



Legal Concerns for the Music Educator

CLINICIAN:
Holly Wardell

Texas Bandmasters Association 2016 Convention/Clinic

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HENRY B. GONZALEZ CONVENTION CENTER
SAN ANTONIO, TEXAS**



LEGAL CONCERNS FOR THE MUSIC EDUCATOR

Presented by: Holly Boyd Wardell
July 21, 2016

EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

AUSTIN

4201 W. Parmer Lane, Suite A-100
Austin, TX 78727
(512) 476-9944

D/FW METROPLEX

5801 Tennyson Parkway, Suite 360
Plano, TX 75024
(972) 377-7900

(800) 488-9045 | information@edlaw.com | www.edlaw.com



EICHELBAUM WARDELL
HANSEN POWELL & MEHL, P.C.

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 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.

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's email address is hwardell@edlaw.com.

4201 W. Parmer Lane, Suite A-100, Austin, Texas 78727
Ph: 512.476.9944 Fax: 512.472.2599
www.edlaw.com | information@edlaw.com



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HANSEN POWELL & MEHL, P.C.

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www.edlaw.com

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
- 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





MUSIC LICENSING

Many different types of licenses apply to copyrighted music. Some licenses are not required for schools unless an educational fair use exception, 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 share 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:

ASSIGNMENT - for creation of a new version of a composition other than a simple change of key, included new instrumentation, modified lyrics, changing a lengthy composition, changing a key, changing musical style from jazz to hip-hop, for example.

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

PERFORMING RIGHTS ASSOCIATION - for use of phonorecords of a performer when music is played in a musical performance.

GRAND - for playing a musical piece, lyrics, or score in 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.

MASTERS - for use of existing recordings. 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. They need this license to sell or give recordings of student concerts to students, parents, and friends. Mechanical rights are available to a publisher, record producer, or the songwriter. If you are selling or giving away the publisher has recorded and released the song. Royalty rates are set by law. Mechanical rights are licensed through the Harry Fox Agency (www.harryfox.com) and are available for small form. You can try to negotiate a reduced rate through individual copyright owners, but the reduced rate must still be submitted to Harry Fox. See



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 purchase of accompanying gear) is for the nonprofit school. You do need a license to hire a DJ to live band to play music at a dance.
2. If you are planning to perform a play or musical, think ahead. Usually everything you do with a play or musical must be licensed. If you want to use photos of the show, rehearsal in the newspaper to advertise, you must have rights to take photos. If you want to record the performance for the participants (or sell to parents), you must have rights to do that. If you want to use the recording on the local radio channel or stream on the web, you need a license to do that. It is much more expensive to obtain all the licenses when you are negotiating with the physical company than to get those rights later.
3. Photocopying sheet music requires a photocopy license or permission unless you are only copying a single, non-profitable edition of a piece with an accompanying used to produce a particular type of singing, rhythm, or harmony. "Emergency" copying, such as when school music has sheet music in book form or electronic performance, is also permitted as long as the work has already been played for legal copies. An example of "emergency" copying that is either not equal to how the book has been used and has released three copies per year, but a new licensee transfers in and you don't have sufficient licenses for the new performer. Stop the new part, and you may have photocopying 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 a get mechanical licensing rights on each recording with recorded. Mechanical rights cost about \$0.09 per song per copy, so licenses for a recording containing 12 songs would cost about one dollar in the cost of the recording.
5. Music arrangements, or recording plans you have written for previous employers, unless you have specific written arrangements to use the rights, belong to the previous employer, so work for you.

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What people worry about...

- Liability for supervision
- Student injuries
- Trips/travel
- Parents suing because child did not make first chair or questioning your decisions



Student Injuries

Liabile or Immune?



PERSONAL INJURY CLAIMS

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



School Districts

- Sovereign Immunity
- Governmental Immunity

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



“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

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...

Tex. Educ. Code § 22.0511

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

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

Barr v. Bernhard

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



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



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.



Professional employees are protected from personal injury claims like:

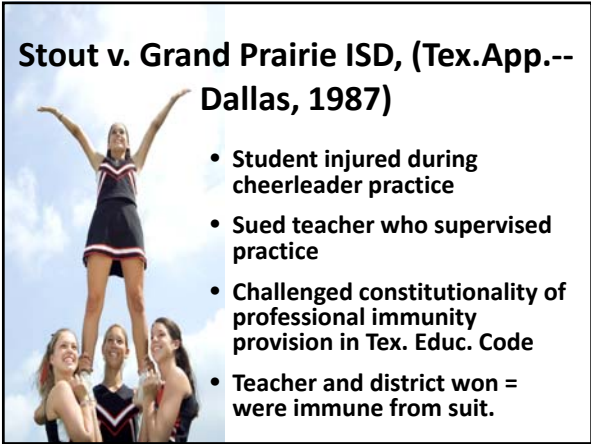
- Playground Accidents
- Sports Injuries
- Student Fights
- Classroom Accidents
- Natural Death



Tex. Educ. Code § 22.0511

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

**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.

Stout v. Grand Prairie ISD

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.

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.

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



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

Yes, but be careful




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)



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



What should you worry about?

- Harassment Allegations
- Relationships with Students
- Use of Districts Funds and Resources
- First Amendment
- Fourth Amendment
- Students with Disabilities



Harassment Policies

- FFH – Students
- DIA – Employees
- DH – Standards of Conduct

RELATIONSHIPS WITH STUDENTS

In-class treatment
Communication
Out of class communication





- 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.

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

SOLICITING ROMANTIC RELATIONSHIP

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 DISTRICT
 EMPLOYEE STANDARDS OF CONDUCT DH
 (LOCAL)

Each District employee shall perform his or her duties in accord-

DH (LOCAL)

EMPLOYEE STANDARDS OF CONDUCT

VIOLATIONS OF STANDARDS OF CONDUCT Each employee shall comply with the standards of conduct set out in this policy and with any other policies, regulations, or guidelines that the District, Board, Department, or otherwise may establish in his or her duties as a District employee, including if any position.

ELECTRONIC MEDIA Electronic media includes all forms of social media, such as text messaging, instant messaging, electronic mail (e-mail), Web logs (blogs), electronic forums (chat rooms), video-sharing Web sites, editorial comments posted on the Internet, and social network sites. Electronic media also includes all forms of telecommunication, such as landlines, cell phones, and Web-based applications.

PERSONAL USE An employee shall be held to the same professional standards in his or her public use of electronic media as for any other public conduct. If an employee's use of electronic media violates state or federal law or District policy, or interferes with the employee's ability to effectively perform his or her job duties, the employee is subject to disciplinary action, up to and including termination of employment.

SAFETY REQUIREMENTS Each employee shall adhere to District safety rules and regulations and all other health, protective or practice in the appropriate department.

MEMORANDUM ON ABUSE An employee shall not engage in prohibited harassment, including sexual harassment, if:

**DATE ISSUED 10/2012
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 DISTRICT/AL** 1 of 1

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 DISTRICT
 EMPLOYEE STANDARDS OF CONDUCT DH
 (LOCAL)

Each District employee shall perform his or her duties in accordance with state and federal law, District policy, and ethical standards, when applicable.

USE WITH STUDENTS In accordance with administrative regulations, a certified or licensed employee, or any other employee, may use electronic media to communicate with currently enrolled students about matters within the scope of the employee's professional responsibilities.

Each employee shall comply with the District's requirements for records retention and destruction to the extent those requirements apply to electronic media. [See CPC]

PERSONAL USE An employee shall be held to the same professional standards in his or her public use of electronic media as for any other public conduct. If an employee's use of electronic media violates state or federal law or District policy, or interferes with the employee's ability to effectively perform his or her job duties, the employee is subject to disciplinary action, up to and including termination of employment.

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Hazing is Criminal

- Engage in
- Solicit, encourage
- Recklessly permit
- Have firsthand knowledge and fails to report
- Consent is not a defense



-First Amendment Claims-
-Fourth Amendment Claims-



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