

SCHOOL LAW OVERVIEW: LAWSUITS & COMPLAINTS THAT CAN RUIN YOUR MOMENTUM

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I. TORTS AND THE DOCTRINE OF SOVEREIGN IMMUNITY

With limited financial resources and responsibility for so many accident-prone individuals, school districts could very easily spend all their education dollars fighting personal injury suits. *Braun v. Victoria ISD*, 114 S.W.2d 947, 950 (Tex.Civ.App.—San Antonio 1938, *writ ref'd*). With this in mind, the Texas Legislature preserved the school districts' broad sovereign immunity. Sovereign immunity is the notion that the government cannot be sued. Think of sovereign immunity as a shield that protects school districts and their employees from tort suits. The areas where school districts and their employees face tort liability are limited to areas *not covered* by sovereign immunity.

A. LIABILITY OF THE SCHOOL DISTRICT ITSELF

School districts look to the Texas Tort Claims Act to determine the scope of their tort liability for personal injury and property damage. §101.021 of the Civil Practice and Remedies Code lists the areas where the Texas Legislature wants there to be liability. That is, the Act tells us where sovereign immunity does *not* apply. Apparently in recognition of the potential for numerous personal injury claims, the legislature carved out very narrow exceptions to the school districts' sovereign immunity. In Texas, school districts are only liable in tort for personal injury or property damage in two potential scenarios: the use or operation of a motor vehicle; or when administering medication to students. TEX. CIV. PRAC. & REMEDIES CODE, §§ 101.021 & 101.051.

1. LIABILITY FOR USE OR OPERATION OF MOTOR VEHICLES

When interpreting the motor vehicle exception, the courts have been careful not to allow liability simply because a motor vehicle is involved in the lawsuit. When school children were hit and injured by a car driven by a student while they waited for a school bus, the injuries sustained did not create a cause of action under this exception because a school vehicle did not *cause* the injuries. *Heyer v. North East Independent School District*, 730 S.W.2d 130 (Tex.App.—San Antonio 1987, *writ ref'd n.r.e.*). Liability has likewise been rejected when the motor vehicle is merely the stage on which the injury occurs, but is not the cause of the injury. As a result, school districts were not liable for the death of a student in a knife fight aboard a bus, nor for injuries to a child who has suffered convulsions from cerebral palsy while on the bus since the bus was only the setting for the injuries. *Estate of Garza v. McAllen*, 613 S.W.2d 526 (Tex.Civ.App.—Beaumont 1981, *writ ref'd n.r.e.*); *Hopkins v. Spring Independent School District*, 736 S.W.2d 617 (Tex. 1987). See also, *LeLeaux v. Hampshire-Fannett ISD*, 835 S.W.2d 49 (Tex. 1992).

Liability has been found, however, when a child exited a school bus and following the bus driver's directions, crossed the street and was struck by a car. Likewise, where the driver fails to activate the flashers or warning signals on the school bus when the children are exiting, the district is liable for the injuries to a child hit while crossing the street. *Madisonville ISD v. Kyle*, 658 S.W.2d 149 (Tex. 1983); *Hitchcock v. Garvin*, 738 S.W.2d 34 (Tex.App.—Dallas 1987, *no writ.*). Most commentators agree that there would be liability for personal injury or property damage caused by a private vehicle driven by a district employee on district business.

2. ADMINISTERING MEDICATION

School district employees are sometimes asked by parents to administer medication to their children at school. While this practice does not necessarily trigger school district liability, if it is not performed in the proper manner, a school district

could be responsible for mistakes made by its personnel, or for their gross negligence. The Texas Education Code provides:

“Sec. 22.052. ADMINISTRATION OF MEDICATION BY SCHOOL DISTRICT EMPLOYEES OR VOLUNTEER PROFESSIONALS; IMMUNITY FROM LIABILITY.

- (a) On the adoption of policies concerning the administration of medication to students by school district employees, the school district, its board of trustees, and its employees are immune from civil liability from damages or injuries resulting from the administration of medication to a student if:
- (1) the school district has received a written request to administer the medication from the parent, legal guardian, or other person having legal control of the student; and
 - (2) when administering prescription medication, the medication appears to be in the original container and to be properly labeled.
- (b) The board of trustees may allow a licensed physician or registered nurse who provides volunteer services to the school district and for whom the district provides liability insurance to administer to a student:
- (1) nonprescription medication; or
 - (2) medication currently prescribed for the student by the student's personal physician.
- (c) This section may not be construed as granting immunity from civil liability for injuries resulting from gross negligence.”

Should the district dispense medication without the required written request or a properly labelled original container (if prescription medication were administered), the district would be liable for any injuries suffered by the student. Likewise, this limited grant of immunity would not apply should a child be injured by the gross negligence of a school district employee in administering medication. Note further the board policies must be in place for immunity to apply!

B. LIABILITY OF SCHOOL DISTRICT EMPLOYEES

The general rule is that “[t]rustees and agents of a school district while acting in such official capacity, enjoy the same governmental immunity as does the school district.” *Stimpson v. Plano ISD*, 743 S.W.2d 944 (Tex.App.—Dallas 1987, writ *dism’d.*). Like school district immunity, immunity for personnel has its roots in common sense and good public policy. Since we won’t know until trial whether the allegations have any merit, school employees, the innocent as well as the guilty, would have to endure the burden of trial and the inevitable danger of its outcome. With liability on the horizon, it is doubtful that most employees could exercise their duties with the necessary vigor. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), quoted in *Baker v. Storey*, 621 S.W.2d 639 (Tex.Civ.App.—San Antonio 1981, writ *ref’d n.r.e.*).

“Sec. 22.051. IMMUNITY FROM LIABILITY FOR PROFESSIONAL EMPLOYEES.

- (a) A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee’s position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.
- (b) This section does not apply to the operation, use, or maintenance of any motor vehicle.
- (c) In this section, “professional employee” includes:
- (1) a superintendent, principal, teacher, supervisor, social worker, counselor, nurse, and teacher’s aide;
 - (2) a student in an education preparation program participating in a field experience or internship;
 - (3) a school bus driver certified in accordance with standards and qualifications adopted by the Department of Public Safety; and
 - (4) any other person whose employment requires certification and the exercise of discretion.”

The three requirements in subsection (a) are fairly logical. The first creates the exception for discipline. The second recognizes the reason for immunity—if officials are immune so that they can carry out their official responsibilities, they should only be immune so long as they are acting officially. The final requirement creates the distinction between discretionary and ministerial acts. The act is discretionary if it involves the exercise of judgment or discretion. It is

ministerial “where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of judgment or discretion.” *Austin v. Hale*, 711 S.W.2d 64 (Tex.Civ.App.—Waco 1986, no writ).

1. EMPLOYEE TORT LIABILITY FOR DISCIPLINE

In his Proposed Voluntary Student Code of Conduct, former Attorney General Mark White described corporal punishment as “any type of punishment administered to a student’s body.” This widely accepted definition encompasses conduct such as striking the child with one’s hand, grabbing a child, pushing a child, restraining a child, or throwing something at a child. Truly creative educators are not sued for paddling, but for things like striking a student on the head with a coffee cup (*Coleman v. Franklin Parish School Board*, 702 F.2d 74 (5th Cir. 1983)) or a tennis shoe (*Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971).), forcing students to eat potato chips off the floor, throwing shoes, chalk and erasers at them, and blowing whistles in their ears. (*Gonzalez v. Brown*, 768 F. Supp. 581 (S.D. Tex. 1991).)

Corporal punishment can only be used for the “special purpose,” of “controlling, training, and educating the child.” *Hogenson v. Williams*, 542 S.W.2d 456, 459-60 (Tex.App.—Texarkana 1976, no writ). Do not be misled by the broad language. The force must be reasonable, and cannot be used to punish a child’s failure to perform academically or athletically, “even though the teacher considers such violence to be instruction and encouragement.” *Id.*, at 460.

A. EXCESSIVE FORCE IN THE DISCIPLINE OF STUDENTS a/k/a CORPORAL PUNISHMENT

Excessive force creates the liability. An educator using corporal punishment should have reasonable force as the goal. Unfortunately, what is reasonable depends on the student and the circumstances. “Whether it is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the scholar, with all the attending and surrounding circumstances to be judged by the jury[.]” *Dowlen v. State*, 14 Tex.App. 61, 66 (1883). A student who cannot mentally connect the punishment to his conduct is a poor candidate, as are students with brittle bones, back problems or other similar ailments.

A disabled child eligible under special education or §504 should never be paddled without consulting the child’s behavior management plan to determine whether corporal punishment is an appropriate discipline management technique for this particular child. If the ARD Committee or the §504 Committee has determined that corporal punishment is not an acceptable method, that is, corporal punishment is not effective or appropriate for this child, it would be difficult for the principal to argue that any use of force is not excessive. The safest course is to avoid using corporal punishment. *For additional reasons to avoid corporal punishment altogether, see the section on criminal penalties on page 10.*

B. NEGLIGENCE (IN DISCIPLINE) RESULTING IN BODILY INJURY TO STUDENTS

The statute is also designed to cover situations where no physical force is used, but an injury still results. For example, a student misbehaving during physical education class might be directed to run laps as punishment. Should the punishment result in injury (due to the number of laps, the weather—excessive heat or cold—or the student’s physical condition), the P.E. instructor faces potential liability. Great care must then be taken in assessing the “reasonableness” of the punishment and perhaps more importantly, assessing the student to be punished. *Diggs v. Bales*, 667 S.W.2d 916 (Tex. App.—Dallas 1984, writ ref’d n.r.e.).

In various contexts, parents of a child assaulted by another child have argued that had the district adequately disciplined the evil assaulter for prior misbehavior, the assault on their child would not have occurred. The courts have consistently rejected liability on this theory. “Negligence resulting in bodily injury” applies to situations where no physical force is used, but the student is required to take some action as punishment for his misbehavior, and suffers an injury. For example, where a child was assaulted by another child on the playground, a court found no employee liability for negligent discipline. The injured student was not punished by school employees. He was not paddled, suspended, expelled, placed in AEP, etc. No district employee required the student to take an action which resulted in bodily injury to him. “It is undisputed that [the student] did not receive his injuries at the hands of the two teachers or the principal, but rather when he was hit or pushed by another student.” *Davis v. Gonzalez*, 931 S.W.2d 15 (Tex.App.—Corpus Christi 1996).

2. EMPLOYEE TORT LIABILITY FOR MOTOR VEHICLES OR ADMINISTERING MEDICATION.

As noted previously, the immunity from tort actions enjoyed by school officials is largely related to and stems from the immunity of their employer. As a result, since school districts are liable for personal injury or property damage arising from the use or operation of a motor vehicle, so too are their employees. Likewise, since the district is liable for injuries resulting from an administration of medication in violation of the Education Code, so too is the employee who administered the medication.

C. LIABILITY OF VOLUNTEERS

1. EMPLOYEE IMMUNITY APPLIES (ALMOST COMPLETELY).

A school volunteer (a person providing services for or on behalf of a school district, on the premises of the district or at a school-sponsored or school-related activity on or off school property, who does not receive compensation in excess of reimbursement for expenses) enjoys the virtually the same tort liability protection as school employees. §22.053 Immunity for volunteers does not extend to intentional misconduct or gross negligence. §22.053(c).

2. DISTRICT SEEMS PROTECTED FROM ERRORS MADE BY VOLUNTEERS

For purposes of the motor vehicle exception, the Texas Supreme Court has determined that the “agent” or driver of the vehicle must be an employee for liability to attach. *LeLeaux v. Hampshire Fannett ISD*, 835 S.W.2d 49, 51 (Tex. 1992). As a result, injuries and property damage resulting from students being allowed to drive personal vehicles or ride with parents or other volunteer drivers to district events would not trigger the exception to the District’s immunity. More recently, in the case of a drunk volunteer reserve deputy sheriff who embarked on a high-speed chase and ends up killing the passenger in a third car, the Texas Supreme Court found that liability comes from employment. At the time of the accident, the reserve deputy was not in the paid service of the county. Instead, he was a volunteer, subject to being called into service. This factor is critical in determining government liability under the Tort Claims Act. Under the Act, an employee is a person “including an officer or agent, who is in the paid service of a government unit[.]” A volunteer does not qualify as an employee, and thus the county is not liable, even though the death resulted from use or operation of a motor vehicle. *Harris County v. Dillard*, 883 S.W.2d 166 (Tex. 1994).

BOTTOM LINE ON TORTS

WHERE DISTRICT TORT LIABILITY IS POSSIBLE:

- 1) Use or operation of a motor vehicle.
- 2) Administering medication without the required safeguards, or in a manner constituting gross negligence.

WHERE DISTRICT EMPLOYEES ARE POTENTIALLY LIABLE IN TORT:

- 1) Excessive force or negligence in discipline.
- 2) Use or operation of a motor vehicle.
- 3) Administering medication without the required safeguards, or in a manner constituting gross negligence.

THINGS FOR WHICH YOU AND YOUR DISTRICT ARE NOT LIABLE IN TORT:

Unlike other governmental entities, school districts are not concerned with the liability provisions for use or misuse of tangible personal or real property, or premise defects. As a result, districts have *not* been liable for:

- Accidents on playground swingsets, *Duson v. Midland ISD*. 627 S.W.2d 428 (Tex.Civ.App.—El Paso 1981, no writ);
- Injuries from the partial collapse of a building at an ag-farm, *Barr v. Bernhard*, 562 S.W.2d 844 (Tex. 1978);
- Injuries from an acid spill suffered by a child while carrying acid to a new chemistry building, *Wagner v. Alvarado*, 598 S.W.2d 51 (Tex.Civ.App.—Waco 1980, writ ref’d n.r.e.);
- Injuries suffered by a spectator at a basketball game when the bleachers collapsed. *Gravelly v. Lewisville ISD*, 701 S.W.2d 956 (Tex.App.—Ft. Worth 1986, writ ref’d n.r.e.).
- No school district tort liability for bumps, scrapes, cuts, bruises, sprains, breaks, etc., unless arising from the motor vehicle exception. No school employee tort liability for bumps, scrapes, cuts, bruises, sprains, breaks, etc., unless arising from motor vehicle exception or the discipline exception.
- No tort liability for educational malpractice or negligent supervision.

II. CONSTITUTIONAL TORTS: 42 U.S.C. §1983

§1983 is a provision in federal law providing a method of suing governments (and sometimes government employees) for violation of rights and federal law. Where do we see §1983 claims against administrators?

A. SEXUAL ASSAULTS AND SEXUAL ABUSE

1. SEXUAL ASSAULT/ABUSE OF STUDENTS BY A DISTRICT EMPLOYEE.

The *Doe v. Taylor ISD* General Rule: Deliberate indifference = liability. Once aware that a sexual assault of a student by an employee is occurring, educators must take *some kind of action calculated to stop the constitutional violation* of the student's right to be free from sexual assault. Liability rises from knowledge plus the failure to act. Note that the action taken need not be the best action, and need not even cure the problem—it must be *calculated* to solve the problem.

The *Doe v. Rains* Rule: In the district court's opinion, things look bad. The court opined: (1) school employees have a duty to report child abuse under state law; (2) The failure of an employee to perform that duty, even if the employee takes other action calculated to stop the abuse, can result in liability under §1983. Ouch. On review, the Fifth Circuit rejected this simplistic view of §1983 liability. Instead, the court concluded that a teacher or other employee is only liable under §1983 for failure to report child abuse by another employee when the law has empowered the employee who failed to report with a right of legal control over the employee committing the abuse. In other words, the failure of a teacher to report child abuse by another teacher does not necessarily implicate §1983 (though it certainly is a violation of the Family Code and is punishable there). *Doe v. Rains ISD*, 66 F.3d 1402 (5th Cir. 1995).

2. STUDENT ON STUDENT SEXUAL ASSAULT/ THIRD PARTY ASSAULTS ON STUDENTS

The U.S. Supreme Court has taken the position that unless the district has established a special relationship with the student, the district cannot be held liable for a sexual assault on that student by a nonemployee (including another student, or someone else who is on campus, but not employed by the school). Note that special relationships are rare, and are limited to circumstances where government has so limited a person's freedom and ability to protect himself that government must protect the individual. Typically, the cases finding a special relationship involve someone in prison, in police custody or committed to a psychiatric facility. *DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998 (1989). Nevertheless, the best practice for districts and administrators faced with these situations is to take actions calculated to prevent assaults against students by other students and third parties from recurring.

Because of the *DeShaney* decision, plaintiffs have tried using Title IX (which prohibits sex discrimination) as a vehicle for recovery. The Fifth Circuit (which covers Texas) has rejected those attempts. *Rowinsky v. Bryan ISD*, 80 F.3d 1006 (5th Cir. 1996), *cert. den'd*, ___ U.S. ___ (1997). Note that the Eleventh Circuit (among others) has come to the opposite conclusion, applying by analogy the hostile environment analysis used in Title VII. *Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir. 1996). A Texas Title IX case is before the Supreme Court on the issue of district liability for a teacher's sexual harassment of a student when *someone other than a person with supervisory authority over the teacher had knowledge of the abuse and failed to stop it*. *Doe v. Lago Vista ISD*, 106 F.3d 1223 (5th Cir. 1997).

3. OFFICE OF CIVIL RIGHTS GUIDELINES, BAD NEWS FOR OTHER CIRCUITS

In March of 1997, the Office of Civil Rights introduced a set of guidelines to assist districts in identifying sexual harassment and in understanding OCR's position on district liability for harassment. While OCR recognizes that the Fifth Circuit has limited district liability for sexual harassment, it takes a more litigation-friendly position. For example, OCR believes that a school *will always be liable* for even one instance of *quid pro quo* harassment by a school employee in a position of authority (such as a teacher or administrator), whether or not the school knew, should have known, or approved of the harassment at issue. So, if a teacher uses his power to assign grades, for example, to force a student to submit to sexual demands, the school is liable. Period. With reference to student-on-student harassment and harassment of students by third parties, OCR adopts the 11th Circuit rule in *Davis*. A school district would be liable for third party harassment or student-on-student harassment if (1) a hostile environment exists in the school's programs or activities; (2) the school knows or should have known of the harassment; and (3) the school failed to take immediate and appropriate corrective action. While OCR promises to enforce the Fifth Circuit's rules here in Texas (as outlined in 1 and 2 above), it seems clear that its heart will not be in it.

B. VIOLATION OF FOURTH AMENDMENT RIGHTS (SEARCH & SEIZURE)

School searches must be justified from their inception and must be reasonable in scope. School officials need only individualized suspicion (rather than probable cause) to search a student. Individualized suspicion is reason to believe that a search of this student will turn up evidence of violation of law or a school rule. A tip from another student is enough to trigger a search (assuming the tipster is reasonably reliable). Once begun, the search must be reasonable in its scope. No looking in backpacks for a missing 20" television. Helpful Hint: If you are dealing with contraband so dangerous or serious that you begin to consider a strip search of a student, don't do it. Call the police instead.

C. EMPLOYMENT AND DISCIPLINE MATTERS (DUE PROCESS).

1. PROPERTY RIGHTS

Because of Texas compulsory attendance laws, all students of compulsory attendance age have a property right in a public school education. At a minimum, due process is notice and a hearing. As the level of deprivation increases (the time the student is excluded from school increases) more due process becomes necessary. On the employment front, district employees who serve under a written contract of employment have a property right in employment during the term of the contract. Their employment cannot be terminated without providing due process. Even employees on probationary contracts have property rights during the term of their contracts. Of course, they can easily be released from employment at the conclusion of the probationary term because they have no property right in continued employment beyond the contract term.

2. SUSPENSIONS, EXPULSIONS & AEP

In *Goss v. Lopez*, the U.S. Supreme Court created the ten-day rule, which basically calls for informal notice and hearing should a student with a property right in public education be excluded from school for less than ten days. When the deprivation is greater, more formal expulsion hearings are necessary. Note that Texas state law gives more protection under Chapter 37. The Fifth Circuit concluded that placement in an AEP is not a deprivation of education since there is no federally protected property right in a particular curriculum. *Nevarres v. San Marcos CISD*, 111 F.3d 25 (5th Cir. 1997). As a result, there is no federal requirement to provide due process prior to AEP placement. While the Texas Legislature considered amendments to the AEP provisions requiring a *hearing* prior to placement, only a *conference* is required under the amendments to Chapter 37. EDUC CODE §37.009.

3. DISABLED STUDENTS AND THE TEN DAY RULE

The Ten-Day rule takes on additional importance with special education (IDEA eligible) and §504 students. Students who qualify under IDEA or §504 may not be subjected to a removal from their current educational placement for more than 10 days *for disciplinary reasons* unless the appropriate ARD or §504 committee first determines that the behavior giving rise to the discipline was not linked to the student's handicapping condition or to an inappropriate placement. To do otherwise is to punish the child because of his disability. Note: the ten days are *cumulative* over the school year.

4. DISABLED STUDENTS AND THE FORTY-FIVE DAY RULE (NEW & IMPROVED?)

In May of 1997, the U.S. Congress passed the reauthorization of the IDEA (the law creating the federal framework for special education). Among the provisions is an addition to the 45 day rule which allowed the district to place a disabled student in an alternative education program for up to 45 days for bringing a gun to school, even if the behavior was related to his disability. Under the new amendment, schools may remove a disabled child for (1) carrying a weapon to school or to a school-related function, (2) knowingly possessing or using illegal drugs while at school or a school-related function, or (3) selling or soliciting the sale of a controlled substance while at school or a school-related function. INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997, §615(k)(1).

Important: While the Department of Education specifically applied the old 45 day rule on guns to §504 students even though the rule was created as an amendment to the IDEA, the new expanded weapons and drugs provisions have not yet been applied to §504 students.

D. FAMILY EDUCATIONAL RIGHTS & PRIVACY ACT (FERPA).

The school district has a duty under federal law to prevent disclosure of personally identifiable information about students to unauthorized individuals and groups. While a parent has a right to see and copy student records involving her own child, that does not mean that information about other children can be disclosed at the same time.

E. THE DEFENSE OF QUALIFIED IMMUNITY

In response to actions brought under §1983, a school district employee generally raises this defense. “Qualified immunity shields public officials from exposure to extensive discovery, trial, and liability for alleged constitutional torts if their questioned conduct does not violate clearly established law effective at the time of the alleged tort. The qualified immunity determination requires a two-step analysis: (1) whether the plaintiff has alleged a violation of a constitutional right, and (2) whether the constitutional right allegedly violated was clearly established at the time the events in question occurred.” *Doe v. Hillsboro Independent School Dist.*, 81 F.3d 1395, 1405-6 (5th Cir. 1996). Not knowing what the law is provides no defense. If the law is clearly established, you are presumed to know what it requires.

III. DEALING WITH EMPLOYEES

Various state and federal laws prohibit evil acts by employers against employees. Typically, these laws focus on making illegal certain motivations for employment actions. For example, an employer cannot terminate or nonrenew an employee because of the employee’s race, color, religion, sex, national origin, disability, his reporting the employer for violating TAAS security, his nasty article about the employer’s curriculum changes in the local paper, etc. To avoid the problem, principals need only worry about making employment decisions (such as recommendations for nonrenewal and termination) based on the employee’s job performance.

A. HAVE A SOUND BASIS FOR EVERY EMPLOYMENT DECISION YOU MAKE.

- Only look at reliable information. Consider the source of complaints to determine the weight to give them.
- Don’t be a stranger to the classrooms in your school. Frequent, unannounced walk-throughs can help you gauge teacher performance far better than scheduled, choreographed appraisals. Remember: *even good teachers have bad days.*
- Use employee job descriptions, board policy, and campus teacher manuals as written reminders of what you expect from employees. Reference these sources when performance is below par.
- When making employment decisions (hiring, assignment, renew/nonrenew, etc) only use legitimate job-related information. Is Teacher X doing his job? Are lesson plans turned in on time? Is his grade book in compliance with school rules? Be able to articulate the reason for every employment decision you make when you make it.
- Document employee performance by at-will employees on your campus. Even though they are not under contract and no reason for termination must be given, you may be accused of discrimination (on account of race, sex, national origin, etc.) and put in the position of having to prove a legitimate *nondiscriminatory* reason for the termination. If you have no recollection of why the action was taken (or there was no good reason) the former employee will likely be able to allege that the reason is merely a pretext for discrimination.
- Immediately investigate allegations of sexual harassment. Where the charges are valid, initiate appropriate employment action (letter of reprimand, nonrenewal, etc). Where the facts do not support the charge, counsel with the employees and remind them of the rules. In any case, document your investigation and your findings.

B. THE PRINCIPAL’S VETO (REVISED)

The principal retains the power to reject the assignment of new employees on her campus, but that veto is subject to override. “The superintendent or the person designated by the superintendent has final placement authority for a teacher transferred because of enrollment shifts or program changes in the district.” §11.202(d). Note that the override does not apply to an employee who had problems on a campus and is reassigned for a “fresh start.” Of course, that cuts two ways. If you’re concerned about your campus becoming a dumping ground for misfit or grumpy employees that no other principal will document and fire—worry not. Only reassignments due to enrollment shifts or program changes trigger the override. Conversely, if your concern is that you can’t rid yourself of a horrible employee through reassignment—shame on you. Document and do it right. Don’t pass your problem to another campus. After all, the favor might one day be returned, with interest.

C. SITE-BASED CONCERNS

Despite very explicit language in the Education Code stating that collective bargaining is not the result of site-based decisionmaking (EDUC. CODE §11.253(f.)), some teacher groups argue that they must approve every change on the campus. Wrong. While the principal is required to “regularly consult” with the campus level committee about the campus education program, only the portion of the plan addressing campus staff development needs must be approved by the committee. EDUC. CODE §11.253(e). The committee is “involved” in decisions in the areas of planning, budgeting, curriculum, staffing patterns, staff development and school organization, but its approval is required only on staff development. Involvement can come through providing input into the final decision, and need not be a formal vote or discussion. Note that local policies may create greater responsibilities, and that SBDM generates often-testy grievances.

D. TEACHERS OUSTING KIDS FROM CLASS— BEWARE OF RETALIATION COMPLAINTS.

At least one teacher organization has warned that administrators who penalize teachers for using the removal procedure in §37.002 are asking for a retaliation complaint. So, before disciplining a teacher for using this mechanism, make sure that the provision has been misused. If the student who has been ejected from class does beautifully in another class, document it. If a teacher has ejected all of her students at one time or another, document it. Remember, we want order in the classroom so that instruction can occur. That order must begin with the classroom teacher. This provision does not allow the teacher to abdicate his responsibility for classroom order to someone else.

E. DOCUMENTATION—TIMING & ACCURACY ARE EVERYTHING

If an employee’s performance is poor, let him know how to improve, when the improvement needs to be completed, and what will occur if things do not get better. Put it in writing. Give the warning to the employee and allow the employee a reasonable time to respond. Don’t count on your memory. Write things down. After all, it is little consolation to know in your heart that an incompetent employee should have been fired when after hearing the evidence (including your testimony) the hearing examiner disagrees and finds no poor performance. Your further professional association with the employee will be less than enjoyable for both of you, and your campus and students will suffer as well.

F. GRIEVANCES— STOP, LOOK AND LISTEN

The hearing of grievances is a simple process, complicated only by legend or misconception. A grievance, by definition, is a time for the employee to complain about “wages hours and conditions of work” to someone in authority to do something about his complaint. But just because you have to listen does not mean that you have to act. Your duty is to “stop, look, and listen.” You are not there to answer questions or defend other employees or policies. You listen. If you need additional information, you can ask questions. When the employee or representative is finished, you thank them and make your decision on whether to grant or deny the grievance. Know your local grievance policy (DGBA) and follow it. Pay close attention to timelines. Once you hear a grievance that is untimely, TEA has concluded that you cannot later argue that the employee started too late. Note that boards often consider a principal to be weak or ineffective if the board is forced to deal with grievances which the board believes could have been resolved at the campus level.

IV. DEALING WITH PARENTS & STUDENTS

Even in the absence of a law allowing parents to successfully sue, some will probably try anyway. There are any number of ways to make parents angry at you. Remember, your best defense is the perception that you care, listen, and are fair.

A. OTHER STUDENT DISCIPLINE ISSUES

The parents of students victimized by other students are often eager to learn the punishment received by the offending student. This is especially troublesome where an offense, such as an assault, requires placement in the AEP, and the victim’s parents learn that the attacker was not sent to AEP. Remember FERPA!

Be consistent in the application of discipline. Parents are much more likely to accept a disciplinary action when they understand that similar misconduct has been dealt with in a similar manner. Conversely, hell hath no fury like a parent who believes that junior was done wrong. Parents and kids talk. Disparities in discipline will not go unnoticed.

B. IDEA & §504 ISSUES

- Resist the urge to dictate to the ARD or §504 Committee the results of their findings on link between disability and behavior. The decision is one for the entire committee to make, not for a single member to dictate.
- Actively participate in the creation of behavior management plans (BMP's), but recognize where your expertise stops.
- When any disabled student demonstrates behaviors that do not diminish as a result of your use of traditional discipline management techniques, strongly encourage the ARD or §504 committee to develop a BMP.
- Once an IEP (under the IDEA) or an accommodation plan (under §504) is created, actively encourage (and practice) consistent adherence to the plan on your campus. Failure to follow modifications outlined in the plans, or failure to provide required services can result in substantial liability to the district.
- Remember that some of the easiest special education hearings for a parent to win allege the district's failure to identify the child or failure to assess areas of suspected disability. When parents complain about a student's lack of progress and his numerous disciplinary referrals, don't hurry them out, convinced that the kid is just a bad kid or a lazy kid. Consider an IDEA or §504 referral.
- Keep track of short-term disciplinary removals. Remember that they add up, and once you reach ten days, bad things can happen (OCR complaint/investigation, IDEA or §504 hearing). When the behavior management plan appears to be failing call an ARD or seek assistance from the special education department or §504 committee.

C. "BAD IDEA" ACTIONS

- Interviewing young kids about classroom incidents without parent knowledge
- Strip searches of young kids
- Actions or disciplinary techniques which tend to embarrass or ostracize kids
- Allowing someone you do not know to take a child out of school. *See the ADVISOR article on parent rights after divorce.*
- Coercing or encouraging students to withhold information from parents. Education Code §26.008(b).

D. PARENT RIGHTS

Senate Bill 1 created a lengthy laundry list of parent rights, some of which already existed under state and federal law. It is unclear at this point whether these statements of rights will be read to create a cause of action in state or federal court should they be violated by the district. Principals should be familiar with these rights as various parent groups have fought long to get them, and have done much to publicize their existence.

The following are the rights most likely to be asserted:

- Petition board designating school where child will attend. §26.003(a)(1).
- Access to principal to reassign student, or to request a teacher or class change. §26.003(a)(2).
- Access to state assessments. §26.005.
- Access to teaching materials (including tests once administered) during reasonable hours. §26.006.
- Exemptions from instruction due to conflicts with parent's moral or religious beliefs. §26.010.

V. OTHER ISSUES

A. ACTIVITY FUNDS & ACCOUNTING

Follow district procedures for accounting and safeguarding funds to the letter. Train (or seek training) for faculty or staff who oversee monies. Do not tolerate informal banking or loans. Develop procedures to check on security of funds and recordkeeping so that no surprises crop up at year's end.

B. GRADE CHANGES

TEA rules (TEA Bulletin 742) require that a student's grade should be the *teacher's* assessment of the child's performance in the classroom. The grade recorded on the transcript should also match that in the teacher's gradebook. If the grades have been entered incorrectly or arbitrarily, address that issue. If the issue is a difference of opinion among educators on the performance of a child, do not second-guess the grade—Teacher wins.

C. TAAS & OTHER STANDARDIZED TESTS

The TEA takes very seriously issues of TAAS security, and will not hesitate to recommend sanctions against the certificates of educators breaching security. Understand the rules regarding confidentiality and follow them. If you see a violation, report it.

D. ETHICS COMPLAINTS

An unfortunate new trend in Texas is use of the ethics complaint, with its threat of sanctions to professional certificates, as a way for militant campus employees to intimidate principals or other administrators. While there is no mechanism to stop the filing of such complaints, the principal subjected to this tactic should attempt to secure central office and board support. In some cases, especially where the complaint is an attempt to force a change in campus policy or procedure, the board can be convinced to fund the defense. Of course, not all complaints about principals are unjustified. Be familiar with the Code of Ethics adopted in your local board policy, and that adopted by the State Board of Educator Certification.

E. CRIMINAL LIABILITY FOR CORPORAL PUNISHMENT

The Texas Penal Code includes an exception allowing for educators to use corporal punishment without being subject to criminal prohibitions on assault. Section 9.62 of the Penal Code protects the educator so long as (1) the corporal punishment is being used to control, train, or educate the child; (2) corporal punishment is not used to punish academic or athletic failures, but disciplinary lapses; and (3) the amount of force must be reasonable or moderate. So, a student could not be given swats for failure to complete an assignment, not studying sufficiently, or forgetting to write his name at the top of an assignment. *Hogenson v. Williams*, 542 S.W.2d 456, 459-60 (Tex.App.—Texarkana, no writ). If these three elements are not met, the educator faces potential criminal penalties. Since the criminal definition of assault is easily met (the contact must be intentional and must cause pain), a Class A misdemeanor resulting in up to a \$4,000 fine and one year in jail or both is possible. Note further that merely threatening a student with a paddle (if the three elements are not in place) is also an assault if the student regards the threat as provocative or offensive. A Class C misdemeanor is possible, with a fine of up to \$500, but no jail time. That punishment increases to a Class C misdemeanor if the conduct is directed at a disabled person. Under the Injury to a Child provision (Penal Code §22.04) bodily injury to a child 14 years or younger can result in a third degree felony, punishable by two to ten years in jail and a fine not to exceed \$10,000. Like the assault statute, proving bodily injury is as simple as proving that the paddling caused pain. The lesson: Don't Paddle.

VI. THE LESSON OF THE DOCTORS: IT PAYS TO BE NICE

In February of 1997, a study on medical malpractice appeared in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION. The study attempted to determine what factors play into a patient's decision to sue a doctor. The findings are somewhat startling: the quality of care received was not the determining factor in whether a patient sued his doctor. Whether the doctor did a bad job as a doctor was not the big issue. Instead, "patients and families are more likely to sue if they feel the physician was not caring and compassionate." American Medical Association New Update, *Correlation Seen Between Communication Skills and Malpractice Risk*, February 19, 1997.

The study was conducted by tape recording office visits between doctors and patients in 120 physicians offices, and analyzing the communications skills utilized by doctors who had two or more malpractice claims filed against them during their lifetimes, versus those with less than two complaints. The study confirmed that certain communication skills will reduce a doctor's malpractice exposure.

The physicians with less than two lifetime malpractice claims:

- Used more statements of orientation (helping the patient to know what to expect from the visit, letting the patient know when it was appropriate to ask questions and voice concerns).
- Laughed and used humor more
- Used more facilitative comments (asked the patient to tell the doctor more about the problem, asked the patient's opinion about treatment, asked questions to verify the patient's understanding)
- The most startling finding was that the doctors sued less spent more time with their patients—on average 3.3 minutes more per visit. The length of visit, by itself, had an independent positive effect on a patient's likelihood of suing the doctor. *The Relationship With Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 553-559, February 19, 1997.

DAVE'S PRACTICAL GUIDE FOR AVOIDING & SURVIVING LEGAL TROUBLES*

*These observations are based on Dave's experiences with school districts and lawsuit dynamics over a period of nine years. Keeping these thoughts in mind will help you understand the folks who could potentially sue you, and may decrease your chances of being called "defendant." But as they say in the car commercials, your results may vary.

PARENTS:

- Parents will sometimes lash out at your actions *even if they know the child is wrong and your response is appropriate.*
- Parents want respect. Remember that it is not always an easy thing to leave work in the middle of the day and go down to the school. When a parent makes that effort, respect the effort and the message. Listen carefully, even if the concern is wacky.
- Administrative convenience is usually not perceived by parents as a good reason for anything.
- Some parents are still intimidated by principals, and may be reluctant to raise issues. Be approachable/accessible. Parents may not employ an attorney if they believe that they can talk to you and resolve things fairly.
- Parents sometimes want what they think is best for the child, *not what's fair or right.*
- *Some* Parents may never realize that their view of their child is incorrect. Nothing you can do or say will change that.
- Parents want to see your concern for their kids.
- Parents vote for board members, patronize businesses owned by board members, and complain directly to board members.

STUDENTS:

- Be fair and consistent in your application of discipline (kids talk amongst themselves and so do their parents)
- Kids should understand school rules and need to know that breaking rules results in unpleasant consequences.
- Don't use corporal punishment.
- If the discipline management techniques you are using with the habitual "discipline problem" student are ineffective, and you see a slide in the student's performance in the classroom, *consider* a referral to §504 or special education.
- Avoid interference in grade disputes. Instead, make it your practice to defer to the teacher, unless there is evidence that the grade is arbitrary, capricious, or mathematically incorrect.
- Let the kids know you enjoy being with them. Be seen in the halls and classrooms. Greet the kids when you pass them. The students' familiarity with you can build trust, make you appear more accessible, and that helps you solve or prevent problems.

EMPLOYEES:

- Your administrator's contract means that you are not one of "them" anymore. Don't worry about forgetting, people will probably remind you when you make a decision they don't like. You are the boss. Make decisions. But keep the lighthouse in mind.
- When a student is sent to the office for discipline, do something to improve the situation (discipline the kid, or help the teacher understand better how to do it, but respond *somehow* to the situation). Not taking action is often perceived by the faculty as a lack of support—something that may be returned to you with interest (or disinterest) when *you* need support.
- Respect differences of opinion—get advice from people with differing viewpoints. Remember that good ideas can come from anywhere and a successful leader takes them when she sees them. Give credit for the idea! More will likely follow.
- Human nature makes you rely on and overwork the people you trust and who get things done. Don't over-assign special projects, and remember to show gratitude. Know what personality types you like/despise. Make a special effort to be patient with the latter, and not too lenient on the former.
- Evaluations are not a time to look for the silver lining in the dark cloud. If the teacher is bad, *let it rain.* The evaluation should accurately reflect performance. Sugar-coating your comments sends the wrong message. It dramatically undermines the sense of urgent change that should come from a critical evaluation and may hamper efforts to nonrenew or terminate a bad employee.
- Leave your campus with a better staff and faculty than when you arrived. Don't avoid removing deadwood because you think that you won't be there more than a year or two. Remember the kids... and remember that you might spend *many* years there.
- When employees spot one of your memos in their box, they should not presume they are in trouble. A memo from you should not be seen as necessarily a bad thing. Write people up for good things. When parents compliment your teachers or staff, pass it on.
- Remain the instructional leader. Make time to demonstrate good instruction and reward good instruction when you see it.