



**Texas Bandmasters Association
Virtual Convention July 20-22, 2020**

Legal Issues Facing Music Educators

**CLINICIAN:
Holly Wardell**



Legal Concerns for New Music Educators

Presented by: Holly Boyd Wardell
July 19, 2020

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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 Northern, Eastern, Southern, and Western 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, Litigation, Administrative and Public Law, 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 cooperatives, 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.

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LEGAL CONCERNS FOR NEW MUSIC EDUCATORS

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**



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MUSIC LICENSING

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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).

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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

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Licensing

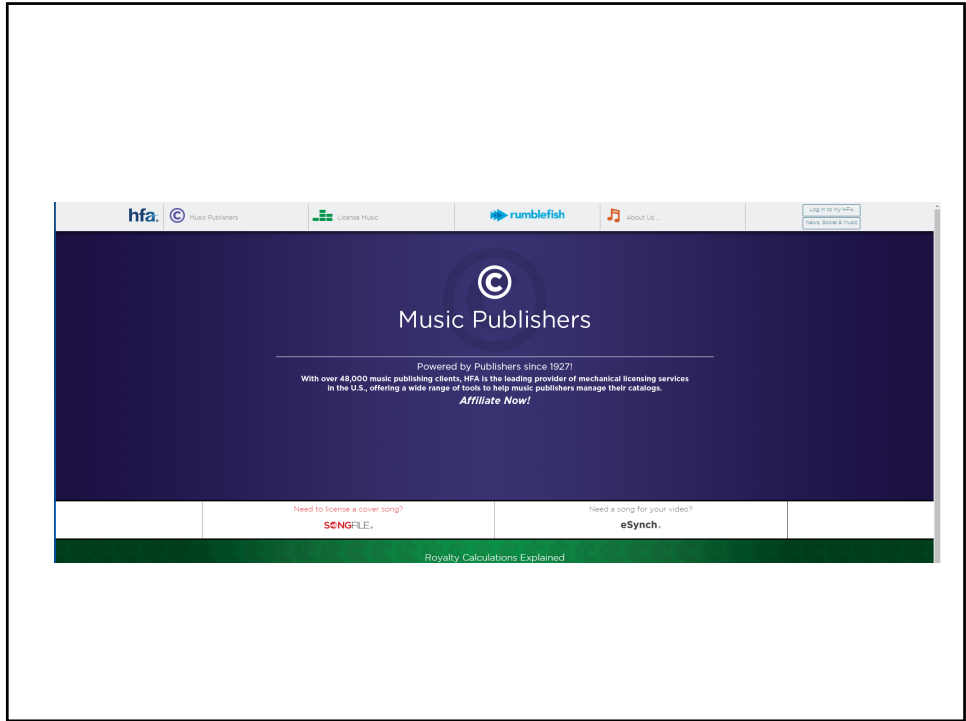
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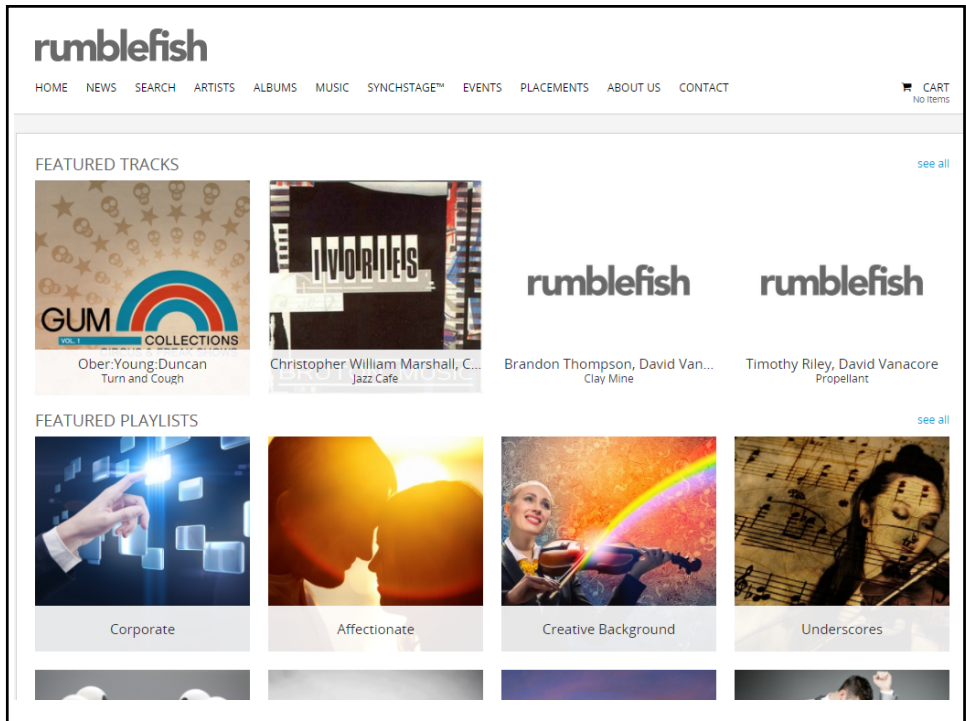
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Top 5 Copyright Tips for Music

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 5.09 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.

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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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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)

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Student Injuries

Liable or Immune?

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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

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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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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



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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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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.

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



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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

30

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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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**

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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
- Copyright infringement



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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

35



- 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 wanting an ardent relationship with student**
- Including providing drugs or alcohol**

SOLICITING ROMANTIC RELATIONSHIP

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Palmdale (D)
101917

EMPLOYEE STANDARDS OF CONDUCT

DH
(LOCAL)

Each District employee shall perform his or her duties in accordance 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.

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.

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.

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, or

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1 of 3

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Palmdale (D)
101917

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 D(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 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

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-First Amendment Claims-

-Fourth Amendment Claims-

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PARENT COMPLAINTS

FNG (LOCAL)
3 LEVELS
FINAL W BOARD OR NOT?

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- Be fair
- Seek prior approval from administration before changing long-standing procedures
- Be involved in any complaints
- Remember trustees are local politicians

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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

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KNOW YOUR BOARD POLICIES

MONEY & DISTRICT RESOURCES – CFD; CAA

FIRST AMENDMENT – FNA, FNAA, FNAB

FOURTH AMENDMENT – STUDENT SEARCHES - FN

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FERPA

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

#thisincludesemails

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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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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."