



Legal Concerns for the Music Educator

**CLINICIAN:
Holly Wardell**

Texas Bandmasters Association 2013 Convention/Clinic



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**JULY 21 – 24, 2013
HENRY B. GONZALEZ CONVENTION CENTER
SAN ANTONIO, TEXAS**



Legal Issues for Band, Choir and Orchestra Directors

Presented by: Holly Boyd Wardell
July 21, 2013

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Holly Boyd Wardell



Holly is a Shareholder in our Austin office. Holly graduated Cum Laude from Texas Wesleyan University in 1992 and earned her Juris Doctorate from The University of Texas School of Law in 1996.

Holly has an impressive litigation background in whistleblower cases and civil rights cases including gender, race, and national origin, and disability discrimination claims. Her work on position statements, motions, and briefs has resulted in numerous victories for school districts at every level conceivable. Additionally, she regularly attends ARD and Section 504 Committee meetings and represents clients at due process hearings.

Holly's outgoing personality, enthusiasm, and thoroughness combine to make her a popular lecturer. She is a frequent guest speaker for school districts, regional education service centers, special education shared service arrangements, state organizations, and universities on a variety of topics related to school law, including special education, Section 504, education records, sexual harassment, student discipline, and search and seizure. Holly has published numerous articles for state and firm publications on special education and other issues.


Holly is licensed to practice law in all Texas state courts; the United States District Courts for the Western, Northern and Southern Districts of Texas; the United States Court of Appeals for the Fifth Circuit; and the United States Supreme Court.

She is a member of the National School Boards Association Council of School Attorneys, School Law, Administrative, and Labor and Employment Law Sections of the Texas Bar, Texas Council of School Attorneys, and the Texas Association of Defense Counsel. Holly has also served on the State Bar's Disabilities Issues Committee and the Texas Education Agency's State Supervision Committee & Complaints Management System.

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LEGAL LIABILITY ISSUES FOR TEXAS DIRECTORS

Holly Boyd Wardell


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Legal Issues Related to Student Activities

- Rights Associated with School Activities
- Education Records
- Rights under TEC
- Parent Grievances
- Student Injuries
- Immunity and Liability
- Relationships with Students
- Student Trips
- Cases
- Search & Seizure
- Hazing
- No Pass, No Play
- Commissioner's Rules for Practice
- Copyright & Trademark Issues
- Booster Clubs
- Students with Disabilities
- Religion: team prayer, religious music
- Drug Testing Policies


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What people worry about...

- Liability for supervision
- Kids getting physically hurt
- Trips/travel
- Parents suing because kid didn't make first chair or questioning your decisions


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Student Injuries

Liabile or Immune?


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Torts = personal injury claims

- Negligence
- Negligent failure to supervise
- Negligent failure to train
- Intentional infliction of emotional distress
- Defamation

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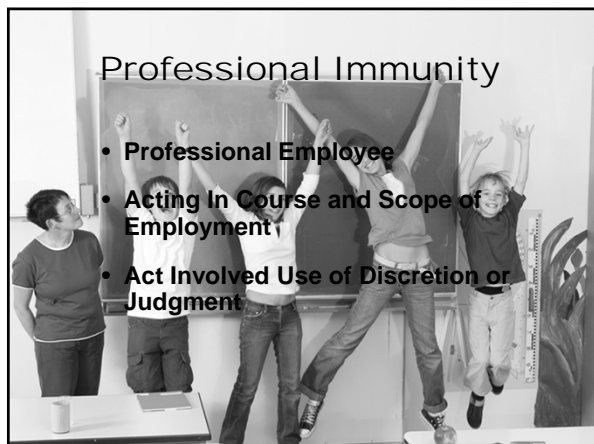
School Districts

- Sovereign Immunity
- Governmental Immunity

Waiver of immunity for negligent use or operation of a motor vehicle

Professional Immunity


- Professional Employee
- Acting In Course and Scope of Employment
- Act Involved Use of Discretion or Judgment



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“Professional Employee”


- Superintendent
- Principal
- Teacher
- Substitute Teacher
- Supervisor
- Social Worker
- Counselor
- Nurse
- Teacher's Aide
- Student Teacher
- Bus Driver
- School Board Trustee
- Any other employee whose employment requires certification and the exercise of discretion



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Tex. Educ. Code
§ 22.0511


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...



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Tex. Educ. Code
§ 22.0511


...that involves the exercise of judgment or discretion on the part of the employee...




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Tex. Educ. Code
§ 22.0511

...except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.






Barr v. Bernhard
(Tex. 1978)

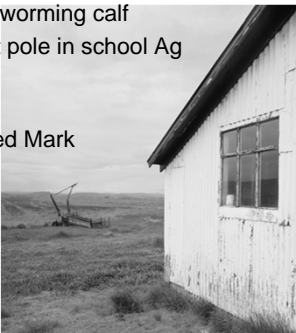
- Saturday, 1976
- Kerrville, Texas
- Mark Bernhard
- Voc-Ag

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Barr v. Bernhard

- Weighing and worming calf
- Struck support pole in school Ag building
- Roof collapse
- Severely injured Mark




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Parents sued District and individuals for negligence

- Failing to properly inspect the facility
- Failing to maintain or supervise the facility; and
- Allowing the facility to be used while in a condition of disrepair


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Texas Supreme Court

We hold...that a professional school employee is not personally liable...except in circumstances where disciplining a student, the employee uses excessive force or his negligence resulting in bodily injury to the student.

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Amarillo Court of Appeals, 1996

- The court's holding in Barr has been "widely criticized" but that's what they meant.
- The Legislature has declined to modify the statute to overrule the Tex. Supreme Court.

Downing v. Brown, 925 S.W.2d 316 (Tex. Ct. App.—Amarillo, 1996), reversed on other grounds.

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Torts = personal injury claims

- Negligence
- Negligent failure to supervise
- Negligent failure to train
- Intentional infliction of emotional distress
- Defamation

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Professional employees are protected from personal injury claims like:

- Playground Accidents
- Sports Injuries
- Student Fights
- Classroom Accidents
- Natural Death




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Stout v. Grand Prairie ISD, (Tex.App.--Dallas, 1987)

- Student injured during cheerleader practice
- Sued teacher who supervised practice
- Challenged constitutionality of professional immunity provision in Tex. Educ. Code
- Teacher and district won = were immune from suit.

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Stout (cont'd)

COURT:

While this immunity works a hardship upon injured students, it is necessary to effect a rational and compelling legislative purpose that rests upon the importance of a free public education to this state.


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Williams v. Chatman

- End of Year Swimming Party
- Texas Tech Univ.
- Student fatality
- In course and scope of employment?
- Professional judgment/discretion?


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Foster v. Estrada

- Student fell from a wall in the school gym while retrieving a tennis ball
- Parents claimed coach and principal were negligent in supervising students
- Coach and principal filed affidavits – “we were using our professional judgment”
- Court: That’s not enough.

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Discretionary v. Ministerial Duties

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Tex. Educ. Code
§ 22.0511


This section does not apply to the operation, use, or maintenance of any motor vehicle.



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Professional Immunity

- Exceptions
 - Excessive force/negligence in discipline
 - Negligent use of motor vehicle



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- Exhaustion Requirement
- Attorney's Fees
- Damages limited to \$100,000



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Can we require students to perform extra physical activities as punishment?

Yes, but be careful


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Moore v. Willis ISD
(5th Cir. 2000)

- 100 squat-thrusts as punishment
- Diagnosed with a degenerative disease of skeletal muscles and renal failure.
- Parents/student sued claiming personal injury and violation of substantive due process
- Teacher's claims remanded (excessive discipline)

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STUDENT TRAVEL
AND TRIPS




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What are the dangers of transporting students in my personal automobile?

PERSONALLY LIABLE



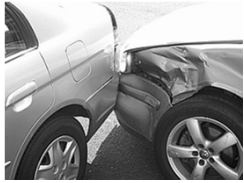


Is there anything we need to be concerned about when leaving the great State of Texas?


- Could lose immunity
- Comity
- Interesting things happen on trips!
- Get a release

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Peterson v. State of Texas
(Colorado Ct. App. 1981)



- Texas Youth Council
- Student stole vehicle and damaged it
- Sued TYC employees for negligent supervision
- Not immune




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What should you worry about?

- Harassment & bullying claims
- First Amendment
- Fourth Amendment


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Harassment & Bullying Claims

- Harassment & bullying claims
- First Amendment
- Fourth Amendment


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Harassment

- Staff to student
- Student to student – illegal harassment
- Student to student – bullying


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SOLICITING ROMANTIC RELATIONSHIP

- Behavior
- Gestures
- Expression
- Communications, pattern
 - Nature
 - Timing
 - Extent
 - Counseling?


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SOLICITING ROMANTIC RELATIONSHIP

- Comments about body
- Sexually demeaning comments to student
- Student's potential sexual performance
- Requesting details of a student's sexual history
- Requesting date
- Engaging in conversation about sexual problems, preferences, etc.


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SOLICITING ROMANTIC RELATIONSHIP

- Inappropriate hugging, kissing, or excessive touching
- Suggesting that a romantic relationship is desired after graduation
- Any other acts tending to show want an ardent relationship with student
 - Including providing drugs or alcohol


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Harassment Claims

Actual knowledge/notice
Deliberate Indifference


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Bullying

- FFI (LOCAL)
- Follow requirements for reporting and responding to bullying


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FIRST AMENDMENT

Freedom of religion
Freedom of speech

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FIRST AMENDMENT

Music

- Do not have to eliminate all religious music.
- Well-rounded program.
- Don't discriminate based on religious view point.

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MEHL, P.C.

EICH
HANSE



FNA (LEGAL)

DATE: 11-13-09
BY: [redacted]
REVISIONS: [redacted]

CLASS ASSIGNMENTS

Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Homework and classroom assignments must be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the District. Students may not be penalized or rewarded on account of the religious content of their work. *Education Code 25.153*

APPROVED BY THE BOARD OF SUPERVISORS, 11/13/09


APPROVED BY THE BOARD OF SUPERVISORS, 11/13/09

DATE CLEARED 11-13-09

APPROVED BY [redacted]

WARDELL
MEHL, P.C.

EIC
HANSE



Speech

DATE: 11-13-09
BY: [redacted]
REVISIONS: [redacted]

Student expression that is protected by the First Amendment may not be prohibited absent a showing that the expression will materially and substantially interfere with the operation of the school or the rights of others.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)
[See also FNCI]

APPROVED BY THE BOARD OF SUPERVISORS, 11/13/09

APPROVED BY THE BOARD OF SUPERVISORS, 11/13/09

DATE CLEARED 11-13-09

APPROVED BY [redacted]


JARDELL MEHL, P.C.

Speech

REVISED 03/11
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The inculcation of fundamental values necessary to the maintenance of a democratic society is part of the work of the school. The First Amendment does not prevent school officials from determining that particular student expression is vulgar and lewd, and therefore contrary to the school's basic educational mission. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)

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FOURTH AMENDMENT

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Students shall be free from unreasonable searches and seizures by school officials. School officials may search a student's outer clothing, pockets, or property by establishing reasonable cause or securing the student's voluntary consent. Coercion, either expressed or implied, such as threatening to contact parents or police, invalidates apparent consent. *U.S. Const., Amend. 4.; New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733 (1985); Jones v. La-texo Indep. Sch. Dist., 499 F.Supp. 223 (1980)*

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FOURTH AMENDMENT

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A search is reasonable if it meets both of the following criteria:

1. The action is justified at the inception; i.e., the school official has reasonable grounds for suspecting that the search will uncover evidence of a rule violation or a criminal violation.
2. The scope of the search is reasonably related to the circumstances that justified the search in the first place; i.e., the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

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FOURTH AMENDMENT

ISSUED 03/2013
 SUBJECT: STUDENT RIGHTS AND RESPONSIBILITIES / STUDENT INFORMATION AND CONSENT
 PURPOSE: TO CLARIFY STUDENT CONSENT TO THE USE OF TECHNOLOGICAL SERVICES AND SERVICES

SEARCHES OF TELECOMMUNICATIONS / ELECTRONIC DEVICES


A person is prohibited from obtaining, altering, or preventing authorized access to a wire or electronic communication while it is in electronic storage by:

1. Intentionally accessing without authorization a facility through which an electronic communication service is provided; or
2. Intentionally exceeding an authorization to access that facility.


1. The scope of the privacy interest encompassed by the drug testing policy;
 2. The number of the collection requests by the drug testing policy;
 3. The scope and consistency of the government's interests in safety and the efficacy of the drug testing policy for testing team.

REVISIONS: THIS POLICY WAS REVISED FROM AN EARLIER VERSION (2008) TO ADD A SECTION REGARDING STUDENT RIGHTS AND RESPONSIBILITIES AND TO ADD A SECTION REGARDING STUDENT INFORMATION AND CONSENT. THE POLICY IS SUBJECT TO THE POLICY REVIEW AND REVISION PROCESS OF THE BOARD OF TRUSTEES. THE BOARD OF TRUSTEES SHALL REVIEW THE POLICY ANNUALLY TO DETERMINE IF ANY REVISIONS ARE NEEDED TO MAINTAIN THE POLICY'S EFFECTIVENESS AND TO ENSURE IT REMAINS CURRENT AND ACCURATE.

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MUSIC LICENSING

Many different types of licenses apply to copyrighted music. Some licenses are not required for schools under an educational fair use exemption, but other types of licenses are required. Note that for many uses you will need multiple licenses. For example, to record music in a video and show the program on television you would need mechanical, synchronization, broadcast and possibly grand rights. Here is a brief synopsis of the most common types of music licenses.

ARRANGEMENT – for creation of a new version of a composition other than a simple change of key. Included: new instrumentation, simplified chords, shortening a lengthy composition, changing lyrics, changing musical style (from jazz to hip-hop, for example).

BROADCAST – for use of a recorded performance on radio, television, satellite, or cable. Typically even short excerpts must have a broadcast license.

FESTIVAL USE (ADJUDICATION) – for use of photocopies of out-of-print sheet music for judges in a musical competition.

GRAND – for staging a musical play, ballet, or opera or performing any song in a dramatic manner. These rights are available directly from the publisher of the sheet music or the producer of the show.

MASTER – to use an existing recording. These rights are usually available directly from the recording company.

MECHANICAL – for an audio recording of a composition on tape, CD, or digital download format, whether or not the recording is sold. You need this license to sell or give recordings of student concerts to students, parents, and friends. Mechanical rights are mandatory – a music publisher cannot prevent you from recording a cover of its song once the publisher has recorded and released the song. Royalty rates are set by law. Mechanical rights are brokered through the Harry Fox Agency (www.harryfox.com) and are available for small runs. You can try to negotiate a reduced rate through individual copyright owners, but the reduced rates must still be submitted to Harry Fox. See

website for details. You will need master use rights and mechanical rights if you wish to make copies of existing recordings.

PERFORMANCE – for a public performance of a musical work. For schools, many exceptions apply to public performance. If used in direct teaching, apply the 5-part AV fair use guidelines. If used for a public performance by students, some exemptions apply. Entertainment and reward performances require performance licenses. Performance rights are available from one of the music rights organizations: ASCAP, BMI, SESAC.

PHOTOCOPY – for making photocopies of out-of-print music. Not for copies for festival adjudication. These rights are available directly from the music publisher.

REPRINT (LYRICS OR MUSIC) – for use of music or lyrics in a book, magazine, or printed publication. Some uses may be covered under the print exemptions for schools. These rights are available directly from the music publisher.

SUB-OUT – for selling a new arrangement of an existing composition. Most likely covered under the arrangement license agreement, as well.

SYNCHRONIZATION (SYNCH) – for including a performance of a musical composition in film or video, such as background music in a film, or a recording of a band performing copyright protected music in a music video. Synch rights must be negotiated directly with the publisher of the underlying sheet music.

WEB POSTING / DIGITAL DOWNLOADS – for posting print and recorded material on the Internet. Digital downloads are licensed through Harry Fox Agency. Web posting of print material is negotiated directly with the publisher of the underlying sheet music.

Works Cited

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ASCAP, *Common Music Licensing Terms*,
<http://www.ascap.com/licensing/termsdefined.html>, 2008.

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Simpson, Carol, *Copyright for Schools* (4th ed.), Linworth Publishing, 2004.



Top 5 Copyright Tips for Music

1. Check your music licenses. You don't need a license to perform music live, with unpaid students or other unpaid performers, as long as any revenue derived from the performance (including donations or purchases of concessions) goes to the non-profit school. You do need a license to hire a DJ or live band to play music at a dance.
2. If you are planning to perform a play or musical, think ahead. Virtually everything you do with a play or musical must be licensed. If you want to use photos of the dress rehearsal in the newspaper to advertise, you must have rights to take photos. If you want to record the performance for the participants (or to sell to parents, etc.) you must have rights to do that. If you want to run the recording on the local cable channel or stream on the web, you need a license to do that. It is much more cost-effective to include all the licenses when you are negotiating with the play/musical company than to add those rights later.
3. Photocopying sheet music requires a photocopy license or permission unless you are only copying a small, non-performable section of a piece such as something used to practice a particular type of fingering, rhythm, or harmony. "Emergency" copying, such as when ordered music has failed to arrive in time for an imminent performance, is also permitted so long as the order has already been placed for legal copies. An example of "emergency" copying can be when you expect to have three bassoons and have ordered three bassoon parts, but a new bassoon transfers in and you don't have sufficient bassoon parts for the new performer. Order the new part, and you may then photocopy the part until the purchased music arrives.
4. If you record school concerts and either give or sell copies to students or parents, you need to get mechanical licensing rights on each copyrighted work recorded. Mechanical rights cost about \$.09 per song per copy, so licenses for a recording containing 11 songs would add about one dollar to the cost of the recording.
5. Music, arrangements, or marching plans you have written for previous employers, unless you have specific written arrangements to own the rights, belong to the previous employers as "work for hire."