in an informed and practical manner.

ENDNOTES

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2 *See, e.g.*, "Chief Justice Roberts: High court not setting school rules," USA Today, June 29, 2009, at http://www.usatoday.com/news/education/2009-06-29-supreme-court-schools_N.htm.

3 In this article "cyber" conduct includes students' and employees' use of the internet, social networking sites such as MySpace and Facebook, blogs, Twitter, text messaging, smart phones, and the like.

4 It is worth noting that during its most recent session, the Texas Legislature passed HB 2003 which amends the Texas Penal Code at Section 33.07 make it a third degree felony to use the name or persona of another to create a web page or to post messages on social networking sites absent the person's consent and with the intent to harm, defraud, intimidate or threaten another.

Thirty Overshadowed Bills from the 81st Legislative Session

By: Allyson Collins
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The Texas Legislature was busy during the 81st Legislative Session. The House and Senate filed a total of 7,419 bills. Of the bills filed, 1,459 passed, and 35 were subsequently vetoed by the Governor. By now, most people in the education community have heard of "the accountability bill" (House Bill 3), "the finance bill" (House Bill 3646), and "the unfunded mandate bill" (Senate Bill 300). However, as is the case every session, many other notable bills passed that may have been overshadowed by the front-page story bills. This article discusses 30 bills that should be on the radar of school districts and attorneys.[1]

House Bill 171—Mitigating Factors in Discipline Placements: Beginning with the 2009-10 school year, this bill requires districts to consider mitigating factors in each decision concerning suspension, DAEP placement, expulsion, or JJAEP placement, regardless of whether the action is mandatory or discretionary. Previously, districts were granted discretion when indicating in the Student Code of Conduct whether self-defense, intent, a student's disciplinary history, or a student's disability would be considered as a factor in a decision to suspend, expel, or remove a student to DAEP.

House Bill 192—Excused Absences for Naturalization Ceremonies, Autism Services: Effective June 19, 2009, HB 192 provides that absences from school for appearing at a government office to complete paperwork for citizenship or for taking part in a United States naturalization oath ceremony are excused.

Additionally, this bill clarifies that an excused absence for an appointment with a health care professional includes the temporary absence of a student diagnosed with autism spectrum disorder on the day of the student's appointment with a health care practitioner to receive generally recognized services for autism spectrum disorder. Such services include applied behavioral analysis, speech therapy, and occupational therapy. The description of *health care practitioner* is in Texas Insurance Code, Section 1355.015(b).

House Bill 401 – Changing Date of General Election: Effective May 13, 2009, the governing body of a political subdivision, other than a county, that holds its general election for officers on a date other than the November uniform election date may change the date on which it holds its general election to the November uniform election date. This change must be made by no later than December 31, 2010. Typically, a similar bill is filed every session allowing a governmental entity to change its election to any uniform election date. This bill only authorizes a change from May to November.

House Bill 567—Eligibility of Candidates to Serve as Election Workers: Under current law, a person is ineligible to serve as an election judge or clerk if that person is a candidate for public office in an election held on the same day. Effective September 1, 2009, a candidate in a contested election is ineligible to serve, in an election to be held on the same day, as an election judge or clerk in any precinct in which the office sought is to be voted on.

House Bill 829—Appeals to the Commissioner of Education: Effective June 19, 2009, a person is not required to appeal to the commissioner of education before pursuing a remedy under a law that is outside Texas Education Code Titles 1 (General Provisions) and 2 (Public Education), but to which Titles 1 and 2 make reference or require compliance. Current common law requires a person who is aggrieved by a statute outside of Titles 1 and 2 (e.g., open meetings laws) to exhaust all administrative remedies before seeking a judicial remedy. This bill also requires the commissioner to hold a hearing and issue a decision on an appeal under Texas Education Code, Section 7.057 within 180 days after the appeal is filed. The requirement applies only to an appeal filed after June 19, 2009.

House Bill 978—Texas Commission on Human Rights Act (TCHRA): Effective September 1, 2009, this bill aligns the disability discrimination provisions of the TCHRA, which prohibits employment discrimination, with the federal Americans with Disabilities Act Amendments Act (ADAAA). Specifically, the bill adopts many of the provisions from the ADAAA, including definitions of *major life activity* and *regarded as having an impairment*, a definition of *auxiliary aids and services* (from the original Americans with Disabilities Act), rules of construction, a list of mitigating measures, a statement that disability includes an impairment that is episodic or in remission that substantially limits a major life activity when active, and a statement that the TCHRA does not create a cause of action for discrimination based on lack of disability (reverse disability discrimination). The bill does not adopt language from the ADAAA specifying that "an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability." Also, it is important to note that in many other respects, the TCHRA is different from the federal employment discrimination laws. Nonetheless, this bill does bring the TCHRA more in line with the ADAAA. (The bill has little impact on districts with more than fifteen employees, because those districts were already subject to the ADAAA. Districts with fifteen or less employees, however, were covered only by the TCHRA. These smaller districts are now subject to expanded protections for employees with disabilities.)

House Bill 987—Competitive Procurement Requirements: Effective June 19, 2009, HB 987 raises the contractual amount that triggers a school district's duty to competitively procure a contract from $25,000 to $50,000. Additionally, the bill repeals the required procedures for purchasing personal property valued between $10,000 and $25,000. School districts are no longer required to develop categories of personal property, create vendor lists, and solicit telephone price quotations before making such purchases. Purchases of produce and fuel were required to be made by these procedures as well.

House Bill 1041—Sexual Abuse of Children: Effective June 19, 2009, school districts are required to adopt and implement a policy addressing sexual abuse of children to be included in the district improvement plan and the student handbook. The policy must address methods for increasing teacher, student, and parent awareness of the issue, including knowledge of likely warning signs, using resources developed

by the Texas Education Agency (TEA), actions that a victim should take to obtain assistance and intervention, and available counseling options for affected students. The TEA resources are available on the Prevention of Child Abuse Overview Web Site at: www.tea.state.tx.us/index.aspx?id=2820.

House Bill 1332—Student Responsibility for Technological Equipment: Under current law, students and parents are responsible for textbooks that are not returned by the students, and a student who fails to return all textbooks forfeits the right to free textbooks until each textbook not returned is paid for by the student, parent, or guardian. Additionally, if a textbook is not returned or paid for, a school district may withhold the student's records, but may not prevent the student from graduation, participating in a graduation ceremony, or receiving a diploma. Beginning with the 2009-10 school year, this bill expands these provisions to also apply to electronic textbooks and technological equipment. The commissioner is charged with adopting rules for determining whether textbooks or technological equipment are returned in an acceptable condition.

House Bill 1365—Service Records of Professional Staff: Beginning with the 2009-10 school year, a district is required to provide a former employee who is a classroom teacher, librarian, counselor, or nurse a copy of the person's service record, upon request. A district must also provide the service record to another district that employs the former employee. The district must provide the copy of the service record by the later of thirty days after the request or thirty days after the employee's last day of work. If a district fails to provide a copy of the service record, TEA is directed to provide the new employing district with as much information as is available to the agency so that the new district may determine the person's placement on the new district's salary schedule.

The bill defines *service record*, for purposes of this law, as "a school district document that indicates the total years of service provided to the district by the employee." The bill defines *salary schedule* as the state minimum salary schedule or a comparable local salary schedule that specifies salary amounts based on an employee's level of experience.

House Bill 1425—County Population for JJAEP Establishment: Beginning with the 2009-10 school year, certain counties with an actual size of greater than 125,000 are exempt from the statutory requirement that the juvenile board in a county of that size establish a JJAEP. Under HB 1425, a county with a population higher than 125,000 would be considered a smaller county if the county population was 125,000 or less according to the 2000 census, and the juvenile board, with approval of the Texas Juvenile Probation Commission, enters into a memorandum of understanding (MOU) with each school district in the county. Each MOU must outline the responsibilities of the juvenile board and the school district in minimizing the number of students expelled without receiving alternative educational services and must reference the coordination procedures outlined in Texas Education Code, Section 37.013.

House Bill 1470—Notice of Assault Leave Rights: Beginning with the 2009-10 school year, school districts are required to provide employees with specific notice of their right to take assault leave. Notice must be included in any informational handbook a district provides to employees or makes available on its Web site. In addition, any form the district uses for employees to request leave must include assault leave "as an option."

House Bill 1720—Political Advertising: Effective September 1, 2009, this bill clarifies that an officer or employee of a political subdivision may not *knowingly* spend or authorize public funds to be spent for political advertising. An officer or employee also may not spend or authorize the spending of public funds for a communication describing a measure if the communication contains information that the person knows is false, and is sufficiently substantial and important as to be reasonably likely to influence a voter to vote for or against the measure. Additionally, the bill adds an affirmative defense to these prohibitions if an officer or employee of a political subdivision reasonably relied on a court order, or an interpretation of the law in a written opinion issued by a court, the Attorney General, or the Texas Ethics Commission. On written request of the governing body of a political subdivision that has ordered an election on a measure, the Texas Ethics Commission is required to prepare an advance written advisory opinion as to whether a particular communication relating to the measure violates these political advertising laws. Similar provisions are in Senate Bill 2085.

House Bill 2004—Notice of a Breach of Computer Security: Effective September 1, 2009, in the event of a breach of system security, a local government that owns, licenses, or maintains computerized data, including sensitive personal information, must comply with the notification requirements set forth at Business & Commerce Code section 521.053. Section 521.053 requires an entity to disclose any breach of system security to any resident of the state whose sensitive personal information was, or is reasonably believed to have been, acquired by an unauthorized person. With limited exceptions, the notice may be provided in writing or electronically in accordance with 15 U.S.C. § 7001. If an entity is required to notify more than 10,000 persons at one time, the entity must also notify each of the credit reporting agencies of the timing, distribution, and content of the notices.

House Bill 2291—Required Language for Adopting Certain Tax Rates: Effective June 19, 2009, this bill changes the language of a motion and order to adopt and set a tax rate that exceeds the effective tax rate. Additionally, the bill includes revised language that must be included in the ordinance, resolution, or order setting a tax rate that exceeds the effective tax rate and on any Internet Web site. These wording changes affect the rates set in 2009.

House Bill 2512—Audio Recordings of Grievances: Effective September 1, 2009, HB 2512 requires a school district's grievance policy to permit an employee who reports a grievance to make an audio recording of any meeting or proceeding at which the substance of a grievance that complies with the policy is investigated or discussed. The implementation of this section may not result in a delay of the timelines under the grievance policy. A district is not required to provide the recording equipment.

House Bill 2542—Excused Absences for Higher Education Visits: Beginning with the 2009-10 school year, school districts are allowed to excuse an absence related to visiting an institution of higher education. If a high school junior or senior visits an accredited institution of higher education to determine the

student's interest in attending the institution, the absence from school may be excused. A school district may only allow four days of excused absences for visiting institutions of higher education (two days during the junior year and two days during the senior year). In order for a district to recognize these days as excused absences, the district must adopt a policy to determine when an absence will be excused for this purpose and a procedure to verify the student's visit at the institution of higher education.

House Bill 2730—Criminal History Record Information: This bill is an omnibus bill relating to the functions and duties of the Department of Public Safety. Additionally, the bill clarifies several questions that arose during application of the Senate Bill 9 fingerprinting requirements, several of which are described below. First, this bill reverses a TEA rule that makes contractors responsible for obtaining criminal history records on employees of subcontractors. Specifically, the bill makes a contractor responsible only for requiring its subcontractors to obtain criminal history records on the subcontractor's employees. This bill also changes the eligibility standard for contractor employees. Additionally, this bill reverses an AG ruling that only criminal history record information in the form provided by the Department of Public Safety is confidential and exempt from the Public Information Act. (See Op. Tex. Att'y Gen. OR-2008-7450A.) HB 2730 expands the meaning of *criminal history record* to include any information obtained from DPS that could reveal the identity of a person or that directly or indirectly indicates or implies that a person was involved in the criminal justice system, and provides that *criminal history record* does not refer to any specific document, but to the information in the document, in its original form or any subsequent form or use. Additionally, the bill adds a provision allowing an employee to request a copy of his or her criminal history record information.

House Bill 3543—Students Eligible for Prekindergarten: With regard to eligibility for tuition-free prekindergarten, HB 3543 adds *stepchild* to the definition of *child* and *stepparent* to the definition of *parent*, beginning with the 2009-10 school year. By broadening the definition of *child* and *parent*, this bill expands the group of military children who are eligible for free prekindergarten.

House Bill 4456 – Definition of Switchblade: Effective September 1, 2009, this bill amends the definition of *switchblade* found at Penal Code section 46.01(11) to except knives designed to be opened by one handed operation, often referred to as one-handed openers or assisted openers. These knives have a spring, detent, or other mechanism designed to create a bias toward closure and that requires exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure and open the knife. School districts should decide whether to continue prohibiting and imposing discipline consequences for use, possession, or exhibition, of such one-handed knives.

Senate Bill 90—Interstate Compact on Educational Opportunities for Military Children: Effective May 5, 2009, Texas joined a large number of other states as a member of the Interstate Compact on Educational Opportunities for Military Students (Compact) and the Interstate Commission on Educational Opportunity for Military Children (Commission). The purpose of the Compact is to remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents. More information on the Compact can be found on the Commission's Web Site: www.csg.org/programs/ncic/InterstateCommissiononEducationalOpportunityforMilitaryChildren.aspx.

Senate Bill 283—School Health Advisory Councils (SHAC) and Human Sexuality Instruction: Effective September 1, 2009, this bill clarifies a school board's duties in creating the local SHAC. The school board must appoint at least five members to the SHAC. A member who is a parent and not an employee of the district must serve as chair or co-chair of the SHAC. The SHAC is now required to meet at least four (4) times a year. The SHAC must also submit a report, at least annually, to the board (the first report is due April 1, 2010). The report must include recommendations concerning the district's health education curriculum and instructional matters not previously submitted to the board. If the SHAC has suggested modifications to previous recommendations, they should be included in the report. In addition, the report must include an explanation of the SHAC's activities since the date of the previous report.

Additionally, this bill also amends the contents of the required notice of the district's human sexuality instruction, which already existed under current law. The notice must now be in writing, provided before each school year, and must include the board's decision as to whether the district will provide human sexuality instruction to students. If the district is providing instruction, the notice must include a summary of the content of the instruction to be provided and a statement of the instructional requirements under state law. The notice must now include a statement that the parent has a right to review the human sexuality instructional material and a statement that the parent's option to remove a student from any part of the instruction will not result in disciplinary action, academic penalty, or any other sanction. In addition, the notice should describe how a parent can become involved in developing the human sexuality curriculum, including information about the SHAC. To complain about violations of the human sexuality instruction notice, a parent may use the grievance procedure adopted under Section 26.011.

Senate Bill 451—Staff Development of Non-Special Education Teachers: Beginning with the 2009-10 school year, the staff development requirements for teachers who primarily work outside the area of special education are modified. Current law allows staff development to include training that relates to instruction of students with disabilities and is designed for educators who work primarily outside the area of special education. This bill requires that staff development include this training for educators who do not already possess the knowledge and skills necessary to implement a student's Individualized Education Program (IEP). In developing or maintaining the training, a district must consult persons with expertise in research-based practices for students with disabilities, including colleges, universities, private and nonprofit organizations, education service centers, qualified district personnel, and any other persons identified as qualified by the district.

Senate Bill 522—Use of Personal Leave: Beginning with the 2009-10 school year, this bill prohibits districts from restricting the order in which employees use leave. Under current law, all district employees are entitled to five days of

state personal leave per year and any local leave a district may choose to extend to them. In addition, persons employed in a school district before May 1, 1995, may have accrued leave under the former state sick leave provisions. Many districts have local policies specifying the order in which leave shall be used. This bill prohibits a local policy from restricting the order in which an employee may use the state minimum personal leave and any additional personal leave provided by a school district. Similarly, it specifies that an employee with accrued state sick leave, under the former law, may use that leave in any order to the extent the leave is used for appropriate purposes.

Senate Bill 891—Physical Education (PE) Curriculum: Effective June 19, 2009, this bill requires the State Board of Education (SBOE) to adopt PE TEKS that are sequential, developmentally appropriate, and designed, implemented, and evaluated to enable students to develop the motor, self-management, and other knowledge, attitudes, and confidence necessary to participate in physical activity throughout life. Among other goals, the curriculum requirements must be consistent with national PE standards, require that at least 50 percent of PE class time be used for actual student physical activity at a moderate or vigorous level, include an element of student choice in activities, include both competitive and cooperative games, include activities that meet the needs of all students at all ability and health levels, acknowledge possible cultural and gender influences on the types of activities that interest students, and allow PE classes to be enjoyable for all students.

Starting with the 2009-10 year, a school district must require a student enrolled in full-day prekindergarten (and to the extent practicable, in half-day prekindergarten) to participate in moderate or vigorous daily physical activity for at least 30 minutes throughout the school year as part of the district's PE curriculum or through structured activity during daily recess, as is currently required for all other elementary grades.

The bill also adds Texas Education Code, Section 25.114, which requires that a school district establish specific objectives and goals the district intends to accomplish through the PE curriculum, including, to the extent practicable, student/teacher ratios that are small enough to enable the district to carry out the purposes and requirements of the curriculum and to ensure student safety in PE classes. If a district establishes a student to teacher ratio greater than 45 to 1 in a PE class, the district must specify the manner in which student safety will be maintained.

Senate Bill 1068—Redacting Personal Information under the Public Information Act Without Requesting an Attorney General Decision: Effective June 4, 2009, if a public employee (including a peace officer) or a public officer chooses to restrict public access to personal information under the PIA, a governmental entity may redact the home address, home telephone number, social security information, and information that reveals whether the individual has family members, without requesting an AG decision. If a governmental body redacts or withholds information under this new law, the entity must provide information to the requestor (on a form prescribed by the AG), including a description of the redacted or withheld information and instructions on requesting a decision from the AG regarding the redacted or withheld information. The AG must establish procedures and deadlines for receiving information from the requestor, the governmental body, and any interested person. A written decision from the AG must be rendered no later than 45 business days after receiving a request for a decision, and the decision may be appealed to the Travis County district court.

This bill also adds an additional exception to disclosure under the PIA for certain information about a public employee or officer. If, under specific circumstances pertaining to the officer or employee, disclosure of information would subject the employee or officer to a substantial threat of physical harm, such information is excepted from public disclosure.

Senate Bill 1598—Agreement to Exercise Certain Parental Rights: Effective June 19, 2009, SB 1598 provides for the execution of an authorization agreement that enables certain relatives of a child to consent to decisions that are regularly made by parents without obtaining a court order. The parent of the child and the child's grandparent, adult sibling, or adult aunt or uncle may enter into an authorization agreement for, among other responsibilities, medical, dental, psychological, surgical treatment, and immunization of the child, enrolling the child in daycare, preschool, or a public or private primary or secondary school, participating in extracurricular, civic, social, or recreational activities, including athletic activities for the child, and applying for and receiving public benefits on behalf of the child. The bill contains extensive details outlining the required elements of such an agreement and the responsibilities of the respective parties.

Senate Bill 1970—Changes to Various Election Procedures: Effective September 1, 2009, this bill makes changes to numerous elections procedures, several of which are described below. With regard to canceling school board trustee elections, under current law, a trustee election cannot be cancelled if a proposition (such as a bond or rollback election) is also on the ballot. This bill clarifies that a special election (such as a bond or rollback election) held by a school board is considered to be a separate election with a separate ballot from the general election for trustees, or another special election held at the same time. Thus, bond and rollback elections held on the same day as a trustee election are considered separate elections, and school districts can cancel trustee elections, depending on the number of candidates. The bill contains procedures for including the names of elected officers on the special election ballots. Additionally, SB 1970 requires a political subdivision to post notice of the dates of the filing period in a public place in the offices of the person with whom applications are filed no later than the 30th day before the first day a candidate may file an application for a place on the ballot.

Senate Bill 2033—District Grading Policies: Beginning with the 2009-10 school year, school districts are required to adopt a grading policy, including provisions for the assignment of grades on class assignments and exams, before each school year. The policy must require a classroom teacher to assign a grade that reflects a student's relative mastery of an assignment and may not require a teacher to assign a minimum grade for an assignment without regard to the quality of the student's work. The policy may allow a student a reasonable opportunity to make up or redo assignments or exams on which the student received a failing grade.

Senate Bill 2505—Rodeo Safety: This bill implements new rodeo safety requirements effective for rodeo activity after January 1, 2010. This bill requires persons under the age of eighteen to wear a bull riding helmet and protective vest when riding bulls during practices and rodeo competitions. In addition, parents and guardians may not knowingly or recklessly allow children to ride bulls without wearing protective gear. Additionally, SB 2505 adds training requirements for a primary or secondary school that sponsors, promotes, or otherwise is associated with a rodeo in which children who attend the school are likely to participate. Such a school is required to conduct a mandatory educational program on safety, including the proper use of protective gear, for children planning to participate in the rodeo. This training must be conducted before the first rodeo associated with the school in each school year, and a child may not participate in a rodeo associated with the child's school during a school year unless the child has completed the educational program no more than one year before the first day of the rodeo. The executive commissioner of the Health and Human Services Commission will adopt standard for helmets and protective vests and rules for the educational program by November 1, 2009.

ENDNOTES

[1] To review the text, history, and other details about these bills, see http://www.capitol.state.tx.us/

Are Discovery Subpoenas in Criminal Cases in Texas "Lawfully Issued Subpoenas" Under FERPA?

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School districts throughout the State of Texas routinely receive requests for information and documents in myriad forms. One form of request that occurs with some frequency is a subpoena seeking documents that is issued in conjunction with a criminal proceeding to which the school district is not a party. Such subpoenas are often issued when a current or former student has become involved in a criminal prosecution. Oftentimes, the subpoena is, in essence, a discovery subpoena that seeks production of documents such as a student's educational records, prior to trial. This article addresses a unique issue that can arise under the Family Educational Rights and Privacy Act ("FERPA") when a school district is served with a subpoena in a criminal case.

The Family Educational Rights and Privacy Act and Subpoenas

As every school attorney knows, student records are generally required to be kept confidential by virtue of FERPA.[1] FERPA contains statutory requirements that govern when, and to what extent, a school district or other FERPA covered entity may properly release or disclose a student's educational records. Relevant to this article, are FERPA's provisions governing the extent to which educational records may be released pursuant to a lawfully issued subpoena or court order.[2]

Under FERPA, confidential records may be released pursuant to a subpoena if the subpoena is "lawfully issued."[3] Consequently, because compliance with FERPA depends upon the extent to which a school district's attorney or public information officer has properly assessed the validity of any given subpoena.[4] Thus, upon being served with a subpoena and before complying with the subpoena, a school district's attorney or public information officer must consider the extent to which the subpoena is a lawfully issued subpoena to ensure compliance with FERPA. The Texas Rules of Civil Procedure provide the criteria as to whether or not a subpoena issued pursuant to a civil proceeding pending in a Texas court is a lawfully issued subpoena. The Texas Rules of Civil Procedure provide for relatively expansive pretrial discovery and this includes wide latitude for subpoenaing records from a non-party to the litigation.[5] Significantly, the Texas Rules of Civil Procedure do not govern the issuance of subpoenas in a criminal proceeding.[6] Furthermore, the law permitting the issuance of subpoenas in criminal proceedings is substantially narrower.

Discovery Subpoenas in Criminal Litigation

Under Texas law, the scope of discovery in a criminal proceeding is wholly governed by the provisions of the Texas Code of Criminal Procedure.[7] Two articles in the Texas Code of Criminal Procedure govern the issuance of subpoenas. In relevant part, Article 24.01 of the Texas Code of Criminal Procedure provides as follows:

> (a) A subpoena may summon one or more persons to appear: (1) before a court to testify in a criminal action at a specified term of the court or on a specified day; or (2) on a specified day: (A) before an examining court; (B) at a coroner's inquest; (C) before a grand jury; (D) at a habeas corpus hearing; or (E) at any other proceeding in which the person's testimony may be required in accordance with this code.[8]

Notably, each of the proceedings set forth in article 24.01 contemplates that a witness will be appearing in court to offer testimony.[9] Additionally, article 24.02 provides that "[i]f a witness have in his possession any instrument of writing or other thing desired as evidence, the subpoena may specify such evidence and direct that the witness bring the same with him and produce it in court."[10] Read together, these provisions authorize a criminal defendant to issue a subpoena *duces tecum* compelling a witness to attend a testimonial hearing and produce documents at that hearing.[11] Therefore, the Texas Code of Criminal Procedure provides that a defendant may issue subpoenas to compel a non-party witness to give testimony at a hearing or trial and to produce documents in conjunction with the witness' appearance.[12] Consequently, if a school district receives a subpoena seeking the appearance of a witness at a

testimonial hearing or trial that also requests that the witness produce documents, such a subpoena is properly issued under the Code of Criminal Procedure.[13] Even with a lawfully issued subpoena, FERPA mandates that notice must be given to the students or their parents prior to the time that a school district releases FERPA protected records pursuant to a subpoena or court order.[14] Accordingly, after providing the good faith requisite notice to affected students or their parents, the school district may properly release records in conjunction with a trial or hearing subpoena.[15]

In contrast, these provisions do not authorize the issuance by criminal defendants of pretrial discovery subpoenas.[16] In each instance, live testimony at a hearing is required.[17] Moreover, the Code of Criminal Procedure does not contain any provisions that authorize the issuance of such subpoenas. In light of the limited subpoena authority granted by the Texas Code of Criminal Procedure, the question arises: is a pre-trial discovery subpoena issued to a non-party in criminal litigation lawfully issued for purposes of FERPA?[18]

One Texas appellate court that has considered the scope of the subpoena power available to a criminal defendant concluded that a criminal defendant has a very limited right to discovery. In *Martin v. Darnell*, the Amarillo Court of Appeals construed the Code of Criminal Procedure to determine the extent to which a criminal defendant could properly issue discovery subpoenas to a nonparty witness.[19] The criminal defendant in *Martin* sought to subpoena financial records from a non-party in an effort to obtain potentially exculpatory evidence.[20] The Amarillo Court of Appeals held that a criminal defendant's exclusive right to pretrial discovery in a criminal matter is defined by article 39.14 of the Code of Criminal Procedure and article 39.14 does not authorize the use of pretrial discovery subpoenas targeted to nonparties in criminal litigation.[21] Thus, *Martin* stands for the proposition that a criminal discovery subpoena targeted served upon a non-party is not authorized under the Texas Code of Criminal Procedure and is, therefore, not lawfully issued for purposes of FERPA.[22]

There is, however, some contrary authority. As the Amarillo Court of Appeals noted in *Martin*, the Houston First Court of Appeals in *Thurman v. State* stated, in dicta, that the State could have used an ordinary subpoena, as opposed to a grand jury subpoena, to obtain documents prior to trial.[23] The court in *Thurman* was certainly correct in its assertion that the State could have used an ordinary subpoena to obtain evidence at trial; however, the court was likely incorrect in concluding that an ordinary subpoena could be used to conduct pretrial discovery. Indeed, the *Thurman* court's statement was made without the benefit of any analysis and, as such, the *Martin* court's treatment is better reasoned.[24] Conversely, the State could have used a grand jury subpoena to obtain documents prior to trial by subpoenaing a witness to testify and produce documents at a grand jury proceeding.[25]

In short, the distinction between criminal discovery subpoenas and criminal trial subpoenas necessarily requires a close examination of the stated purpose of the subpoena. An instanter subpoena seeking the production of documents not otherwise tethered to a testimonial hearing is improper under the Code of Criminal Procedure and, thus, may not be "lawfully issued" under FERPA. A subpoena seeking production of documents in conjunction with a testimonial hearing or trial is a proper subpoena under the Code of Criminal Procedure and is "lawfully issued" for purposes of FERPA. Indeed, even if the subpoena states that it requires the production of documents in conjunction with a hearing, the hearing must be evidentiary or testimonial; in other words, the limitations imposed by the Code of Criminal Procedure cannot be overcome by counsel attempting to link the subpoena to a status conference or other non-evidentiary or non-testimonial hearing. To determine the nature of a hearing referenced in a subpoena, simply call the clerk of the court to ask what type of hearing is being held.

FERPA also provides that a school district may release otherwise confidential records in response to a court order.[26] Can a Texas trial court order a school district to produce FERPA protected records upon the request of a criminal defendant seeking pretrial discovery? Under the logic of *Martin*, the answer would appear to be, no. In *Martin*, the court concluded that the Legislature's enactment of Article 39.14 of the Texas Code of Criminal Procedure created a comprehensive pretrial discovery statute that stripped Texas trial courts of the inherent authority to order pretrial discovery in a criminal matter. The *Martin* court acknowledged that Texas trial courts may once have possessed such inherent power, but concluded that the enactment of Article 39.14 of the Texas Code of Criminal Procedure as a comprehensive discovery regime for criminal proceedings stripped Texas trial courts of the authority to fashion pretrial discovery plans in criminal matters.[27] As a result, a trial court cannot sidestep the limitations upon criminal subpoenas imposed by Articles 24.01 and 24.02 of the Texas Code of Criminal Procedure and order other forms of discovery.

Practical Tips for Responding to Improper Criminal Discovery Subpoenas

In the event that a school district receives an improper criminal discovery subpoena, simply ignoring the subpoena is, of course, not the best course of action. Even though the subpoena may be improper and invalid, there is still a substantial risk that the attorney issuing the subpoena and the trial court will treat the subpoena as proper and fine the witness or order a constable to enforce compliance.[28] To avoid such an unwelcome occurrence, the school district should attempt to seek relief from the subpoena by agreement with the attorney issuing the subpoena or by way of court intervention.

If a school district is served with an improper subpoena, the first step is to contact the attorney issuing the subpoena to discuss the school district's obligations under FERPA. In many instances, the issuing attorney is likely to never have heard of FERPA (or, for that matter, have researched the extent to which they can properly issue a discovery subpoena in a criminal proceeding). Oftentimes, once FERPA's requirements are explained, the attorney is perfectly willing to assist you in complying with the district's FERPA obligations.

Frequently, the party issuing a subpoena will, in fact, be the student or former student whose own educational records are being sought. If this is the case, the easiest way to comply with FERPA's mandates is to contact the attorney issuing the subpoena and discuss the extent to which the attorney is willing to obtain a FERPA compliant release from their client to provide to the school district. If they are willing to do so, the subpoena can then be withdrawn and the FERPA problem eliminated.

Given that the attorney is probably not familiar with FERPA, it is often easiest to provide the attorney with a form release that can be used. Be sure to emphasize that the form must be filled out in its entirety before it can be processed. Once the school district receives a fully executed FERPA compliant release, the school district can compile responsive documents and execute a business records affidavit to put the documents into admissible form. Putting responsive documents into admissible form should avoid the necessity of school district employees being subpoenaed to trial merely to authenticate documents.

If, however, the party issuing the subpoena cannot, or will not, cooperate, the school district should seek judicial relief from the subpoena on the grounds that the subpoena is not properly issued. Unlike the Texas Rules of Civil Procedure, which establish a procedural mechanism for quashing subpoenas, the Code of Criminal Procedure does not contain any such mechanism.[29] Nevertheless, Texas appellate courts have held that a trial court has the authority to quash an invalid subpoena.[30]

To present the issue to the trial court, the school district should file objections to the subpoena coupled with a motion to quash in the court where the criminal proceeding is pending. Depending upon the court's rules, it may also be necessary to set a hearing on the objections and motion to quash. Oftentimes, the prosecuting attorney may be willing to provide you with advice regarding practice in the judge's court if you are not familiar with the judge or court. If a hearing is required, it is worthwhile to bring copies of the relevant FERPA provisions to the hearing for the judge's review. Finally, if the court refuses to quash the subpoena, the school district can pursue relief via a mandamus action.[31] Of course, even if the trial court quashes the subpoena, the defendant can still subpoena the witnesses and documents to a subsequent trial or evidentiary hearing.

ENDNOTES

1 *See generally* 20 U.S.C.S. § 1232g (LEXIS 2009).

2 Section 1232g(b)(2)(B) provides that "except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." 20 U.S.C.S. § 1232g(b)(2)(B) (LEXIS 2009). Subsection (1)(J) provides that the existence or contents of a Federal grand jury subpoena and other subpoenas issued for law enforcement purposes may, by court order, be kept secret. *Id.* § 1232g(b)(1)(J)(i), (ii).

3 *Id.* § 1232g(b)(1)(J)(i), (ii).

4 *Id.*

5 *See generally* Tex. R. Civ. P. 176 (governing the formal requirements of civil subpoenas and setting the procedures for complying with or challenging a civil subpoena).

6 Tex. R. Civ. P. 2 ("These rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a ***civil nature*** . . . .") (emphasis added); *Ex parte Donaldson*, 86 S.W.3d 231, 233 (Tex. Crim. App. 2002) (holding that the Texas Rules of Civil Procedure do not apply to criminal proceedings); *Ex parte Davis*, 542 S.W.2d 192, 198 (Tex. Crim. App. 1976) (observing that "[w]e have before us a criminal case. The trial court was not authorized to compel a psychological examination of the appellant by the Rules of Civil Procedure.").

7 Code Crim. Proc. Ann. art. 24.01 (Vernon 2009).

8 *Id.* 24.01(a).

9 *Id.*

10 *Id.* 24.02.

11 *Id.* 39.14, *Martin v. Darnell*, 960 S.W.2d 838, 841 (Tex. App.—Amarillo 1997, no pet.).

12 Code Crim. Proc. Ann. art. 24.01-24.02 (Vernon 2009). Indeed, such a right is necessary to ensure that a criminal defendant's Sixth Amendment confrontation and compulsory process rights are vindicated. U.S. Const. amend. VI; *Martin*, 960 S.W.2d at 841 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) for the proposition that the Sixth Amendment protects trial rights, not pretrial rights.).

13 Code Crim. Proc. Ann. art. 24.01-24.02 (Vernon 2009).

14 20 U.S.C.S. § 1232g(b)(2)(B) (LEXIS 2009).

15 *Id.* § 1232g(b)(1)(j)(ii).

16 Code Crim. Proc. Ann. art. 24.01-24.02.

17 *Id.* 24.01.

18 Of course, in the absence of a statutory mandate such as FERPA or a privilege that the witness seeks to preserve, a witness can always voluntarily comply with an invalid subpoena.

19 960 S.W.2d 838 (Tex. App.—Amarillo 1997, no pet.).

20 *See generally id.*

21 *Id.* at 841-42.

22 *See id.*

23 *Thurman v. State*, 861 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (stating that "the State could have obtained the same evidence before or during trial by use of an ordinary subpoena duces tecum, rather than a grand jury subpoena.").

24 *Id.*

25 Code Crim. Proc. Ann. art. 24.01(C). If the State has obtained documents in this manner, then the criminal defendant may obtain those documents from the State by virtue of article 39.14.

26 20 U.S.C.S. § 1232(g)(b)(2)(B) (LEXIS 2009) (permitting nonconsensual disclosure of protected records in response to a lawfully issued subpoena or court order).

27 *Martin*, 960 S.W.2d at 841 (citing *State ex rel. Wade v. Stephens*, 724 S.W.2d 141 (Tex. App.—Dallas 1987, orig. proceeding) for the proposition that the enactment of Article 39.14 stripped criminal trial courts of their authority to fashion discovery plans in criminal proceedings.).

28 Code Crim. Proc. Ann. art. 24.05 (Vernon 2009) (providing for the imposition of fines for non-compliance with subpoena.)

29 *Compare* Tex. R. Civ. P. 176.6, *with* Code Crim. Proc. Ann. art. 24 (Vernon 2009).

30 *See Martin*, 960 S.W.2d at 845 (Tex. App.—Amarillo 1997, no pet.) (granting conditional mandamus relief ordering the trial court to quash improper subpoenas).

31 *See id.*