Legal Concerns for the Music Educator

CLINICIAN:

Holly Wardell

Texas Bandmasters Association
2017 Convention/Clinic

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HENRY B. GONZALEZ CONVENTION CENTER
SAN ANTONIO, TEXAS

LEGAL CONCERNS FOR NEW MUSIC EDUCATORS

Presented by: Holly Boyd Wardell
July 20, 2017

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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.

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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
- 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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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

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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."

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REQUIRED TRAININGS
(Marching Band Directors)

CPR and AED – Tex. Educ. Code 22.902
Each marching band director – must receive and maintain certification

CPR & First Aid Certification – Tex. Educ. Code 33.086
Head Director of School Marching Band – must maintain and submit proof of current certification

Safety Training – Tex. Educ. Code 33.202
Director responsible for school marching band – must complete training (emergency action planning, CPR, communicating with 911, recognizing symptoms of potentially catastrophic injuries, safety drill 1x/yr)

Student Injuries

Liable or Immune?

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 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…

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.

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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**

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.

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.

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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.**

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.

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.

- 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

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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)

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

PERSONALLY LIABLE

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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

Not Necessarily Immune From Federal Claims:

1) **Illegal Discrimination or Harassment**
2) **First Amendment (Religion & Speech)**
3) **Fourth Amendment (Search & Seizure)**
4) **Intentional Violations of Student's IEP or 504 Plan**

What should you worry about?

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

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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

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

  Including providing drugs or alcohol

SOLICITING ROMANTIC RELATIONSHIP

EMPLOYEE STANDARDS OF CONDUCT

DH
(LOCAL)

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.

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]

FRAMERS CO
SERIES
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 stand-

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.

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)

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SAFETY REQUIREMENTS Each employee shall adhere to District safety rules and regulations and shall report unsafe conditions or practices to the appropriate supervisor.

HARASSMENT OR ABUSE An employee shall not engage in prohibited harassment, including sexual harassment, of:

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UPDATE 83
DH(LOCAL)-X 1 of 3

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-

KNOW YOUR BOARD POLICIES

School district's website

Sections

- A – Basic District Foundations
- B – Local Governance
- C – Business and Support Services
- D – Personnel
- E - Instruction
- F – Students
- G – Community and Governmental Relations

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KNOW YOUR BOARD POLICIES

- STANDARDS OF CONDUCT – DH
- HARASSMENT - FFH
- BULLYING - FFI
- ELEC. COMMUNICATIONS – DH; CQ & CQA

KNOW YOUR BOARD POLICIES

- MONEY & DISTRICT RESOURCES – CFD; CAA
- FIRST AMENDMENT – FNA, FNAA, FNAB
- FOURTH AMENDMENT – STUDENT SEARCHES - FN

FERPA

Parents have a right to access any record related to their children.

#thisincludesemails

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