



**Texas Bandmasters Association
Convention/Clinic July 25-27, 2019**

**Legal Concerns for the Music
Educator**

**CLINICIAN:
Holly Wardell**

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



Legal Concerns for The Music Educator

Presented by: Holly Boyd Wardell
July 25, 2019

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Holly Boyd Wardell



Holly is a Shareholder in our Austin office.

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 Austin Bar Association, 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 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.

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LEGAL CONCERNS FOR THE MUSIC EDUCATOR

Holly Boyd Wardell
www.edlaw.com

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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



2

What people worry about...

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



3

What people **SHOULD** worry about

- Copyright infringement
- Student harassment and hazing
- Corporal punishment
- Searches
- **RELATIONSHIPS WITH STUDENTS**

4

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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LEARN • TEACH • PLAY

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Licensing

New License Request

Click this to request an Arrangement, Sub-publishing, Print (using lyrics or music in a publication), Mechanical, Synchronization, Broadcast, Performance, Photocopy or Web Posting license.

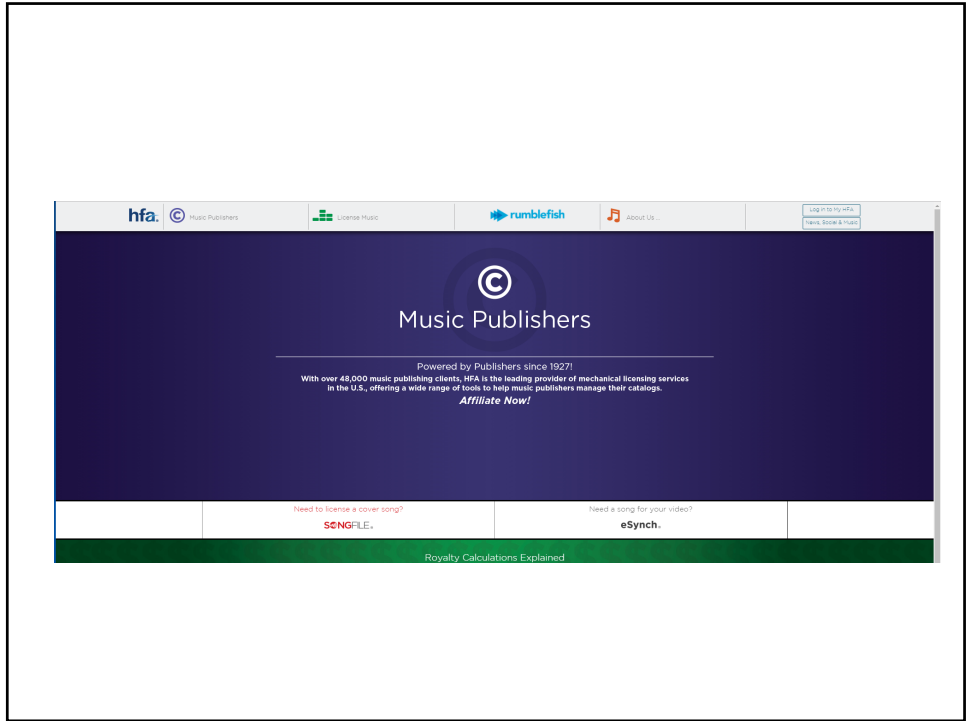
New Festival Permission

Click this to request adjudicate copies of scores for competitions, festivals and evaluations.

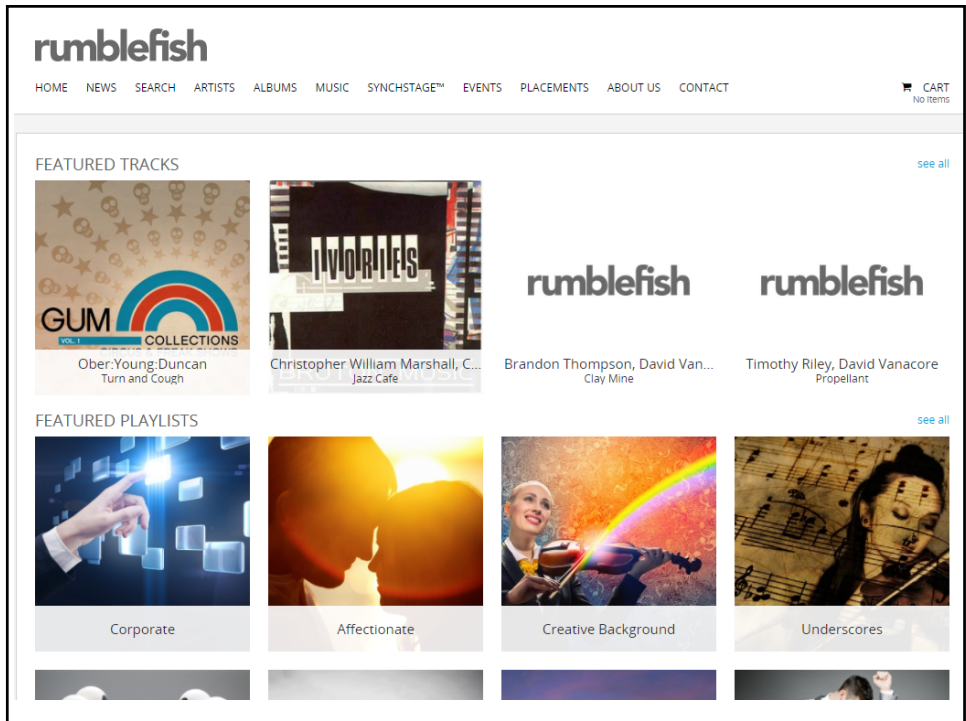
Edit Personal Information

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Top 5 Copyright Tips for Music

1. Check your music licenses.
2. Virtually everything you do with a play or musical must be licensed.
3. Photocopying sheet music requires a photocopy license or permission (with few exceptions).
4. If you record school concerts, you need mechanical rights.
5. Music, arrangements, or marching plans belong to your employer.

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Student Injuries

Liable or Immune?



10

PERSONAL INJURY CLAIMS

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



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“Professional Employee”

<ul style="list-style-type: none">• Superintendent• Principal• Teacher• Substitute Teacher• Supervisor• Social Worker• Counselor• Nurse	<ul style="list-style-type: none">• 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...

15

Tex. Educ. Code § 22.0511

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

16

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

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Barr v. Bernhard

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



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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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Professional employees are protected from personal injury claims like:

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



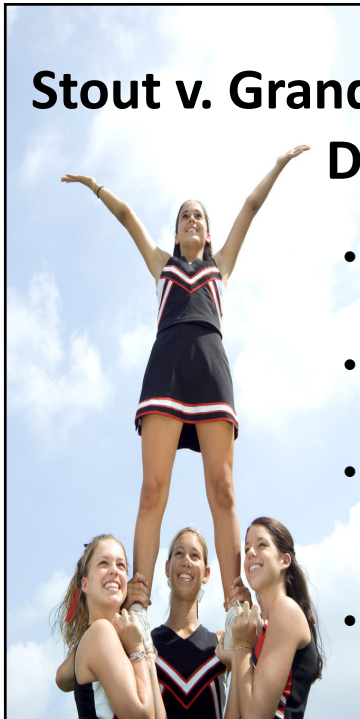
22

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.

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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.

25

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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- 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)

29



30

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

PERSONALLY LIABLE

31



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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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

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RELATIONSHIPS WITH STUDENTS

In-class treatment
Communication
Out of class communication



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- 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 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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PARADISE (D)
10/19/17

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. [See DM(EXHIBIT)]

EMPLOYEE STANDARDS OF CONDUCT

DH
(LOCAL)

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, and guidelines that impose duties, requirements, or standards attendant to his or her status as a District employee. Violation of any policies, regulations, or standards shall be cause for disciplinary action, up to and including termination of employment.

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 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:

DATE ISSUED: 3/04/2012
UPDATE 03
DHLOCAL1X

1 of 3

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PARADISE (D)
10/19/17

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. [See DM(EXHIBIT)]

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

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DATE ISSUED: 3/04/2012
UPDATE 03
DHLOCAL1X

1 of 3

40

Palmdale (D)
10/19/17
EMPLOYEE STANDARDS OF CONDUCT

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(LOCAL)

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DATE ISSUED: 10/20/17 1 of 3
LUDWIG (D)
DHLOCALXX


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Hazing is Criminal



8/20/14 2:19 pm EDT | Updated 3/6/2014 2:19 pm EDT


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



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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 for sheet music are available from one of the music rights

organizations: ASCAP, BMI, SESAC. Performance rights for music recorded by others are available from the record company.

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 may be negotiated directly with the publisher of the underlying sheet music, or you can check the Harry Fox eSynch catalog to see if the song is in their database.

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

Alfred Publishing, Co., *Licensing*.
<https://licensing.alfred.com/ClientHome.aspx>, 2013.

ASCAP, *Common Music Licensing Terms*,
<https://www.ascap.com/help/ascap-licensing/licensing-terms-defined>, 2018.

Harry Fox Agency, *Mechanical Licensing*,
https://www.harryfox.com/license_music/what_is_mechanical_license.html, 2015.

Simpson, Carol, *Copyright for Schools* (5th ed.), Linworth Publishing, 2010.

Licenses Required for Common Uses

USE	LICENSE(S) NEEDED	SOURCE OF LICENSE(S)
Podcasting/blogs	Mechanical	Music publisher (sheet music) directly or through Harry Fox Agency
	Performance	ASCAP, BMI, SESAC
	Master Use	Record Company (directly)*
Website background music	Mechanical /Synch	Music publisher (sheet music) directly
	Performance	ASCAP, BMI, SESAC
	Master Use / Synch / Performance	Record Company (directly)*
Web video	Mechanical / Synch	Music publisher (sheet music) directly
	Performance	ASCAP, BMI, SESAC
	Master Use / Synch / Performance	Record Company (directly)*
Web streaming (on demand)	Mechanical	Music publisher (sheet music) directly or through Harry Fox Agency
	Performance	ASCAP, BMI, SESAC
	Master Use / Performance	Record Company (directly)*

* Only applies if using music recorded by others.