STATE BAR of TEXAS

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A MESSAGE FROM YOUR CHAIR

Dear School Law Section Members:

I am honored to serve as the Chair of the School Law Section for the 2016-17 school year. Although many of us in the Section may not have intended to practice school law, I think we are all very pleased to have ended up here. I truly believe that no other Section has the collegiality and mutual respect as there is between teacher's lawyers, administrator's lawyers and school district's lawyers. Clearly, the spirit of cooperation among our members enriches the programming the Section provides through the annual Section Retreat and participation in the UT School Law Conference.

Last year's Section Retreat at Moody Gardens in Galveston was another success, and we were honored to present Neal Adams with the Kelly Frels Lifetime Achievement Award. Our gratitude goes out to Ellen Spalding, the immediate past Chair, Giana Ortiz and Catosha Woods, the Program Chairs for the Retreat, and all others who lent a hand in presenting and preparing for the Retreat. Similarly, the 2017 UT School Law Conference held February 24-24, 2017 at the AT&T Conference Center in Austin was stellar. A heartfelt thank you is extended to the planning committee. We now look forward to the 2017 Section Retreat, as we return to the Hyatt Hill Country Resort in San Antonio on July 27 - 30, 2017. If you have not attended the annual Section-Retreat before, I strongly encourage you to do so. It is a great way to build and strengthen your professional relationships while earning CLE credit in a congenial environment.

In addition to the Section Retreat and the UT School Law Conference, this Newsletter is another valuable resource for Section members. Leticia McGowan has worked tirelessly for many years as an editor of the Section Newsletter. Joining her this year as a co-editor is Giana Ortiz. I want to personally thank Leticia and Giana for their continued work. Please contact them with any ideas for future articles or information to distribute to the Section. You can reach Leticia at **lmcgowan@dallasisd.org** or Giana at **gortiz@ortizlawtx.com**. The Section Newsletter is reviving its Editorial Review Board. There is an opportunity for six (6) Section members. This is the perfect opportunity for young associates and those new to the Section to become more active in the School Law Section. If you have an interest in serving on the Newsletter's Editorial Review Board, please contact either Leticia, Giana or me.

Thank you for giving me the chance to serve as this year's Section Chair. If you have any questions or suggestions, please feel free to send me an email at **fred.stormer@uwlaw.com**.

Sincerely,

Fred A. Stormer
Section Chair 2016-17

STRAIGHTEN UP AND FLY RIGHT: DRONE USE IN TEXAS SCHOOLS

By Debra Moritz Esterak[1]

Like a scene straight out of the Jetsons, drones have buzzed into everyday life in a supersonic way. As drones, also known as unmanned aircraft systems (UAS), small UAS (sUAS), or unmanned aerial vehicles (UAV), become cheaper, easier to operate, and more widely available, their uses are exploding.[2] No longer exclusively designed for military operations, drones now serve a multitude of uses, as varied as pipeline leak detection, disaster relief, rangeland management, missing person recovery, vineyard microclimate assessment, endangered species monitoring, and wedding videography. Given their wide appeal, affordability and functionality, demand is skyrocketing. The Federal Aviation Administration ("FAA") predicts that 2.7 million commercial drones and 4.3 million recreational drones could be sold by 2020.[3]

Schools, like the average consumer, are succumbing to the lure of drones. Football coaches laud camera-equipped drones for providing better views of practices that help them teach players safer ways to play.[4] Some schools have discovered that drones are a STEM proponent's dream, combining math, electronics, physics, robotics, aeronautics and programming together into a package that, let's face it, is super cool.[5] Some districts are using drones to survey construction sites and record footage for informational videos and bond package updates. Texas A&M-Corpus Christi, home of the Lone Star Unmanned Aircraft Systems Center of Excellence and Innovation, capitalizes on drone interest by offering a summer program for high school students interested in all aspects of unmanned aircraft systems.[6] In addition to academic, construction/maintenance, and extracurricular uses, school drones could be employed for law enforcement and safety purposes such as patrolling the perimeter of the school in order to detect mischief. Why not? High stakes testing advanced to a whole new level when Chinese education officials deployed drones in an attempt to catch high-tech cheaters on the National College Entrance Exam.[7] The uses and benefits of drones in a school setting are limited only by imagination—and a rapidly-evolving set of laws and regulations.

Recent newspaper headlines, like "FAA Opens Inquiry After Baby Hurt in Drone Crash"[8] and "Ohio Prison Yard Free-for-All After Drone Drops Drugs"[9] are cause for alarm. These, coupled with reports of "peeping drones," near-misses with commercial flights, and weaponized drones, underscore why not everyone embraces these devices with open arms. They also highlight why the FAA has been working feverishly to update regulations clarifying where and how a drone may be used. Michael Huerta, Administrator of the FAA, summed up the challenges his administration faces completing this task during a speech at the 2016 South by Southwest Conference when he acknowledged "innovation moves at the speed of imagination and the government has traditionally moved at, well, the speed of government."

The FAA is but one entity addressing how to integrate drones into the legal landscape. According to the National Conference of State Legislators, thirty-two states, including Texas, have enacted drone laws thus far and an additional five have adopted resolutions addressing drone issues.[10] This statutory framework will be sure to change as the judiciary is faced with inevitable challenges, such as the limits of national airspace, Fourth Amendment privacy concerns, aerial trespass allegations, and federal preemption challenges. Ensuring drone safety and upholding individual rights while encouraging technological innovation will be difficult, especially in a deliberate legal system such as ours.

FEDERAL LAW

The FAA, under the Department of Transportation, is responsible for the regulation of the country's navigable airspace and the aircraft operating therein.[11] The term "aircraft" is broadly defined as "any contrivance invented, used, or designed to navigate, or fly in, the air."[12] Under this definition, unmanned aerial vehicles, including model aircraft, are aircraft subject to FAA oversight.[13] Note, however, that the FAA does not regulate purely indoor flights, as those are not within navigable airspace.[14]

The FAA Modernization and Reform Act of 2012 ("the Act" or "FMRA") separates UAVs into three categories—public, civil, and model aircraft—based upon who owns the device and the purpose for which it is used.[15] It is essential for drone operators to know which category their use falls under before conducting a flight, as each category has specific requirements to which the operation must adhere.

Public aircraft are "owned and operated by the Government of a State…or a political subdivision of one of these governments"[16] as long as they are not being used for commercial purposes.[17] An FAA memorandum clearly states that "education is not a valid governmental function that supports the operation of an aircraft, whether manned or unmanned" unless the operation is tied to law enforcement, aeronautical research, geological resource management, or some other specific function described in [the FMRA].[18] The rationale behind this interpretation is that if the FAA were to expand governmental functions to include something as broad as education, unregulated aircraft operations would exponentially expand.[19]

The majority of school district operations, therefore, will not be considered public aircraft operations. For those operations that do qualify, such as school district police department flights, two options exist for ensuring the operation is authorized. The first is via a certificate of authorization (COA), which allows the operation of a particular aircraft for a particular purpose in a particular area. COAs are issued by the FAA for a limited time period and are obtained through an online registry. Designation as a public aircraft operation is attractive because those operations are generally not subject to the more extensive regulations governing civil aircraft. With the recent adoption of 14 C.F.R. Part 107 (the new rules for non-hobbyist small sUAS operations), however, some public aircraft operators may find it more efficient to fly in accordance with those rules (which will be discussed in more detail in the civil aircraft section below) instead of obtaining a COA. The Part 107 option could provide more flexibility as the operation would not be limited to the place, time and purpose limitations of the COA as long as the flight complies with the mandates of Part 107.

Model aircraft are specifically exempted from the public and civil categories. In order to be a model aircraft, the device must a) be flown for hobby or recreational purposes only, b) be operated in accordance with a community-based set of safety guidelines, c) not weigh more than 55 pounds, and d) not interfere with any manned aircraft. [20] Additionally, when flown within 5 miles of an airport, the operator must provide prior notice to the airport operator and air traffic control tower.[21] Note that there are no specific pilot certification requirements. The FAA is prohibited from promulgating any rule or regulation regarding a model aircraft unless the rule applies to all aircraft, such as regulations regarding registration and safety. Despite its fairly lax approach to model aircraft in general, Congress clarified that "nothing in the (FMRA) shall be construed to limit the authority of the Administration to pursue enforcement actions against persons operating model aircraft who endanger the safety of the national airspace system."[22]

The FAA takes a very narrow view of what constitutes a hobby or recreational purpose.[23] Given the absence of a definition of the terms "hobby" or "recreational use" in the FMRA, the FAA looks to the ordinary meaning of those words.[24] Specifically, the use must be in "pursuit outside one's regular occupation engaged in especially for relaxation" or "a means of refreshment or diversion" in order to qualify.[25] According to the FAA, commercial operations are clearly not hobby or recreation flights.[26] Neither are those "in furtherance of a business, or incidental to a person's business."[27] Therefore, if any exchange of money or financial benefit occurs, whether directly or indirectly, it is highly unlikely the flight will be deemed a recreational use subject to the model aircraft exemption.

Civil (non-governmental) aircraft are those UAVs that do not fit into the public or model aircraft category. Generally, these aircraft are used in commercial operations. In order to fly a civil UAV, an operator must conduct the operation in accordance with all applicable FAA regulations, including pilot certification and aircraft registration requirements. Once a fairly arduous task, compliance with such requirements and regulations was greatly eased with the finalization of the Operation and Certification of Small Unmanned Aircraft Systems Rule ("sUAS

Rule" or "Part 107") that went into effect August 29, 2016.[28] The sUAS Rule applies to unmanned aircraft weighing less than fifty-five pounds that are flown for non-hobby reasons, though hobbyists are free to comply with the rules if they so choose. Part 107 creates a new pilot certification called the "Remote Pilot in Command" ("RPIC"). Any operator must have a RPIC with an sUAS rating or be under the direct supervision of such an individual. To qualify for an RPIC certificate, a person must 1) pass an aeronautical knowledge test at an FAA-approved testing center or hold a part 61 pilot certificate other than a student pilot and complete an sUAS online training course; 2) be vetted by the Transportation Security Administration; and 3) be at least 16 years old. RPIC certificates are anticipated to cost approximately $150 and are valid for two years.

In addition to pilot requirements, the sUAS Rule imposes operational limitations on all small commercial UAS. These include, but are not limited to the following:

a. Operation must be within the visual line of sight ("VLOS") of the RPIC, though an observer could assist the operator. Binoculars and "first-person view" are not a substitute for VLOS;
b. Operation prohibited over people not directly involved in the flight, unless they are under a covered structure, or inside a stationary vehicle;
c. Operation limited to daylight only (or civil twilight with anti-collision lights);
d. Maximum airspeed (100 mph) and altitude (400 feet AGL);
e. Minimum weather visibility of 3 miles;
f. Air traffic controller permission required for operations in Class B, C, D, and E airspace, but none required in Class G airspace;
g. Aircraft must yield the right of way; and
h. Careless or reckless operations and carriage of hazardous materials prohibited.

A number of these requirements may be waived if the FAA finds the operation can be safely conducted under the terms of the requested waiver. Because the sUAS Rule is new, questions regarding implementation and enforcement are sure to arise. For example, an RPIC must report within 10 days any operation that results in serious injury, loss of consciousness, or property damage of at least $500. What is unclear is whether the property damage includes damage sustained by the aircraft itself, which in many instances would meet the $500 threshold even if no other property was implicated or damaged. Operators and interested parties are encouraged to visit the FAA's UAS site for more detailed information.[29]

FAA GUIDANCE

The FAA has issued a number of guidance documents relating to UAS. Of special interest to school districts is the "Educational Use of Unmanned Aircraft Systems" memorandum[30] which attempts to dispel uncertainty regarding whether particular educational uses are recreational (thereby exempt from FAA authorization) or civil (requiring FAA authorization). It provides that a person (student, faculty member, or community member) may operate a UAS as a model aircraft at schools and community-sponsored events if the person is not compensated or if any compensation is neither directly nor incidentally related to the person's operation of the aircraft. A student's operation of a UAS in furtherance of his or her aviation education at an "accredited educational institution" is a model aircraft operation. Faculty teaching courses that use UAS as a secondary component of the course may provide limited assistance students, but the student must maintain operational control in order for the UAS to be considered a model aircraft. A faculty member engaging in the operation of a UAS as part of his or her professional duties for which he or she is paid, however, would not be engaging in a recreational activity and would need FAA authorization.

The Educational Use memorandum leaves a number of grey areas. At what point does drone operation become part of an educator's professional duties? When is compensation directly or incidentally related to an operation? If a football coach, of his own volition, films a practice using a drone and only uses the film for review with the team, is that part of his professional duties? Does the answer change if the booster club uses the film to create a highlight reel that is sold for a fundraiser? Would the fundraiser be considered compensation incidentally related to the

operation? Could it somehow be considered compensation to the coach? Should districts avoid all these conundrums by using students to film practices? A conservative approach would call for school employees who utilize drones to comply with Part 107 unless their use unquestionably fits the model aircraft exception, keeping in mind that indoor operations are not regulated by the FAA.

Another important FAA guidance document is the "State and Local Regulation of Unmanned Aircraft System (UAS) Fact Sheet" which explores federal preemption of the airspace and instructs that state and local restrictions affecting UAS should be consistent with the federal statutory and regulatory framework. The fact sheet states that state or local governmental entities may not impose additional registration requirements on UAS without FAA approval and should consult with the FAA before enacting any law that addresses operational restrictions or regulation of the navigable airspace. According to the FAA, "federal courts strictly scrutinize state and local regulation of overflight."[31] State and local laws dealing with government police power, such as warrants for UAS surveillance, prohibiting voyeurism, prohibitions regarding hunting, and prohibiting attaching weapons to a UAS are generally permissible.

The extent of the federal government's authority to preempt the navigable airspace, as well as the limits of that airspace, is sure already the subject of a legal challenge. In the "Droneslayer" case pending in Kentucky, a property owner shot down a drone that he alleged was hovering over his property, taking pictures of his daughter—a claim the drone owner contests.[32] Kentucky law allows a landowner to use physical force when necessary to prevent the commission of criminal trespass, but federal law allows a UAS to operate in navigable airspace. This case presents a prime example of how federal aviation law and state privacy law can collide. As is the issue in the *Boggs* case, at what point do state laws protecting privacy become regulation of overflight? Cases such as these are sure to become more prevalent as drones increasingly take to the skies.

REGISTRATION

Due to increasing safety and security concerns raised by unauthorized flights near airports and public places, coupled with the anticipated popularity of drones last holiday season, the FAA now requires all commercial and recreational drone owners to register their aircraft using a web-based process.[33] The registry only applies to drones weighing less than 55 pounds and more than .55 pounds. A registrant must be at least thirteen to register, though children under thirteen may operate a drone under a parent or guardian's registration. In order to register, a person would be required to provide his or her name, address, and e-mail address. Upon registration, the operator would receive a unique identification number that must be clearly marked on each drone he or she owns. All registrants must renew their registration every three years. Failure to register could result in civil penalties, as well as criminal penalties including fines of up to $250, 000 and/or imprisonment for up to three years.

FAA ENFORCEMENT

Failure to comply with the requirements of the particular category of drone use under which the operation falls can result in steep fines. Anyone who conducts an unauthorized operation or operates in a way that endangers the safety of the national airspace system can be subject to warning notices, letters of correction, and civil penalties up to $27,500 per violation.[34] Despite this fairly broad enforcement authority, a recent Freedom of Information Act request revealed that, as of June 2016, only 24 people or companies have been fined for noncompliant drone operations.[35] The standard violation is for reckless or careless operation. Fines commonly range from $1,100 to $2,200, though one company was assessed a fine of $1.9 million. Interestingly, drone operators seem to be their own worst enemies, as evidence leading to most enforcement actions usually comes from the operator's YouTube videos or commercial website.

Two challenges to the FAA's enforcement authority have been filed thus far. In the first case of its kind, *Huerta v. Pirker,*[36] a drone operator, Raphael Pirker, a.k.a. "Trappy," was fined $10,000 for reckless

operation of an aircraft while using a styrofoam Zephyr drone to film a promotional video for the University of Virginia. Pirker appealed the fine to an Administrative Law Judge challenging the FAA's authority to regulate the drone operation. The ALJ sided with Pirker, finding that, despite being paid, Pirker was operating a model airplane and not an "aircraft" subject to FAA enforcement authority. According to the ALJ, at the time of the operation, there were no enforceable FAA rules or Federal Aviation Regulations pertaining to operations such as these. The FAA immediately appealed the decision to the National Transportation Board, which overturned the ALJ, ruling that the definition of aircraft in 14 C.F.R. §1.1 applies to model aircraft and unmanned aircraft. As such, the aircraft was subject to 14 C.F.R. §91.13(a), which prohibits a person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another. The NTSB remanded the case to determine whether Pirker operated the aircraft in a reckless or careless manner. Ultimately, Pirker settled with the FAA for $1,100 and the question of what constitutes a reckless or careless operation remains unanswered.

In the aftermath of *Pirker*, FAA regulations were tightened to clarified the FAA's enforcement authority over UAS and model aircraft, but that authority was once again called into question when the FAA sought to investigate the use of weaponized drones in two YouTube videos. The first video showed a handgun attached to a drone being fired from the air. The second video depicted a turkey being scorched by a drone-mounted flamethrower. The FAA served the drone operator and his father with administrative subpoenas requiring them to submit to questioning about the videos. The father and son declined to comply, stating their drones are not "aircraft" and were therefore not subject to the FAA's enforcement authority. In the subpoena enforcement action, the court found that while the definition of "aircraft" is "stunningly broad," the subpoenas were enforceable.[37]

In dicta, however, the *Haughwout* court touched upon the preemption question, pointing out the disconnect between the FAA's expansive stance that it has "regulatory sovereignty over every cubic inch of outdoor air in the United States (or at least over any airborne objects therein)" and the state and local police power "to regulate what people do in their own backyards." Noting the Supreme Court has ruled that "a landowner owns at least as much of the space above the ground as he can occupy or use,"[38] the *Haughwout* court queried whether that ownership interest must yield to FAA authority the moment a drone is set aloft. Recognizing that the case at bar did not require an answer to that very important question, the court ended its opinion with an accurate prediction: "as with the advent of airplanes before them, the next generation of drones and similar flying contraptions will continue to challenge and shape the law that governs them."

STATE LAW

In addition to federal law, several Texas laws specifically address unmanned aircraft. One prohibits flights over critical infrastructure, such as refineries and water treatment facilities.[39] Another requires the Texas Department of Public Safety to adopt rules governing the use of drones in the Capitol Complex.[40] The law of particular interest to private citizens and schools, however, is the Texas Privacy Act, which governs images taken with the use of unmanned aircraft.[41] Passed in 2013, this Act creates a criminal offense for using a drone to take an image of an individual or privately owned real property with the intent to conduct surveillance on the individual or property.[42] Additional penalties are imposed for displaying or disclosing the image.[43] A property owner or tenant may bring a civil action against a person who has captured an illegal image.[44]

Under the Texas Privacy Act, not all images taken by drone are unlawful. "Images" include those that capture sound, infrared, thermal, and ultraviolet waves, as well as odor. Images captured by drone are lawful in a variety of circumstances, such as those taken for research by an institution of higher education, for real estate marketing purposes, to assess vegetation growth on utility lines, or for public safety such as fire suppression or rescue operations.[45] While additional types of images are specifically permitted, one that may concern school districts allows images taken of "public real property or a person on that property."[46] No definition of public real property is included in the Privacy Act, though it would be dif-

ficult to argue that a public school is not on public real property. This distinction gives rise to important questions. For example, is it permissible for a person to fly a drone over a playground and take pictures of children? Could a drone hover outside the window of a classroom and take video of the class? Can a district limit a person's drone access on public school property without incurring a Constitutional challenge? Unfortunately, no case law exists that provides insight or answers to these questions.

That being said, school districts are not completely without options in these situations. Local law enforcement agencies have been asked to cooperate with the FAA in detecting, investigating and enforcing penalties for reckless, careless or unauthorized drone operations.[47] If a drone flight is reckless or endangering students, the district should immediately contact local law enforcement. Additionally, given the deference courts generally give schools to promote the safety of children, the Education Code's grant of authority to boards of trustees to adopt rules for the safety and welfare of students,[48] and the FAA's requirement that a model airplane be flown "in accordance with a community-based set of safety guidelines,"[49] a local policy prohibiting outside drone flights from landing or originating on school property is defensible. Given the FAA's desire to avoid fractionalized control of the navigable airspace, it is unlikely a blanket prohibition of flights over school district property would receive the FAA's blessing.[50] Future legal challenges regarding property owners' ability to control the airspace over their land are sure to have a bearing on this issue.

Another disconcerting exception in the Privacy Act covers images taken from a height no more than eight feet above ground level in a public place, if the image is captured without using any electronic, mechanical, or other means to amplify the image beyond normal human perception.[51] Just as an average person standing on a public sidewalk or area near a school can take pictures with a camera, apparently so, too, can he do so with a drone if no amplification is used.

The Texas Privacy Act is the subject of a current legal challenge that may be of special interest to school districts near the border with Mexico. Specifically, the Act allows images to be taken of real property within twenty-five miles of the U.S. border or of people on that property.[52] A landowner who lives within the affected area recently filed suit seeking a declaratory judgment that this provision violates the Equal Protection Clause and his right to privacy.[53] While only a narrow provision of the Texas Privacy Act is being challenged, the court's ruling will be an interesting indicator of things to come.

School district police departments should pay special attention to the Texas Privacy Act, as a number of its provisions specifically relate to images taken by law enforcement using UAS.[54] Such images are permissible if, for example, they are pursuant to a valid search or arrest warrant, captured in immediate pursuit of a suspect, taken to document certain crime scenes, or taken for the purpose of protecting property or preserving public safety.[55] Clearly, law enforcement officials do not have an unfettered right to take drone images wherever, whenever. That being said, the exception relating to images taken of public property and people on that property diminishes an individual's privacy interest when on outdoor school property, arguably allowing school district police departments full authority to patrol school grounds. Time will tell as courts begin to grapple with the very difficult tasks of weighing privacy interests, allowing technological flexibility, and safely maintaining the airspace as a "public highway."[56]

LIABILITY CONCERNS

A particular area of concern for any district that owns or is considering using a drone is whether the district could be held liable should the drone injure a person or damage private property. While school districts enjoy a wide degree of immunity in tort actions, the Texas Tort Claims Act ("TTCA") waives that immunity in situations involving the operation or use of a motor-driven vehicle.[57] Whether drones are motor-driven vehicles is a question that has not yet been addressed. Case law would indicate, however, that they are not. Because the TTCA does not provide a definition of "motor-driven vehicle," courts have generally looked to the Transportation Code to provide the definition.[58] The Transportation Code defines "motor vehicle" as a vehicle that is self-propelled.[59] A "vehicle" is defined as "a device that can

be used to transport or draw persons or property *on a highway*," other than a device used exclusively on stationary rails or tracks" (emphasis added).[60] By its very name, an unmanned aerial vehicle is a vehicle. It is self-propelled and, if it is carrying a camera, it is arguably transporting property. However, drones are not operated on land, much less on a highway. Given the ordinary meaning of the word "vehicle," it would be a stretch to liken a drone to a tractor, bus, golf cart, or other device that courts have found to fall into the "motor-driven vehicle" category. Nonetheless, any district considering purchasing a drone should consult its insurance broker regarding coverage. Additionally, if the district intends to hire a contractor or consultant who employs a drone for their services or work, the district should consider allocating any risk relating to such use through contractual indemnity and/or insurance.

POLICIES/ORDINANCES

In addition to state and federal law, districts should be aware of any local ordinance or other policy that may address drone use. Austin, for example, recently banned drone flights over the 2016 South by Southwest conference and maintains aviation ordinances such as one that prohibits a person from causing an object to be thrown, discharged or dropped from an aircraft.[61] Austin police will continue to focus on things like drone use near crowds of people, reckless drone operation, or drone use in a way that could hurt someone or damage property. Echoing the same emphasis on safety, in 2015 the Texas Association of Sports Officials announced that the University Interscholastic League (UIL) and the Texas Association of Private and Parochial Schools (TAPPS) issued guidance on drone use for their member schools.[62] Specifically, the UIL and TAPPS allow drone use for practice purposes only, subject to local discretion. Drones may not be used in conjunction with any scrimmage or game. TAPPS further clarifies that drones may not be used during warm-up, contest or half-time.[63]

SUMMARY

What does this all mean for school districts that own a drone or want one, or for the lawyers who advise them? A district that has or is considering obtaining a drone needs to be aware of the developing laws and regulations governing its use.While drone law is a new and rapidly developing area, some things are certain.

- Register any recreational drone (whether currently owned or obtained in the future) on the new online registry.
- Unless a flight in unquestionably recreational, ensure that it complies with the rules set forth in 14 C.F.R. Part 107.
- Never fly in a way that endangers people or property.
- Every flight must be in accordance with FAA rules and regulations. The FAA's "Know Before You Fly" campaign is a good place to start.[64]
- Be aware of local restrictions and community-based safety standards.
- Be on the lookout for changes in law and regulations.
- Consult the district's insurance carrier to ensure appropriate coverage is in place.
- Consider a school policy addressing requirements for operation by employees and third parties.

ENDNOTES

1 Debra Moritz Esterak is a Partner at Rogers, Morris and Grover, L.L.P.

2 The word "drone" is not defined or used in state and federal laws and regulations. "Drone" is a term used in common parlance that broadly refers to all devices that are unmanned aerial vehicles, though aircraft enthusiasts would point out that the definition is more nuanced and complicated. This article will use the terms "drone," "model aircraft," and "UAV" or "UAS" interchangeably unless specifically noted.

3 http://www.faa.gov/data_research/aviation/aerospace_forecasts/media/FY2016-36_FAA_Aerospace_Forecast.pdf

4 http://www.chicagotribune.com/suburbs/elgin-courier-news/news/ct-high-school-football-drone-met-20141024-story.html

5 http://www.thatdroneshow.com/nj-high-school-uses-drones-classroom/

6 https://www.tamucc.edu/news/2015/08/080715%20UAS%20Summer%20Institute.html

7 http://time.com/3914087/china-drones-cheating-exams/

8 http://www.nytimes.com/2015/09/23/business/drone-crash-injures-baby-highlighting-faa-concerns.html?_r=0

9 http://www.cnn.com/2015/08/04/us/prison-yard-drone-drugs-ohio/

10 http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx

11 Title 49 U.S.C. §40103(b)

12 Title 49 U.S.C. §40102, *see also* 14 C.F.R. §1.1

13 P.L. 112-95 §331

14 See Fed. Aviation Admin., Unmanned Aircraft Systems (UAS) – Frequently Asked Questions/Help, https://www.faa.gov/uas/faqs/ (accessed August 24, 2016) (QUESTION: "If I'm just flying my UAS inside a building, or in my own yard, do I have to register it" with the FAA? ANSWER: "If you're flying indoors, you do not need to register your unmanned aircraft as the FAA does not regulate indoor UAS use. However, when flying in your own yard or over your own property, you will need to register your UAS if the UAS weighs more than 0.55 pounds.")

15 P.L. 112-95 §§331-336

16 Title 49 U.S.C. §40102(a)(41)

17 Title 49 U.S.C. §40125(b)

18 FAA Memorandum from Mark W. Bury, Assistant Chief Counsel for International Law, Legislation and Regulations, AGC-22 to James Williams, Manager, UAS Integration Office, AFS-80, July 3, 2014

19 *Id.*

20 P.L. 112-95 §336(a)

21 *Id.*

22 P.L. 112-95 §336(b)

23 *See* Interpretation of the Special Rule for Model Aircraft, 14 CFR Part 91 [Docket No. FAA-2014-0396],79 Federal Register 36172, June 25, 2014 ("flights that are in furtherance of a business, or incidental to a person's business, would not be a hobby or recreation flight.")

24 14 C.F.R. Part 91 [Docket No. FAA-2014-0396],

25 *Id.*, pg. 9

26 *Id.*

27 *Id.*

28 14 C.F.R. Part 107

29 http://www.faa.gov/uas/

30 FAA Chief Counsel Reginald Govan, May 4, 2016

31 State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation Administration, Office of the Chief Counsel, Dec. 17, 2015, citing *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 623 (1973)

32 *Boggs v. Meredith*, No. 3:16-cv-6-DJH (W.D. Ky.—Louisville, filed January 4, 2016)

33 FAA Rule, Registration and Marking Requirements for Small Unmanned Aircraft, FAA Docket No. FAA-2015-7396, 80 FR 78593

34 9 U.S.C. § 46301

35 Koebler, Jason, "The FAA Gave Us a List of Every Drone Pilot Who Has Ever Been Fined," June 1, 2016 (viewed at http://motherboard.vice.com/read/faa-drone-fines on August 16, 2016).

36 *Huerta v. Pirker*, NTSB Docket CP-217, Order No. EA-5730, Nov. 18, 2014

37 *Huerta v. Haughwout*, No. 3:16-cv-358 (JAM) (D. Conn. July 18, 2016).

38 *United States v. Causby*, 328 U.S. 256, 264 (1946)

39 Texas Government Code §423.0045

40 Texas Government Code §411.062

41 Title 4, Texas Government Code, Ch. 423

42 Texas Government Code §423.003

43 Texas Government Code §423.004

44 Texas Government Code §423.006

45 Texas Government Code §423.002

46 Texas Government Code §423.002(a)(15)

47 https://www.faa.gov/uas/resources/uas_regulations_policy/

48 Texas Education Code §37.102

49 Note that "community-based set of safety guidelines" is not defined in the FAA Modernization Act, and could conceivably include TASB recommended policy or those promulgated by a local school district.

50 *See* State and Local Regulation of Unmanned Aircraft Systems (UAS) Fact Sheet, Federal Aviation Administration, Office of the Chief Counsel, Dec. 17, 2015

51 Texas Government Code §423.002(a)(16)

52 Texas Government Code §423.002(a)(14)

53 *Flores v. State of Texas*, No. 5:16-CV-00130 (S.D. Tex.—Laredo, filed April 15, 2016).

54 Note that certain law enforcement agencies are required to submit a report to the state every other year regarding the particulars of any drone use for law enforcement purposes.

55 Texas Government Code §423.002(a)(7-9)

56 *United States v. Causby*, 328 U.S. 256, 261 (1946)

57 Interestingly, the waiver of immunity for other governmental entities is not as narrow and applies in situations arising from not only the use or operation of motor-driven *vehicles*, but also of motor-driven *equipment*.

58 See *Brookshire v. Hous. Indep. Sch. Dist.*, 508 S.W.2d 675 (Tex. Civ. App.—Houston [14th Dist.] 1974) (forklift is not a motor vehicle), *Lipan Indep. Sch. Dist. v. Bigler*, 187 S.W.3d 747 (Tex. App.—Fort Worth 2006) (a tractor is a motor vehicle)
Ozolins v. N. Lake Cmty. Coll., Div. of Dall. Cnty. Cmty. Coll. Dist., 805 S.W.2d 614 (Tex. App.—Fort Worth 1991) (sailboat is not a motor vehicle), *Slaughter v. Abilene State Sch.*, 561 S.W.2d 789 (Tex. 1977) (tractor is a motor vehicle).

59 Texas Transportation Code §541.201(11)

60 Texas Transportation Code §541.201(23)

61 Austin, Texas Code of Ordinances, Title 13, Ch. 13, §13-1-14

62 http://www.taso.org/rule/football/uil-and-tapps-drone-policy

63 https://tapps.biz/use-of-drones/,
https://tapps.biz/athletic-codes/drones/

64 http://knowbeforeyoufly.org/about-us/

BAD TEACHERS, BAD TEACHERS, WHATCHA GONNA DO…

by Rebecca Bradley[1]

No adult that I know can hear police sirens without thinking about the *Cops* theme song, "[b]ad boys, bad boys . . . whatcha gonna do, whatcha gonna do when they come for you." Unfortunately, sometimes employees make mistakes, the kind of mistakes that make an attorney hear the *Cops* theme song as the attorney reviews the file. While Chapter 37 of the Texas Education Code provides the statutory requirements on a how a school district must react or may react to a student's arrest, conviction, or indictment, what does a school district do with an employee after an arrest?

First, as with most legal issues, it is important that a school district not immediately take adverse employment consequences upon receipt of information that an employee or applicant has been arrested, convicted, or indicted for a criminal offense. All school districts must conduct an individualized assessment of an employee's criminal history, which now includes the arrest, conviction, or indictment for a criminal offense. The Equal Employment Opportunity Commission ("EEOC") provides that the use of an arrest as the sole reason for enforcing negative employment consequences may violate Title VII of the Civil Rights Act of 1964 ("Title VII"). However, the conduct underlying the arrest may lead to disciplinary consequences for an employee, up to and including termination, without violating Title VII.

An employee may be placed on administrative leave with pay pending the outcome of the individualized assessment or investigation into the conduct underlying the arrest. Before proceeding with an investigation into the conduct underlying an employee's arrest, the school district should contact law enforcement to determine whether an investigation would taint or interfere with law enforcement's investigation. Assuming law enforcement allows a school district to investigate, a school district may request documents concerning the employee's arrest from law enforcement through a public information request, allow the employee an opportunity to respond, and interview any available witnesses.

After the information has been gathered and an employee has been provided the opportunity to respond, then a school district may review factors including, but not limited to:

1. The nature of the offense;
2. The age of the person when the crime was committed;
3. The date of the offense and how much time has elapsed;
4. The adjudication of the offense (e.g., whether the person was found guilty by a trier of fact, pled guilty, entered a no contest plea, or received deferred adjudication);
5. The nature and responsibilities of the person's position (or job sought);
6. The accuracy of the person's disclosure of his or her criminal history during the selection process;
7. The effect of the conduct on the overall educational environment; and
8. Any further information provided by the person concerning his or her criminal history record.

Finally, upon the completion of the investigation into the conduct underlying arrest, taking into account all of the factors listed above, the employer must make an ultimate determination as to whether adverse employment action for the offense is job related and is consistent with a business necessity.

For more information regarding this topic, the EEOC's guidance is informative and may be found at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

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1 Rebecca is an associate attorney with Abernathy, Roeder, Boyd & Hullett, P.C. in McKinney.

Commentary:

PRINCIPAL REASSIGNMENTS: ALL ADMINISTRATORS ARE NOT EQUAL

by Kevin Lungwitz[1]

> "The District shall have the right to assign or reassign the Employee to positions, duties, or additional duties and to make changes in responsibilities, work, or transfers, at any time during the contract term." (Common school employee contract language.)
>
> A teacher is, "A superintendent, *principal*, supervisor, classroom teacher, counselor, or other full-time professional employee who is required to hold a certificate . . . , or a nurse." Tex. Educ. Code § 21.201(1) (emphasis added).
>
> "The board's failure to give [lawful notice of proposed nonrenewal] … constitutes an election to employ the [principal] in the same professional capacity for the following school year." Tex. Educ. Code § 21.206.

Principals are commonly reassigned with no reasons given and no opportunity to defend. With little time to clean out the office, a veteran principal and the instructional leader of a campus may be reassigned to one of several assistant principal positions at another campus. The principal is not entitled to a quasi-due-process non-renewal hearing where the basis for the reassignment might be confronted. The principal can file a stop, look, and listen grievance or a discrimination/retaliation claim; or the principal may resign in lieu of the demotion.

Hopefully we can agree that a school district's involuntary reassignment of a principal to a teacher position is illegal. Despite the contract language above, it would violate the "same professional capacity" language in the Texas Education Code § 21.206. More than 30 years ago, the commissioner said, "An administrator … may not be placed in the capacity of a classroom teacher; a classroom teacher may not be placed in the capacity of a counselor; a counselor may not be placed in the capacity of a nurse; a nurse may not be placed in the capacity of a librarian, etc." *Barich v. San Felipe-Del Rio Cons. Indep. Sch. Dist.*, Docket No. 117-R1a-484 (Comm'r Educ. 1985).

Rewind. Notice in *Barich* the commissioner took the job positions in §21.201 and referred to each of them as a §21.206 "capacity." Indeed the commissioner has assured school employees that §21.206 is "a central plank" in an educator's statutory contract rights.[2] The commissioner recently described the competing interests in reassignments:

> The district is given some flexibility to reassign employees in order to manage staff to cover school needs, *while employees are assured of due process to protect against decisions that effectively demote them or fundamentally alter their existing contractual relationships with and duties to the employing district.*

Wheeler v. Austin Indep. Sch. Dist., Docket No. 008-R3-1108, p. 3 (Tex. Comm'r Educ. 2011) (emphasis added).

The commissioner's assurances would seem to protect a veteran principal from being involuntarily reassigned as an assistant principal with little notice and no reasons. Certainly these assurances would protect a principal from reassignment to attendance coordinator or science specialist. But they do not. In spite of the commissioner's pledge to protect against demotions, by transitive equality (if a=b and b=c then a=c), the commissioner has

approved all of these reassignments. The commissioner has blessed all of the positions in §21.201 as protected capacities in §21.206, except that of principal.

The operative word is "administrator." Unlike principal, the term administrator is used in some contracts and is discussed by the commissioner in some cases, but it is not defined in the Texas Education Code. Even when the principal is employed under an insufficient "employee" contract, it does not matter. If the employee works as a principal, the employee is a generic administrator in the eyes of the commissioner, at risk of reassignment to any other administrative position.[3] The commissioner believes all jobs that have administrative qualities are equal.[4] This is not hyperbole. A review of cases over the last 30 years, shows that the commissioner has never granted an administrator's appeal if the school district can vaguely characterize the reassignment as being from one administrator position to another.[5] No matter how different the authority, duties and salary, the result for administrators is always the same: The commissioner has approved all administrator-to-administrator reassignments.

The principal position is unique. The principal is the only instructional leader of the campus. Principal is defined by law, as is superintendent.[6] All other administrator positions are defined by the school district. Texas issues a principal certificate, not a generic administrator certificate. A principal is entitled to a contract.[7] An administrator is not. Principal is named in § 21.201 as a capacity in § 21.206. Assistant principal and administrator are not. A principal is not a generic administrator.

Administrators have the least protection from reassignments than any other contract position. There is a wider range of administrator positions than in other professional categories allowing a school district to use a reassignment as a tool to demote. A teacher may be reassigned, but a teacher must remain a teacher - same with counselor, librarian and nurse. But in the eyes of the commissioner, an assistant superintendent, principal, assistant principal, science specialist, attendance coordinator, and any other quasi-administrative positions are all interchangeable. However, a principal should be recognized as a protected job capacity and should be exempt from a unilateral, involuntary reassignment.

ENDNOTES

1 Kevin Lungwitz represents all categories of school employees across the state in a variety of employment and certification matters. The Lungwitz Law Firm, P.C. is the outside general counsel to the Texas Elementary Principals and Supervisors Association. Kevin represents the appellant in *Jenkins v. Crosby ISD*, et.al pending at the Austin Court of Appeals.

2 *Tuck v. Alief Indep. Sch. Dist.*, TEA Docket No. 008-R10-1007 (Comm'r Educ. 2012) Three years after declaring §21.206 a "central plank" in employee contract rights, the commissioner backtracked and declared that professional capacity protection is not available in the middle of a multi-year contract. *Hughes v. Lancaster Indep. Sch. Dist.*, TEA Docket No. 048-R3-0112 (Comm'r Educ. 2013); *Jenkins v. Crosby Indep. Sch. Dist.*, TEA Docket No. 043-R10-1211 (Comm'r Educ. 2013).

3 *See Jenkins v. Crosby Indep. Sch. Dist. See also infra* n.4, and accompanying text.

4 *See Jenkins v. Crosby Indep. Sch. Dist.*, table below. *See also infra* n.4, and accompanying text.

5 *See* table:

Commissioner Approved Administrator Reassignments			
Case	Contract position	Reassign from	Reassign to
Keith v Tarkington Indep. Sch. Dist., Docket No. 459-R3-491 (Comm'r Educ. 1992)	Prof. Employee	Athletic Dir.	Teacher/AP
Carpenter v. Wichita Falls Indep. Sch. Dist., Docket No. 247-R3-491 (Comm'r Educ. 1993)	Administrator	Science support specialist	High sch. P

Veliz v. Donna Indep. Sch. Dist., Docket No. 011-R3-999 (Comm'r Educ. 2000)	Administrator	Attendance coordinator	Middle sch. AP
Pasqua v. Fort Stockton Indep. Sch. Dist., Docket No. 011-R3-1102 (Comm'r Educ. 2004)	Administrator	HS P	Middle sch. AP
Perales v Robstown Indep. Sch. Dist., Docket No. 052-R10-104, 084-R3-604 (Comm'r Educ. 2006)	Administrator	Director of Even Start	Middle sch. AP
Sanchez v. Donna Indep. Sch. Dist., Docket No. 075-R10-605 (Comm'r Educ. 2007)	Administrator	Central office	AP
Gonzalez v. Donna Indep. Sch. Dist., Docket No. 074-R10-605 (Comm'r Educ. 2007)	Administrator	Central office	AP
Perez v. Donna Indep. Sch. Dist., Docket No. 086-R1-705 (Comm'r Educ. 2007)	Administrator	Central office	AP
Lehr v. Ector County Indep. Sch. Dist., Docket No. 003-R3-0908 (Comm'r Educ. 2011)	Administrator	Exec. Dir. SPED	Elem. AP
Murillo v Laredo Indep. Sch. Dist., Docket No. 027-R3-0108 (Comm'r Educ. 2012)	Prof. Employee	Middle sch. P	HR Coord.
Montgomery v. Richardson Indep. Sch. Dist., Docket No. 007-R10-1008 (Comm'r Educ. 2012)	Administrator	Elem P.	Program Spec. II
McCoy v. Kermit Indep. Sch. Dist., Docket No. 004-R3-0908 (Comm'r Educ. 2012)	Administrator	P	AP
Jenkins v. Crosby Indep. Sch. Dist., Docket No. 043-R10-1211 (Comm'r Educ. 2013); *Jenkins v. Crosby ISD*, Case No. 03-15-00313-CV, (Tex. App. Austin pending)	Employee	Middle sch. P	High sch. AP
Gustafson v. Canutillo ISD, TEA No. 113-R10-0812 (2014)	Administrator	High sch. P	Elem. AP

6 Tex. Educ. Code §§11.201-202. The Texas Education Code sets forth in detail the role and duties of a principal—making "principal" a legal term of art, as well as an educational term of art.

7 Tex. Educ. Code §21.002.

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