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## Education Law

Lynn Rossi Scott

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# EDUCATION LAW

*Lynn Rossi Scott\**

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## I. 1999 TEXAS LEGISLATIVE CHANGES

THE 1999 Texas Legislative Session experienced much “tweaking” of the Education Code, correcting issues which came to light in the years after the 1995 Legislative Session, during which the Education Code experienced a major overhaul.

### A. OPEN MEETINGS, PUBLIC INFORMATION

One example of an issue which arose after the major legislative overhaul involves the applicability of the Texas Open Meetings Act and the Texas Public Information Act to Texas’ charter schools. House Bill 211<sup>1</sup> resolved this and other issues. Open enrollment charter schools are now

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1. See Tex. H.B. 211, 76th Leg., R.S. (1999).

explicitly made subject to the Texas Open Meetings Act and the Texas Public Information Act.<sup>2</sup> Further, a person who has been convicted of a felony or misdemeanor involving moral turpitude is no longer eligible to serve as an officer or member of the governing board of an open enrollment charter school.<sup>3</sup> Interestingly enough, this standard is now higher than the standard for an officer or member of a school board trustee, which has no such restriction for moral turpitude misdemeanors.<sup>4</sup> Open enrollment charter schools may also, through a higher education board, issue revenue bonds to finance or refinance education or housing facilities to be used by the school.<sup>5</sup>

A highly significant legislative act, House Bill 156,<sup>6</sup> amended the Texas Open Meetings Act and the Texas Public Information Act. The most significant revision of the Open Meetings Act expanded the definition of a "meeting" to include a gathering conducted by a governmental body at which a quorum is present and at which the members receive information from or give information to a third person, including an employee of the governmental body.<sup>7</sup> The practical effect of this revision is to repeal the former "staff briefing" exception. Therefore, school district and college boards may no longer meet in closed sessions to hear administrative officers provide them information which is not listed specifically on the agenda. However, the drafting of this provision has already raised some questions, prompting the Texas Attorney General to interpret this statutory revision. The Tarrant County District Attorney asked the Attorney General whether this new provision in effect repealed the ability of governing boards to conduct "open forum" or "staff briefing" sessions in public meetings, since all subject matters in a meeting, including subjects presented by a third person, now require advance agenda notice. The Texas Attorney General ruled that because it would be impractical, if not nearly impossible, for a school board to give prior notice of agenda items when members of the public came to present information or complaints, specifying merely "open forum" on an agenda would be appropriate provided the school district is unaware of the subject matter of the citizen's presentation to the board.<sup>8</sup> However, if the school board is aware of the subject matter of the citizen's presentation, then the school board should specifically list the agenda topic.<sup>9</sup> As for staff briefings in open session, the Attorney General ruled that because the governing body has more control over the employees, the specific subject matter of their presentations must be included in the agenda.<sup>10</sup>

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2. See TEX. EDUC. CODE ANN. § 12.105(b) (Vernon 2000).

3. See TEX. EDUC. CODE ANN. § 12.120 (Vernon 2000).

4. See TEX. EDUC. CODE § 11.061(b) (Vernon Supp. 2000); TEX. ELEC. CODE §§ 11.002(4), 141.001 (Vernon Supp. 2000).

5. See TEX. EDUC. CODE ANN. § 53.48 (Vernon Supp. 2000).

6. TEX. H.B. 156, 76th Leg., R.S. (1999).

7. See TEX. GOV'T CODE ANN. § 551.001(4) (Vernon Supp. 2000).

8. See Op. Tex. Att'y Gen. No. JC-0169 (2000).

9. See *id.*

10. See *id.*

The Texas Public Information Act, House Bill 211,<sup>11</sup> made it clear that a school district or open enrollment charter school must now appeal, within thirty days of receipt of an Attorney General's open records, decisions regarding a student's records when the student's parents make the request.<sup>12</sup> The statute also limited the school district or charter school's rights to appeal the district court's decision on the matter involving the student's records.<sup>13</sup>

House Bill 211 added an informer's privilege, which now allows a school district or open enrollment charter school to keep confidential the name of a student or employee who reports a civil, criminal, or regulatory violation.<sup>14</sup> This legislation also allows a school board to meet with another governmental entity if the boundaries of the entity are located entirely or partially within the school district's boundaries.<sup>15</sup>

In this new age of high technology, the Texas Legislature added Senate Bill 125<sup>16</sup> to allow governmental bodies to broadcast open meetings over the internet.<sup>17</sup> "A governmental body that broadcasts a meeting over the Internet shall establish an Internet site and provide access to the broadcast from that site."<sup>18</sup> The governmental body must provide, on the internet site, the same notice of the meeting that the governmental body is required to post under the Texas Open Meetings Act.<sup>19</sup> The notice must also be posted within the same time limits as the Texas Open Meetings Act.<sup>20</sup>

Senate Bill 1851<sup>21</sup> made a large number of technical changes to the Texas Public Information Act and the Texas Open Meetings Act. The Texas Public Information Act now states that a court cannot order a school district to withhold a category of public information unless that category of information is made expressly confidential by other law.<sup>22</sup>

In order to provide some additional confidentiality to protect the integrity of economic development activities, Senate Bill 1851<sup>23</sup> also added a provision to the Texas Public Information Act stating that unless and until an agreement is made with a business prospect, information related to any financial incentive provided by a school district is exempted from disclosure.<sup>24</sup> If an agreement is made with the business prospect, the financial or other incentive offered by the district, and any other financial incentive offered by another person involving public funds, may then be

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11. See Tex. H.B. 211, 76th Leg., R.S. (1999).

12. See TEX. EDUC. CODE ANN. § 26.0085(a) (Vernon Supp. 2000).

13. See *id.* § 26.0085(c).

14. See TEX. GOV'T CODE ANN. § 552.131 (Vernon Supp. 2000).

15. See TEX. EDUC. CODE ANN. § 26.007(b) (Vernon Supp. 2000).

16. Tex. S.B. 125, 76th Leg., R.S. (1999).

17. See TEX. GOV'T CODE ANN. § 551.128(b) (Vernon Supp. 2000).

18. *Id.* § 551.128(c).

19. See *id.*

20. See *id.*

21. Tex. S.B. 1851, 76th Leg., R.S. (1999).

22. See TEX. GOV'T CODE ANN. § 552.022(b) (Vernon Supp. 2000).

23. See Tex. H.B. 1851, 76th Leg., R.S. (1999).

24. See TEX. GOV'T CODE ANN. § 552.131(b) (Vernon 2000).

subject to disclosure.<sup>25</sup>

Senate Bill 1851<sup>26</sup> provided an exception to the Open Meetings Act to allow a school board to conduct a closed meeting for economic development negotiations. A school board may now deliberate in closed session about commercial or financial information that it receives from a business prospect that the board wants to aid in locating, remaining, or expanding in or near the district, and with which the board is conducting economic development negotiations.<sup>27</sup>

Senate Bill 1851<sup>28</sup> amended the litigation or settlement negotiation exception of the Texas Public Information Act to specify that litigation information is excepted only if litigation is pending or reasonably anticipated on the date the information is requested.<sup>29</sup> The provision which previously excepted settlement negotiations was specifically deleted.<sup>30</sup>

The Public Information Act now requires that the district's public information officer must display a sign describing the public's rights and responsibilities to inspect and obtain public information in a district's administrative offices, plainly visible to the public and district employees.<sup>31</sup> The General Services Commission has a copy of that sign on its website.<sup>32</sup>

Under Senate Bill 1851, governmental entities may also require a deposit on copies if the charge is estimated to exceed \$50 or \$100, depending on the number of full-time employees in the entity.<sup>33</sup> For the first time, the Legislature has authorized certain charges for "inspection only" requests, as opposed to the previous requirement which only applied to "copy" requests.<sup>34</sup> A district can also give a requestor notice that a request will result in a charge of more than \$40 for information requested, along with an itemized statement of expenses.<sup>35</sup> If the requestor does not respond, the request is considered dismissed.<sup>36</sup> A requestor must respond and agree to pay the costs in order to continue the public information process.<sup>37</sup> A governmental body that requests an Attorney General's opinion on the release of public information must inform the requestor, within ten business days after receiving the request, that the district is withholding the requested information and has asked for an Attorney General's opinion.<sup>38</sup> The district must give the requestor a

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25. *See id.* § 552.131(c).

26. *See* Tex. H.B. 1851, 76th Leg., R.S. (1999).

27. *See* TEX. GOV'T CODE ANN. § 551.086 (Vernon Supp. 2000).

28. Tex. S.B. 1851, 76th Leg., R.S. (1999).

29. *See* TEX. GOV'T CODE ANN. § 552.103(c) (Vernon Supp. 2000).

30. *See id.* § 552.103(a).

31. *See id.* § 552.205.

32. *Texas General Services Commission* (visited Apr. 17, 2000) <[http://www.gsc.state.tx.us/open\\_records/pia.html](http://www.gsc.state.tx.us/open_records/pia.html)>.

33. TEX. GOV'T CODE ANN. § 552.263(a) (Vernon 2000).

34. *See id.* § 552.271.

35. *See id.* § 552.2615(a).

36. *See id.*

37. *See id.* § 552.2615(b).

38. *See id.* § 552.301(d).

copy of the opinion request to the Attorney General. However, the school district may redact information that it believes to be confidential.<sup>39</sup>

The amendment to the Public Information Act also states that if an individual's proprietary information may be subject to certain public information exceptions, the district must make a good faith attempt to notify the person whose proprietary information is involved.<sup>40</sup> That person then has the right to correspond with the Attorney General regarding disclosure of the information, on his or her own behalf.<sup>41</sup> The Attorney General now only has forty-five working days to provide a response to a request for an opinion regarding a request for public information, rather than the previous sixty working days.<sup>42</sup> However, if the Attorney General cannot meet the forty-five-day deadline, then the Attorney General must notify the governing body in order to obtain an additional ten days.<sup>43</sup>

A person who claims to be a victim of a Public Information Act violation, including a requestor making a claim against a district, may sue for injunctive or declaratory relief.<sup>44</sup> A thirty-day statute of limitations has been added for districts to bring suit to challenge an Attorney General decision.<sup>45</sup>

#### B. TAMPERING WITH GOVERNMENTAL RECORDS

House Bill 926<sup>46</sup> amended Texas Penal Code § 37.10(c)(2) so that tampering with a public school record, report, or assessment instrument, such as the Texas Assessment of Academic Skills ("TAAS") exam, constitutes a felony.<sup>47</sup> An offense for tampering with a public school record is now a third-degree felony unless the intent was to defraud or harm another, which constitutes a second-degree felony.<sup>48</sup>

#### C. JUNIOR COLLEGES

House Bill 2415<sup>49</sup> clarified a junior college district board of trustee's ability to establish and operate branch campuses, centers, or extension facilities within the district's service area. "Before any course may be offered by a public junior college within the service area of another operating public junior college, it must be established" to the Texas Higher Education Coordinating Board "that the second public junior college is not capable of or is unable to offer the course."<sup>50</sup> A board of trustees

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39. See TEX. GOV'T CODE ANN. § 552.301(d)(2) (Vernon Supp. 2000).

40. See *id.* § 552.305(d).

41. See *id.* § 552.305(b).

42. See *id.* § 552.306(a).

43. See *id.*

44. See *id.* § 552.3215.

45. See TEX. GOV'T CODE ANN. § 552.324(b) (Vernon Supp. 2000).

46. Tex. H.B. 926, 76th Leg., R.S. (1999).

47. See TEX. PENAL CODE ANN. § 37.10(c)(2) (Vernon Supp. 2000).

48. See *id.*

49. H.B. 2415, 76th Leg., R.S. (1999).

50. TEX. EDUC. CODE ANN. § 130.086(d) (Vernon Supp. 2000).

may accept, purchase, or rent land and facilities in the name of the junior college district in the district's service area in order to establish and operate branch campuses, centers, or extension facilities.<sup>51</sup>

In an amendment to the Education Code provided by Senate Bill 1352<sup>52</sup> provides that if a school district agrees, a public junior college may offer a course in which a high school student may enroll and receive both high school and junior college course credit, regardless of whether the high school credits fulfill the student's graduation requirements.<sup>53</sup>

Senate Bill 1670<sup>54</sup> states that if a student is fully enrolled in an accredited secondary school, in a program leading toward a high school diploma, or enrolled in courses for joint high school and junior college credit, family court may render an original support order or modify an existing order providing for child support past the eighteenth birthday of the child.<sup>55</sup>

#### D. PERSONNEL

Senate Bill 4<sup>56</sup> has finally clarified the process by which a probationary contract employee is notified of the school district's decision not to offer the employee a contract for the next school year.<sup>57</sup> Previously, a Board was required to give notice of "intent" to terminate a probationary contract at the end of the contract term. The statute was amended to delete the word "intent" and to make it clear that the employee will be notified of the board's "decision" to terminate the employee's probationary contract. The Legislature thus contemplates now clearly a one-step, as opposed to a two-step, process.<sup>58</sup>

House Bill 269<sup>59</sup> amended Texas Education Code § 22.006 based on issues which arise regarding jury service by public school employees. Previously, school districts were not required to provide paid leave in addition to accumulated personal leave for an employee to serve on a jury in state court. However, beginning with the 1999-2000 school year, school districts must provide school employees with state jury service leave.<sup>60</sup> School districts may not discharge, reduce the salary of, or otherwise penalize or discriminate against, a school district employee who complies with a jury summons in state court.<sup>61</sup> Non-salaried school employees must receive their daily pay while serving on the state jury.<sup>62</sup> School districts may not reduce an employee's accumulated personal leave for state

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51. *See id.* § 130.086(c).

52. *Tex. S.B. 1352*, 76th Leg., R.S. (1999).

53. *See TEX. EDUC. CODE ANN.* § 130.008 (a)(i)(2) (Vernon Supp. 2000).

54. *Tex. S.B. 1670*, 76th Leg., R.S. (1999).

55. *See TEX. FAM. CODE ANN.* § 154.002(a) (Vernon Supp. 2000).

56. *Tex. S.B. 4*, 76th Leg., R.S. (1999).

57. *See TEX. EDUC. CODE ANN.* § 21.103(a) (Vernon Supp. 2000).

58. *See id.*

59. *Tex. H.B. 269*, 76th Leg., R.S. (1999).

60. *See TEX. EDUC. CODE ANN.* § 22.006 (Vernon Supp. 2000).

61. *See id.* § 22.006(a).

62. *See id.* § 22.006(b).

jury service.<sup>63</sup>

A much-heralded new statute is House Bill 341,<sup>64</sup> which added Texas Labor Code Chapter 103. The new law extends, for the first time, statutory protection to employers or former employers who give references for their former or current employees. Employers, or their authorized employees, may provide "information about a current or former employee's job performance to a prospective employer of the current or former employee on the request of the prospective employer or the employee."<sup>65</sup> "Job performance" information relates to the manner in which the employee performs, and can include "attendance at work, attitudes, effort, knowledge, behaviors and skills."<sup>66</sup> Those who provide job performance information are immune from civil liability or any damages caused by the disclosure, unless the employee or former employee provides clear and convincing evidence that the employer knew at the time of the disclosure that it was false or that it was made with malice or reckless disregard for its truth or falsity.<sup>67</sup> However, despite the significant immunities, an employer is still not required by statute to provide an employment reference.<sup>68</sup>

House Bill 618<sup>69</sup> modified Texas Education Code § 21.057. Beginning with the 1999-2000 school year, when a school district assigns an uncertified or inappropriately certified person to teach a class for more than thirty consecutive instructional days during that school year, the district must provide written notice to the parents of students in that class.<sup>70</sup> That parental notice must be provided within thirty instructional days of the assignment of the teacher.<sup>71</sup> Uncertified or inappropriately certified teachers include those serving on emergency permits and those who do not hold any certification.<sup>72</sup> The terms do not include teachers serving on temporary classroom assignment permits, a hearing impairment certificate, or a school district teaching permit; teachers certified under an alternative certification program; or those who are employed under a certification waiver granted by the Commissioner of Education.<sup>73</sup>

It is now a Class C misdemeanor for a school district employee to knowingly sell, market, or distribute the use of dietary supplements that contain performance-enhancing compounds to students with whom the employee has regular contact as a part of the employee's regular school

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63. *See id.* § 22.006 (c).

64. Tex. H.B. 341, 76th Leg., R.S. (1999).

65. TEX. LAB. CODE ANN. § 103.003(a) (Vernon Supp. 2000).

66. *Id.* § 103.002(3).

67. *See id.* § 103.004(a).

68. *See id.* § 103.005.

69. Tex. H.B. 618, 76th Leg., R.S. (1999).

70. *See* TEX. EDUC. CODE ANN. § 21.057(a) (Vernon Supp. 2000).

71. *See id.* § 21.057(b).

72. *See id.* § 21.057(d).

73. *See id.* § 21.057(d)(2)(A)-(F).



district duties.<sup>74</sup> House Bill 3420<sup>75</sup> adds this provision to Texas Education Code § 38.011. The list of performance-enhancing compounds includes stimulants, amino acids, hormone precursors, herbs, or other botanicals or substances other than vitamins or minerals, that are intended to increase athletic or intellectual performance, promote muscle growth, or increase endurance and capacity for exercise.<sup>76</sup> A school district employee, however, is not prohibited from providing or endorsing the use of such dietary substances by that employee's child.<sup>77</sup> Furthermore, a school district employee is not prohibited from selling, marketing, distributing, or endorsing the use of dietary supplements by students as a part of activities that take place away from the school property and school-related functions, and that are entirely separate from the school district employee's employment and which do not in any way involve information about or contacts with students that the employee has had access to through any aspect of his or her employment.<sup>78</sup>

Senate Bill 1128<sup>79</sup> made numerous revisions to the Texas Teacher Retirement System, including increasing the multiplier,<sup>80</sup> increasing monthly annuities with the fourth and final phase of the Consumer Price Index catchup, increasing monthly annuities, making new distribution options,<sup>81</sup> and providing for a new lump sum death benefit for an on-duty physical assault which causes death.<sup>82</sup>

Athletic trainers are now regulated as a result of Senate Bill 1233,<sup>83</sup> which amends Texas Revised Civil Statutes article 4512d. Athletic training includes preventing, recognizing, assessing, managing, treating, disposing of, and reconditioning athletic injuries under the supervision of either a licensed physician or other licensed health professional authorized to refer a patient for health care services.<sup>84</sup> The Texas Advisory Board of Athletic Trainers is also authorized to refuse to issue a license, and to suspend or revoke the license of any athletic trainer or applicant who provides services outside the scope of the practice of athletic training.<sup>85</sup> This statutory construction comports with a recent Fifth Circuit decision, in which the Court of Appeals held that athletic trainers are "professionals" under the Fair Labor Standards Act and are, therefore,

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74. See TEX. EDUC. CODE ANN. § 38.011(a), (c) (Vernon Supp. 2000).

75. Tex. H.B. 3420, 76th Leg., R.S. (1999).

76. See TEX. EDUC. CODE ANN. § 38.011(d) (Vernon Supp. 2000).

77. See *id.* § 38.011(b).

78. See *id.* § 38.001(b)(2)(A)-(C).

79. Tex. S. B. 1128, 76th Leg., R.S. (1999).

80. See TEX. GOV'T CODE ANN. § 824.203(a), (e) (Vernon Supp. 2000).

81. See *id.* § 824.2045.

82. See *id.* § 824.402.

83. Tex. S.B. 1233, 76th Leg., R.S. (1999).

84. See TEX. REV. CIV. STAT. ANN. art. 4512d § 1(3) (Vernon Supp. 2000). *But see* TEX. OCC. CODE ANN. § 451.001 (Vernon Supp. 2000).

85. See *id.* art. 4512d § 12(4). *But see* TEX. OCC. CODE ANN. § 451.251 (Vernon Supp. 2000).

exempt from overtime pay.<sup>86</sup>

House Bill 826<sup>87</sup> established the Government Dispute Resolution Act, which allows every governmental body, including school districts, to develop and use alternative dispute resolution procedures to resolve disputes.<sup>88</sup> The Act does not authorize binding arbitration.<sup>89</sup> These new procedures supplement, but do not limit, other dispute resolution procedures available to a governmental body.<sup>90</sup>

#### E. COMPETITIVE PURCHASING

House Bill 2260<sup>91</sup> corrected what appeared to be an oversight in previous statutory revisions to the competitive purchasing laws. Texas Education Code § 44.031(h) allows the board of trustees of a school district to contract to replace or repair school equipment, a school facility, or part of a school facility that undergoes major unforeseen operational or structural failure.<sup>92</sup> A large number of other changes were made to clean up provisions involving competitive purchasing of contracts.

Senate Bill 669<sup>93</sup> amended numerous provisions of Chapter 44 of the Texas Education Code. Among the many changes, the legislation removed from the list of methods of competitive purchasing a request for proposals for construction services. However, the Legislature also added a method: a job order contract for the minor construction alteration or repair of a facility.<sup>94</sup>

Senate Bill 669 also states that the notice of time and place for bids, proposals, or responses to requests for qualifications must now also include a notice of when these items will be opened.<sup>95</sup> Public advertisement for a two-step procurement process must be published only once.<sup>96</sup> This bill also amended Texas Education Code section 44.031(h) to state that the board of trustees may use contracting methods other than those listed under the competitive purchasing statute for the replacement or repair of school equipment or part of a school facility that undergoes major operational or structural failure because of an unforeseen catastrophe or emergency.<sup>97</sup> All of the purchasing and contract laws of Chapter 44 have now been specifically made applicable to junior college districts.<sup>98</sup>

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86. See *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999), *reh'g denied*, 199 F.3d 441 (5th Cir.1999), *cert. denied*, 120 S. Ct. 1423 (2000).

87. Tex. H.B. 826, 76th Leg., R.S. (1999).

88. See TEX. GOV'T CODE ANN. ch. 2009 (Vernon Supp. 2000).

89. See *id.* § 2009.005(c).

90. See *id.* § 2009.052(a).

91. Tex. H.B. 2260, 76th Leg., R.S. (1999).

92. These contractual methods include methods other than those listed in Education Code § 44.031, which detailed competitive purchasing methods. TEX. EDUC. CODE ANN. § 44.031(h) (Vernon Supp. 2000).

93. Tex. S.B. 669, 76th Leg., R.S. (1999).

94. See TEX. EDUC. CODE ANN. § 44.031(a)(8) (Vernon Supp. 2000).

95. See *id.* § 44.031(g).

96. See *id.*

97. See *id.* § 44.031(h).

98. See *id.* § 44.031(a).

A board of trustees may delegate to a designated person, representative, or committee the board's authority regarding actions authorized or required to be taken by the district for competitive purchasing. But the board may not delegate an action required to be taken by the board itself.<sup>99</sup> When obtaining construction services, the district must provide notice of the board's delegation and the board's limitations established on that delegation in the request for bids or proposals.<sup>100</sup> If the district fails to provide the notice, a ranking selection or evaluation of bids for construction services is only advisory.<sup>101</sup> A court may enjoin performance of a contract made in violation of any provision of Texas Education Code Chapter 44.<sup>102</sup> An interested party may bring an action for an injunction<sup>103</sup> and the prevailing party is entitled to reasonable attorney's fees.<sup>104</sup>

Senate Bill 669 also states that when a school board is considering a construction contract, it must decide which method of competitive purchasing provides the best value for the district *before* it advertises.<sup>105</sup> After receiving bids or proposals, the district must select an offer based on statutory criteria and publish in the request for bids, proposals, or qualifications the specific criteria that it will use to evaluate the offerors and the relevant weights, if they are known at that time, the criteria will be given.<sup>106</sup> "The district must document the basis of its selection and must make the evaluations public not later than the seventh day after the date that the contract is awarded."<sup>107</sup>

A large number of technical changes were made to the laws regarding construction contracts. In design/build contracts, for example, the statute now makes specific provisions regarding the qualification and selection of designers/builders of school district facilities.<sup>108</sup> The amount and sufficiency of payment and performance bonds are also clarified in the statute.<sup>109</sup>

Construction manager-agent contracts have also been revised in the statutes as a result of Senate Bill 669. The statute now specifies the types of services that a school district can require of a construction manager-agent.<sup>110</sup> An architect or engineer is prohibited from serving as a construction manager-agent unless the architect or engineer serves as the construction manager-agent under a separate or concurrent procurement

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99. See TEX. EDUC. CODE ANN. § 44.0312(a), (b) (Vernon Supp. 2000).

100. See *id.* § 44.0312(a).

101. See *id.*

102. See *id.* § 44.032(f).

103. See *id.*

104. See TEX. EDUC. CODE ANN. § 44.032(f) (Vernon Supp. 2000).

105. See *id.* § 44.035(a).

106. See *id.* § 44.035(b).

107. *Id.* § 44.035(c).

108. See *id.* § 44.036(e).

109. See *id.* § 44.036(j).

110. See *id.* § 44.037.

process.<sup>111</sup>

Construction manager-at risk contract issues have also been clarified under Senate Bill 669. "The district's engineer, architect, or construction manager-agent" is prohibited from serving "alone or in combination with another, as the construction manager-at risk."<sup>112</sup> The statute clarifies that the district is responsible for selecting a construction manager-at risk in either a one-step or a two-step process.<sup>113</sup> Selection criteria must be contained in the request for proposals or the request for qualifications.<sup>114</sup> "At each step, the district shall receive, publicly open, and read aloud the names of the offerors."<sup>115</sup> The district must also "read aloud the fees and prices, if any, stated in each proposal as the proposal is opened."<sup>116</sup> The legislation also requires a ranking and selection process which must be completed within forty-five.<sup>117</sup> Once a construction manager-at risk is employed and begins work, the construction manager-at risk must publicly advertise and receive bids or proposals from contractors or sub-contractors.<sup>118</sup> The contents of a bid or proposal must not be disclosed to any person not employed by the construction manager-at risk, the engineer, the architect, or the district.<sup>119</sup> But all bids or proposals must be made public after the award of the contract, or within seven days after the date of final selection of bids or proposals, whichever is later.<sup>120</sup>

The Legislature also changed the law regarding competitive sealed proposals for construction service contracts.<sup>121</sup> The law now requires that a statement of the selection criteria must be used in the competitive sealed proposal process.<sup>122</sup> The current selection process is identical to that required for construction managers-at risk and design/build companies.<sup>123</sup>

Except as otherwise specifically noted in the law pertaining to competitive purchasing, it is now clear that the Texas Local Government Code provisions relating to competitive bidding on public works projects do not apply to the competitive purchasing process for construction services in school districts.<sup>124</sup> The Local Government Code Chapter 271 provisions do apply if the district chooses to follow a competitive *bidding* process.<sup>125</sup>

School districts are permitted to use job order contracts for minor construction, in addition to minor repair, rehabilitation, or alteration of a

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111. See TEX. EDUC. CODE ANN. § 44.037(c) (Vernon Supp. 2000).

112. *Id.* § 44.038(c).

113. See *id.* § 44.038(e).

114. See *id.*

115. *Id.* § 44.038(f).

116. *Id.*

117. See TEX. EDUC. CODE ANN. § 44.038(g) (Vernon Supp. 2000).

118. See *id.* § 44.038(i).

119. See *id.*

120. See *id.*

121. See *id.* § 44.039.

122. See *id.* § 44.039(d).

123. See TEX. EDUC. CODE ANN. § 44.039 (Vernon Supp. 2000).

124. See *id.* § 44.040(b).

125. See *id.*

facility.<sup>126</sup> Job order contracts may be used for work that is recurrent, where delivery times are indefinite, and where indefinite quantities or orders are awarded substantially on the basis of pre-described and pre-priced activities.<sup>127</sup>

#### F. STUDENTS

It is now a felony to mark graffiti on a school building or on the buildings of an institution of higher education, if the amount of loss is less than \$20,000.<sup>128</sup> Under House Bill 152, the definition of "school" now includes private and public elementary or secondary schools.<sup>129</sup>

For purposes of school attendance, under House Bill 217,<sup>130</sup> school districts must still excuse students from attending class to observe religious holy days (including travel time for that purpose) but can no longer require a written request to be submitted by the student's parent or guardian before the absence occurs.<sup>131</sup>

In House Bill 861,<sup>132</sup> the Texas Legislature created a new criminal offense for threatening a child younger than seventeen with imminent bodily injury to coerce, induce, or solicit the child to participate in the activities of a criminal street gang.<sup>133</sup> Such activity is now a felony.<sup>134</sup> If the person committing the offense causes bodily injury to a child while attempting to coerce, induce or solicit the child, the offense is a third degree felony.<sup>135</sup>

To combat the issue of students over the age of eighteen who may enroll in high school but then choose not to attend since they no longer fall under the compulsory education law, House Bill 907<sup>136</sup> provides that a person who voluntarily enrolls in school or attends school after that person's eighteenth birthday must attend school each day for the entire period that the program of instruction is offered.<sup>137</sup> A person over the age of eighteen with more than five unexcused absences in a semester may have his or her enrollment revoked by the school district for the remainder of the school year and may be considered an unauthorized person when present on school district grounds.<sup>138</sup>

A student may now be expelled if, while on school district property or while attending a school-sponsored or school-related activity on or off school property, the student intentionally, knowingly or recklessly causes

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126. *See id.* § 44.041(a).

127. *See id.* § 44.041.

128. *See* TEX. PENAL CODE ANN. § 28.08(d)(1), (2) (Vernon Supp. 2000).

129. *See id.* § 28.08(e)(4).

130. TEX. H.B. 217, 76th Leg., R.S. (1999).

131. *See* TEX. EDUC. CODE ANN. § 25.087(b) (Vernon 2000).

132. TEX. H.B. 861, 76th Leg., R.S. (1999).

133. *See* TEX. PENAL CODE ANN. § 22.015 (Vernon 2000).

134. *See id.* § 22.015(c).

135. *See id.*

136. TEX. H.B. 907, 76th Leg., R.S., (1999).

137. *See* TEX. EDUC. CODE ANN. § 25.085(e) (Vernon Supp. 2000).

138. *See id.*

bodily injury to a district employee or a district volunteer.<sup>139</sup> Under Senate Bill 260,<sup>140</sup> a student may also be expelled if the student commits the above offense in retaliation for or as a result of the person's employment or association with the district regardless of where the assault occurred.<sup>141</sup>

Senate Bill 858<sup>142</sup> requires a school district to provide written notice to a parent or legal guardian at least once every three weeks or during the fourth week of each nine-week grading period if a student's performance is consistently unsatisfactory in a foundation curriculum subject.<sup>143</sup>

In Senate Bill 138,<sup>144</sup> the State of Texas has now adopted a Texas Religious Freedom Restoration Act, which allows a person, including a parent or a school district employee, to sue a governmental entity, including a school district, when a law, policy or practice restricts the person's religious activity.<sup>145</sup> The lawsuit can be brought against an individual acting in an official capacity. However, school board members and administrators cannot be held personally liable for any damages. The statute provides a very broad definition of "religious activities" and defines free exercise of religion to mean an act that is *substantially* motivated by a sincere religious belief.<sup>146</sup> It does not require that the act or refusal to act be motivated by a central part or requirement of the belief; it merely requires that the religious belief be sincere.<sup>147</sup> In order to impose a restriction on that belief, the school district must prove a "compelling interest" for its imposition of a restriction.<sup>148</sup> A successful plaintiff can receive declaratory relief, injunctive relief, compensatory damages, and reasonable attorney's fees plus court costs.<sup>149</sup> However, compensatory damages have been limited by statute to \$10,000 for each distinct controversy, regardless of the number of members within the religious group who claim the injury.<sup>150</sup> A governmental body receives a measure of safety because the plaintiff must exhaust his or her administrative remedies by giving the district notice of the burden and giving the district sixty days to cure the violation, unless the threat to the person's free exercise of religion is imminent and the person did not have knowledge of the burden in time to reasonably provide notice.<sup>151</sup> In order to cure a violation, a governing body can design a remedy that removes the substantial burden; it need not implement the remedy in the least restrictive manner.<sup>152</sup> If the gov-

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139. *See id.* § 37.007(b)(3).

140. Tex. S.B. 260, 76th Leg., R.S. (1999).

141. *See* TEX. EDUC. CODE ANN. § 37.007(d) (Vernon Supp. 2000).

142. Tex. S.B. 858, 76th Leg., R.S. (1999).

143. *See id.* § 28.022(a)(3).

144. *See* Tex. S.B. 138, 76th Leg., R.S. (1999).

145. *See* TEX. CIV. PRAC. & REM. CODE § 110.001, *et seq.* (Vernon Supp. 2000).

146. *See id.* § 110.001(a)(1).

147. *See id.* § 110.001.

148. *See id.* § 110.003.

149. *See id.* § 110.005.

150. *See id.*

151. *See* TEX. CIV. PRAC. & REM. CODE § 110.006 (Vernon Supp. 2000).

152. *See id.*

erning body has remedies the burden, then the complainant may not bring the claim for declaratory or injunctive relief, compensatory damages, or attorney's fees and costs.<sup>153</sup>

The Omnibus Sex Offender Registration and Public Notice Act, House Bill 2145,<sup>154</sup> amended the statutory provisions regarding the public notice that is provided to a school superintendent or a private school administrator if the victim of a sex offender is a child younger than seventeen years of age.<sup>155</sup> A notice requirement has been added if the sex offender is seventeen or older and is also a student enrolled in a public or private secondary school.<sup>156</sup> This legislation has also made clear the previously unspecified responsibilities of a superintendent upon receipt of a sex offender notification; the superintendent must now release the information in the notice to appropriate school personnel, including peace officers, security personnel, principals, nurses, and counselors.<sup>157</sup> The person's full name, numerical physical address, and either a recent photograph of the person or a website on which the person's photograph is accessible is now published in the local newspaper.<sup>158</sup>

## II. 1999 FEDERAL REGULATORY CHANGES AFFECTING SPECIAL EDUCATION

The Individuals with Disabilities Education Act ("IDEA") has been in existence for at least twenty-five years.<sup>159</sup> On June 4, 1997, the IDEA was reauthorized under Public Law 105-17. One of the main purposes of the reauthorization was to strengthen the role of parents. Additionally, the reauthorization was written to ensure students with disabilities access to the general education curriculum, provide focus for teaching and learning while reducing unnecessary paperwork requirements, assist educational agencies in addressing the cost and approving special education and related services to children with disabilities, provide increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling, ensure that schools are safe and conducive to learning, and encourage parents and educators to work out their differences by using non-adversarial means.<sup>160</sup>

Educators reviewed the 1997 revisions to the IDEA and began to learn to work with the new provisions. However, further guidance was needed from the Department of Education. It was not until 1999, when the U.S. Department of Education finally issued the implementing regulations (the "Regulations") that those who work with the IDEA were able to

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153. *See id.*

154. Tex. H.B. 2145, 76th Leg., R.S. (1999).

155. TEX. CRIM. PROC. CODE § 62.03(e) (Vernon Supp. 2000).

156. *See id.*

157. *See id.*

158. *See id.* § 62.03(f).

159. *See* 20 U.S.C. § 1400(c)(2) (1997).

160. *See id.* § 1400(c)(5).

fully analyze the potential ramifications of the new law.<sup>161</sup>

Although a complete review of all IDEA Regulatory changes would be too lengthy for the purposes of this survey, a brief discussion of one of the most controversial changes in the Regulations is appropriate. Additionally, a brief summary of recent cases interpreting the IDEA is relevant to an understanding of the consequences of the reauthorization.

The Regulations were intended not only to implement changes made in the reauthorization of the IDEA in 1997 but also to incorporate many long-standing interpretations from the Office of Special Education Program ("OSEP"), which administers the IDEA.<sup>162</sup> As with the previous regulations, the new Regulations cover a wide area of issues ranging from general issues (assistive technology, definitions, and related services), to state and local eligibility (free appropriate public education ("FAPE"), exceptions to FAPE, methods of ensuring service), services (responsibility of state education agencies, information regarding Individual Education Plans ("IEPs"), children in private schools), and most importantly, to procedural safeguards.<sup>163</sup> The key controversial changes, which are also the provisions which have had the most impact on the day-to-day implementation of the Regulations and the IDEA are provisions addressing discipline of special education students.

Before the reauthorization of the IDEA and the publication of its Regulations, school districts operated under the standard that special education students could not be removed from their educational placement for more than ten *cumulative* days in a school year.<sup>164</sup> Taking a conservative approach, special education attorneys and educators determined that placing a student in in-school suspension, in the principal's office for "cooling off," in out-of-school suspension, and expelling a student all constituted "removals," when counting the ten cumulative days. This interpretation limited school districts' ability to discipline students for behaviors unrelated to the students' disabilities. Acknowledging these difficulties, the IDEA and the Regulations allowed school districts more flexibility in this area.

A child with a disability may be removed for disciplinary reasons from his or her current educational placement for ten *consecutive* school days or less in a single school year; the school district is not required to provide any services to the child during the first ten days of removal if services would not be provided to non-disabled children who have been similarly removed.<sup>165</sup> For the remainder of the school year, the school district may continue to remove the child for disciplinary purposes for ten school days or less at a time, and even if the removals are not a "change in placement" under section 300.519(b), the district must provide services to the

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161. See 34 C.F.R. § 300.1 *et seq.* (1999).

162. See *id.*

163. See *id.*

164. See *id.* § 300.121; see also *Honig v. Doe*, 484 U.S. 305, 325 (1988).

165. See *id.* § 300.121(d)(1).



extent necessary to "enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP."<sup>166</sup> School personnel determine the appropriate services needed to meet this standard, in consultation with the child's special education teacher.<sup>167</sup>

But when the school district proposes a disciplinary removal that would constitute a "change in placement" under section 300.519, the school district must perform a "manifestation determination review" ("MDR").<sup>168</sup> For behaviors that are not determined to be a manifestation of the child's disability, the school district may impose the same disciplinary consequences as would apply to nondisabled children.<sup>169</sup> The only exception is that the school district ensure that the child with disabilities must continue to receive a FAPE.<sup>170</sup> The IEP team must formally meet and determine which services are necessary to enable the child to appropriately progress in the general curriculum and to appropriately advance toward achieving the goals of the child's IEP.<sup>171</sup>

Extensive litigation is anticipated, as school districts make these decisions, which are, at best, subjective. In particular, questions have already arisen regarding the determination of what constitutes a "change in placement," what length of removal counts toward the ten days, and which school district personnel should conduct the determination regarding a change in placement. But, it is likely that as the litigation evolves, these issues will be clarified, giving school districts additional guidance when implementing the IDEA and the Regulations.

In addition to changes in the IDEA and the Regulations, two recent court decisions have clarified a school district's obligations under the IDEA. The first highly publicized case involved a dispute over the provision of related services to a medically fragile student.<sup>172</sup> Specifically, the issue in *Cedar Rapids Community School District v. Garret F.* was the school district's obligation to provide the student with continuous one-on-one nursing services that the student required in order to remain in school.<sup>173</sup> The dispute centered on the definition of "related services," which expressly excludes "medical services . . . [other than those performed] for diagnostic and evaluation purposes."<sup>174</sup> The services requested by the student included manual pumping of an air bag attached to his tracheotomy tube, urinary bladder catheterization, suctioning of his tracheotomy tube, and the services of someone familiar with emergency procedures should the student experience autonomic hyperreflexia (an

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166. *Id.* § 300.121(d)(2)(i).

167. *See* 34 C.F.R. § 300.121(d)(3)(i) (1999).

168. *See id.* § 300.523.

169. *See id.* § 300.121(d)(3)(ii).

170. *See id.* § 300.121.

171. *See id.* § 300.121(d)(3)(ii).

172. *See Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 68-69 (1999).

173. *See id.* at 70.

174. *See* 20 U.S.C. § 1401(a)(22) (1997).

uncontrolled visceral reaction to anxiety or a full bladder).<sup>175</sup> Despite the school district's arguments that these services were medical in nature, that they posed serious concerns regarding the continuous nature of the care required, and that they presented broader financial concerns, the Court held that the services requested by the student were required as "related services" under the IDEA.

Focusing on its decision in *Irving Independent School District v. Tatro*,<sup>176</sup> which required a school district to provide clean intermittent catheterization for a kidney patient, the Court found the medical services requested by the student should be provided by the school district.<sup>177</sup> Specifically, the Court held that: 1) the definition of "related services" includes those services which may be required to assist a child with a disability to benefit from special education; 2) the in-school care did not require the training, knowledge, or judgment of a licensed physician; and 3) the in-school care did not involve any more medical intervention than the care required under *Tatro*.<sup>178</sup> Additionally, the Court found that a rule limiting the exclusion of medical services to those services requiring a physician was reasonable and workable for districts.<sup>179</sup> The Court reaffirmed the finding in *Tatro*, that, when necessary, the IDEA requires districts to hire specially trained personnel to meet disabled students' needs.<sup>180</sup> The Supreme Court stated:

This case is about whether meaningful access to the public schools will be assured, not the level of education that a school must finance once access is attained. It is undisputed that the services at issue must be provided if Garret is to remain in school. Under the statute, our precedent, and the purposes of the IDEA, the District must fund such "related services" in order to help guarantee that students like Garret are integrated into the public schools.<sup>181</sup>

Although school districts recognize and respect the Court's interpretation and the need to include students with disabilities in the regular education environment, this decision has raised serious concerns on the part of school districts as to their obligations for similar services which may require other kinds of medical interventions. The Court's decision will have far-reaching ramifications for school districts both financially and practically, as qualified personnel must be found to fill the necessary health services positions.

Another recent case issued by the Fifth Circuit reinforced many school districts' interpretations of the IDEA.<sup>182</sup> School districts face the constant dilemma of proving whether the educational programming provided

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175. See *Cedar Rapids*, 526 U.S. at 70 n.3.

176. 468 U.S. 883 (1984).

177. See *id.* at 888.

178. *Cedar Rapids*, 526 U.S. at 75.

179. See *id.*

180. See *id.*

181. *Id.* at 79.

182. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

for a student is appropriate and whether it is reasonably calculated to provide the student with an educational benefit. The standard under the IDEA requires school districts to provide students with a "free appropriate public education,"<sup>183</sup> tailored to the unique needs of the child, by means of the child's IEP, also known as the *Rowley v. Board of Education* standard.<sup>184</sup>

In *Cypress-Fairbanks Independent School District v. Michael F.*,<sup>185</sup> the Fifth Circuit outlined the test required to determine whether school districts meet the standard under *Rowley*: 1) whether the program is individualized on the basis of the student's assessment and performance; 2) whether the program is administered in the least restrictive environment; 3) whether the services are provided in a coordinated and collaborative manner by the key stakeholders; and 4) whether positive academic and non-academic benefits are demonstrated.<sup>186</sup>

Applying the *Michael F.* factors, the court's decision in *Houston Independent School District v. Bobby R.*, provides great insight into what evidence will be sufficient to meet the standards under *Rowley* and *Michael F.* Specifically, the court found that parties challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of an IEP.<sup>187</sup> To establish a failure to provide FAPE, the parties must show that the school district failed to implement substantial or significant portions of the IEP.<sup>188</sup> This distinction is significant in that it clarifies that, when determining if FAPE is provided, school districts will be held responsible for material failures, but not minor errors, in an IEP.<sup>189</sup> Additionally, with regard to the evidence which establishes an educational benefit, the court found that

a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student . . . . [T]he district court was correct to focus on the fact that Caius's test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years in HISD.<sup>190</sup>

Through this language, the court indicates that the use of only one academic measure is insufficient to establish whether a student has achieved an educational benefit. All aspects of the child's progress must be examined to determine the appropriateness of his or her program and the

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183. 458 U.S. 176 (1992).

184. *Id.* at 346; see *Board of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1992) (holding that "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. *Id.* at 189. [A]n 'appropriate education' is provided when personalized educational services are provided"). *Id.* at 197. See also *Houston Indep. Sch. Dist.*, 200 F.3d at 346.

185. 118 F.3d 245 (5th Cir. 1997).

186. See *id.* at 253.

187. See *Houston Indep. Sch. Dist.*, 200 F.3d at 349.

188. See *id.*

189. See *id.*

190. *Id.*

school district's ability to provide FAPE for the student. These clarifications will be important in future cases and in the daily implementation of the IDEA. One of the key issues for school districts in defending a case under the IDEA is determining the appropriate measure of progress and the level of compliance with a student's IEP.

As evidenced in this brief summary of the changes in the IDEA and the Regulations, as well as recent court decisions, the area of special education is continually evolving. As school districts and parents work with the revised law and regulations, they will look to the courts to continue to provide interpretations of school districts' responsibilities under the IDEA.

### III. CASE LAW AND OPINIONS

#### A. PERSONNEL ISSUES—FIRST AMENDMENT

Courts have continued to address and refine some long-held concepts in school law, such as in the personnel area. However, the courts have also been active in setting some new standards, particularly in the area of sexual harassment of students by staff and students.

The Fifth Circuit Court of Appeals addressed an employee's First Amendment claim after a former principal, who was transferred to the position of assistant principal at a different school, brought a lawsuit against the school district and the school district's superintendent, alleging a violation of her First Amendment right to free expression.<sup>191</sup> The superintendent acted based on his belief that the principal leaked information to the community regarding a future use of her campus building as an alternative school.<sup>192</sup> The court held that the superintendent's alleged retaliation against the principal for her perceived public statements was not a First Amendment violation, where the principal denied making the statements.<sup>193</sup> The Fifth Circuit further held that the principal's silence on an issue is not protected expression. Therefore, the court concluded that even if the information about the use of the building constituted a matter of public concern, the former principal did not have a retaliation claim because she denied being the source of the leak.<sup>194</sup>

In *Harris v. Victoria ISD*,<sup>195</sup> a group of teachers sued the school district, the superintendent, and members of the board of trustees, claiming violations of their First Amendment rights because they were transferred after they expressed concerns about their principal's conduct.<sup>196</sup> After summary judgment was granted for the defendants, the teachers appealed

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191. *Jones v. Collins*, 132 F.3d 1048, 1053 (5th Cir. 1998), *reh'g denied*, 137 F.3d 1353 (5th Cir. 1998).

192. *See id.* at 1051.

193. *See id.* at 1053.

194. *See id.* at 1054.

195. 168 F.3d 216 (5th Cir. 1999), *reh'g en banc denied*, No. 97-41015, 1999 U.S. App. LEXIS 18305 (5th Cir. July 6, 1999), *cert. denied sub nom.* 120 S. Ct. 533 (1999).

196. *See id.* at 219.

to the Fifth Circuit. The Court held that the transfer and reprimand of teachers constituted an adverse employment action.<sup>197</sup> The Court then determined that the teachers' speech was on a matter of public concern, the teachers' interest in free speech was not outweighed by the school district's interest in promoting the efficiency of the public services it performed, individual defendants were not entitled to qualified immunity; and board members were not entitled to absolute immunity just because their actions in a grievance hearing were quasi-judicial in nature.<sup>198</sup> Further, the Fifth Circuit held that the board's actions could be said to represent the district's official policy because of the board's status as a policymaker for purposes of liability under section 1983.<sup>199</sup>

An accounting supervisor at the North Forest school district encountered problems when a new superintendent was hired in 1996.<sup>200</sup> The accounting supervisor was appointed to a newly created position as Director of Financial Services. Several months later, the director discovered some financial improprieties and reported them to the Texas Education Agency ("TEA") and to the District Attorney's office. After the employee's report, the TEA visited the district to evaluate its fiscal operations. As a result of that visit, TEA recommended that the district reorganize the business office. The employee applied for, but was not promoted to, chief financial officer. He filed suit, claiming a violation of his First Amendment rights and a violation of the Texas Whistleblower Act. The Fifth Circuit held that because the committee that hired the employee who supervised the reorganized business office did not know about the employee's whistleblowing activities during the committee's decision-making process, the employee could not establish any causal connection between his speech and the alleged retaliatory conduct.<sup>201</sup> The court further held that because the school district was suffering such severe financial problems, school officials would have taken the same action regardless of whether or not the employee had blown the whistle.<sup>202</sup> Therefore, the Fifth Circuit held that the school officials were entitled to qualified immunity.<sup>203</sup>

The case of *Madison v. Houston ISD*<sup>204</sup> involved a special education teacher accused of striking a student with a paddle. When the principal investigated, he determined that the employee had previously been reprimanded for improper discipline of students on several other occasions.

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197. See *id.* at 220.

198. See *id.* at 223-24.

199. See *id.* at 225.

200. *Lukan v. North Forest ISD*, 183 F.3d 342, 347 (5th Cir. 1999), *reh'd denied*, No. 98-21158 1999 U.S. App. LEXIS 26266 (5th Cir. Sept. 27, 1999); *cert. denied sub nom.*, *Lukan v. Scott*, 68 U.S.L.W. 3593 (U.S. Mar. 20, 2000).

201. See *id.* at 397.

202. See *id.*

203. *Lukan v. North Forest ISD*, 183 F.3d 342 (5th Cir. 1999), *reh'd denied*, 1999 US App LEXIS 26266 (5th Cir. 1999); *cert. denied sub nom.* *Lukan v. Scott*, 68 U.S.L.W. 3593 (U.S. Mar. 20, 2000).

204. 47 F.Supp.2d 825, 828 (S.D. Tex. 1999), *aff'd without opinion*, 2000 U.S. App. LEXIS 3035 (5th Cir. Jan. 10, 2000).

Therefore, the principal recommended termination of the employee's contract. The employee claimed that the district terminated his employment in retaliation for him alerting the news media about problems within the school where he taught. The Federal District Court determined that the teacher's report to the news media was not a motivating factor in the district's decision to terminate the employee.<sup>205</sup> Rather, the court held that the school district's belief that the employee improperly paddled the child after several remediation attempts for inappropriate discipline was the motivating factor, which was an appropriate reason.<sup>206</sup> Therefore, the court granted summary judgment in favor of the district on the employee's First Amendment claim.

In yet another First Amendment case, an Alvin ISD teacher became identified as the one primary source of tension on her campus because of her confrontational attitude with her peers and her advocacy on behalf of her son.<sup>207</sup> Plaintiff continually made complaints such as finding classroom doors unlocked and finding that student files were misplaced. In spite of being asked to regularly communicate with the assistant principal regarding her concerns about her son's education, the teacher continued her accusatory conduct. In order to avert a morale crisis at the junior high school, the plaintiff was transferred to the high school and was assigned to the alternative education and student suspension center. She filed a grievance which ultimately resulted in the plaintiff seeking to revoke the professional certifications of a dozen school district employees. After taking a medical leave of absence and having her term contract nonextended, the employee filed suit in federal court. The court noted that in order for the employee to show a cause of action based on the exercise of her First Amendment rights, she must show by a preponderance of evidence that her speech was protected; that she suffered adverse employment action; and that there was a causal connection between the protected speech and the adverse employment action. The district court denied all of the plaintiff's claims and even took the extraordinary action of informing her that should she file another meritless lawsuit without compelling new evidence, sanctions would be considered against her.<sup>208</sup>

#### B. PERSONNEL ISSUES—ADVERSE EMPLOYMENT ACTIONS

After his termination, a state university professor and his wife sued the University of Texas and three administrators who participated in negative evaluations of the professor<sup>209</sup> (which included negative comments in the professors' tenure file, and repeated recommendations that he should not be allowed to continue on tenure track). The Texas Supreme Court held that since the administrators' conduct in negatively evaluating the profes-

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205. *See id.* at 829.

206. *See id.*

207. *Upshaw v. Alvin ISD*, 31 F.Supp.2d 553 (S.D. Tex. 1999).

208. *See id.*

209. *Brewerton v. Dalrymple*, 997 S.W.2d 212 (Tex. 1999).

sor was not extreme and outrageous, a necessary element of the tort of intentional infliction of emotional distress was eliminated. The court also held that the wife's derivative loss of consortium claim must fail.<sup>210</sup>

An employee of the Pasadena ISD was employed by the school district for thirty-three years without receiving a negative evaluation.<sup>211</sup> In 1994 and 1995, however, he criticized an upcoming bond election favored by the school board and the superintendent, and supported a candidate running against an incumbent board member who was facing reelection. In the summer of 1995, the employee was investigated by a private detective, was advised to resign and to publicly and privately support the proposed bond election in exchange for a monetary fee and was told that if he did not agree, he would be reassigned to transportation, food services or maintenance. The employee refused to sign the agreement and several days later was reassigned to the newly created position of Associate Superintendent for Project Management and given responsibilities that had previously been handled, for the most part, by a secretary. He later received his first negative evaluation in thirty-three years and was reprimanded in the evaluation for speaking out on the board election and the school district's reorganization. After the trial court dismissed the employee's First Amendment claims, the Fifth Circuit reversed the trial court's dismissal, claiming insufficient evidence to perform an appropriate *Pickering*<sup>212</sup> balancing test. However, because the employee's salary was not reduced when he was demoted, the court ruled that the employee was not denied due process. Therefore, the case was affirmed in part, reversed in part, and remanded.

In one of the most significant state court decisions regarding teacher contracts in 1999, the Austin Court of Appeals ruled that a teacher had no protective property interest in renewal of her term contract.<sup>213</sup> The court ruled that the employee's one year term contract did not create a property interest subject to due process protection; but, even if she had a property interest, she received due process.<sup>214</sup> The court cited the deficiencies noted in the employee's evaluations and growth plans as substantial evidence for the board's decision to not renew her contract. The court specifically cited the 1993 Texas Supreme Court case of *Grounds v. Tolar ISD*,<sup>215</sup> which held that the Term Contract Nonrenewal Act's requirement that there be pre-established reasons for nonrenewal is an essential characteristic of a property interest which warrants due process

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210. See *id.* at 216.

211. *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439 (5th Cir. 1999).

212. *Pickering v. Board of Educ. Of TWP High Sch. Dist.* 205, 391 U.S. 563, 568 (1968). The balancing test involves a weighing of the interests of the [employee] as a citizen in commenting upon matters of public concern [against] the interests of the government, as an employer; in promoting the efficiency of the public services it performs through its employees.

*Id.*

213. *Stratton v. Austin ISD*, 8 S.W.3d 26 (Tex. App.—Austin 1999, no pet. h.).

214. See *id.*

215. 856 S.W.2d 417 (Tex. 1993)

protections.<sup>216</sup> However, the court noted that, in 1995, the Texas Legislature enacted section 21.204(e) of the Texas Education Code, which specifically states that a teacher does not have a property interest in a contract beyond its term.<sup>217</sup>

### C. PERSONNEL ISSUES—FAIR LABOR STANDARDS ACT

In a much anticipated case, the Fifth Circuit Court of Appeals held that school district athletic trainers are exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA").<sup>218</sup> In 1997, a federal district court had determined that athletic trainers employed by the San Antonio ISD were not "professionals" and, therefore, were not exempt from the overtime provisions of the FLSA. The Fifth Circuit, however, ruled that the trainers satisfied the "learned" requirement, because they must take a specific number of specialized courses related to sports medicine and athletic training.<sup>219</sup> Further, the trainers must obtain a university degrees and secure training in subjects like human anatomy, physiology, and sports medicine; and the trainers' work also requires the exercise of judgment and discretion.<sup>220</sup> The court further held that because there was no evidence that a physician supervised athletic trainers' activities at all times, the trainers were working under the exercise of their own judgment and discretion. Therefore, the court held that because trainers are considered "professionals" for purposes of the wage and hour laws, they are not entitled to overtime compensation for hours worked in excess of forty hours per week.

In another employee compensation decision, a retired principal of community services for the Houston Independent School District brought an action for back pay against the school district, alleging that she was compensated at an improper rate for thirteen years.<sup>221</sup> The retired principal had continually complained about her salary and ultimately received a salary increase. The Court of Appeals in Houston held that the superintendent's memoranda, district salary manuals and letters recommending higher compensation did not constitute "state law" so as to create a protectable property interest in the allegedly correct compensation.<sup>222</sup> The court further held that a claim for back pay was essentially a claim for monetary damages, which is not recoverable under the Texas Constitution.<sup>223</sup>

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216. *See id.*

217. *Id.* (citing TEX. EDUC. CODE ANN. § 21.204(e) (Vernon Supp. 2000)).

218. *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999), *reh'd denied*, 199 F.3d 441 (5th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3593 (U.S. Mar. 20, 2000).

219. *See id.* at 525.

220. *See id.*

221. *Jackson v. Houston Indep. Sch. Dist.*, 994 S.W.2d 396 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

222. *See id.* at 400.

223. *See id.*



## D. TORT CLAIMS

In *Lamar University v. Doe*,<sup>224</sup> minor children were photographed and videotaped in explicit sexual poses in a university student's dormitory room. The parents filed suit against the university, claiming that the university had knowledge that the student was a pedophile, yet continued to rent a room to him. The Court of Appeals held that the parents failed to allege that the injuries in question arose from the use of "tangible real property" (specifically, the dormitory) within the meaning of the Tort Claims Act, and therefore vacated and dismissed the action.<sup>225</sup>

A college student, who was accidentally stabbed during the production of a school play, brought suit against Texas A&M University.<sup>226</sup> The Court of Appeals held that neither the drama director and his wife nor the professors who acted as faculty advisors to the drama club were university employees for purposes of establishing the university's liability under the Tort Claims Act. Therefore, the Court of Appeals reversed the trial court judgment in favor of the student.

A health club owner was allowed to open a health club on campus and to charge all students a fee to use the club.<sup>227</sup> Ultimately, when the business failed, the health club owner sued the State, the Texas A&M University, its board of regents, and its president, under the Tort Claims Act, for negligence and gross negligence. The Court of Appeals held that the university's action in allowing the owner to open the club on campus was a governmental function, not a proprietary function, for which the university and its individuals did not have liability.<sup>228</sup> The Court of Appeals further held that the financial loss that the owner experienced in connection with the club was not a "personal injury" as required under the Tort Claims Act.<sup>229</sup>

## E. STUDENTS—RELIGION

As in previous years, some significant issues related to students and religion in public schools were in the forefront of the news. In 1999, the Fifth Circuit held that a school district policy which permits students to deliver sectarian and proselytizing prayers violates the Establishment Clause of the First Amendment.<sup>230</sup> The Fifth Circuit further held that the Free Speech Clause's prohibition against view point discrimination did

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224. *Lamar Univ. v. Doe*, 971 S.W.2d 191 (Tex. App.—Beaumont 1998), no pet.

225. *Id.* "Property does not cause injury if it does no more than furnish the condition that makes the injury possible." *Id.* at 196 (citing *Dallas County Mental Health et al. v. Bossley, et al.*, 968 S.W.2d 339, 343 (Tex. 1998)).

226. *Texas A&M Univ. v. Bishop*, 996 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1999).

227. *Hencerling v. Texas A&M Univ.*, 986 S.W.2d 373 (Tex. App.—Houston [1st Dist.] 1999), pet. denied.

228. *See id.*

229. *See id.* at 374.

230. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999), *reh'g denied*, 171 F.3d 1013 (5th Cir. 1999), *cert. granted*, 120 S.Ct. 494 (1999).

not protect the policy from challenge under the Establishment Clause.<sup>231</sup> Another version of the school district's policy which only allowed students to give nonsectarian, nonproselytizing prayers at graduation ceremonies violated the Establishment Clause when that policy was extended to permit such prayers over the public address system at football games. The Fifth Circuit concluded that football games are not solemn and serious enough occasions for such a religious message.<sup>232</sup> The Santa Fe ISD case was recently upheld the U.S. Supreme Court.<sup>233</sup>

In another case involving students and religion, public school students in the Beaumont ISD challenged the constitutionality of the school district's "clergy in the schools" volunteer counseling program, which brought clergy members into the schools to provide nonsectarian counseling to students.<sup>234</sup> The court held that the program violated the Establishment clause under the *Lemon v. Kurtzmann*,<sup>235</sup> test because the program has the primary effect of advancing religion and constitutes excessive government entanglement with religion. The court also held that the program was unconstitutional under the "coercion" test and the "endorsement" test of the Establishment Clause. The Fifth Circuit further held that the program was not neutral as to religion, since only members of the clergy were invited to participate as counselors.

A high school student challenged the school district's policy of requiring transfer students from non-accredited private or home schools to pass proficiency exams in order to receive high school credit toward graduation.<sup>236</sup> The student alleged that such a policy violated her free exercise rights under the First Amendment. The Federal District Court held that the policy was a valid religion-neutral policy of general applicability which did not burden the free exercise of religion. The District Court applied the rational basis analysis in reviewing the equal protection challenge and determined that the challenged policy was rational and related to a legitimate state interest in setting uniform public school advancement and graduation requirements.

Finally, in *Freiler v. Tangipahoa Parish Board of Education*,<sup>237</sup> parents of public school children sued to enjoin the school board for mandating that a disclaimer be read immediately before the teaching of evolution in all primary and secondary grades. The Fifth Circuit held that the disclaimer did not further the board's articulated objective of encouraging informed freedom of belief or critical thinking by students. The court further held that the disclaimer did further the purpose of disclaiming a specific belief and reducing any offense to the sensibilities of any student or parent, and that those were permissible secular objectives for purposes of

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231. See *id.*

232. See *id.*

233. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 147 L. Ed. 295 (2000).

234. *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 273 (5th Cir. 1999).

235. 403 U.S. 602 (1971).

236. *Hubbard v. Buffalo ISD*, 20 F. Supp. 2d 1012 (W.D. Tex. 1998).

237. 201 F.3d 602 (5th Cir. 2000).

the secular purpose prong of the *Lemon* test. However, the court ruled that the primary effect of the disclaimer was to protect and maintain a particular religious viewpoint, which violated the second prong of the *Lemon* test, as well as the endorsement test, the third prong. The policy was, therefore, ruled unconstitutional.<sup>238</sup>

#### F. STUDENTS—SEXUAL HARASSMENT

One of the most significant legal issues in school law the past few years has been the developing law with regard to students who are sexually harassed or sexually abused. In 1998, the U.S. Supreme Court, in *Gebser v. Lago Vista Independent School District*,<sup>239</sup> ruled that there is no private right of action for monetary damages when a teacher engages in a sexual relationship with a student, if the school district lacks actual notice and is not “deliberately indifferent.” *Gebser* involved a male teacher who had sexual relations with a female high school student. The student did not report the relationship to school district officials, but a police officer discovered the couple engaging in sexual relations off school grounds and arrested the teacher. Ultimately, the school board fired the teacher and the Texas Education Agency revoked his teaching certificate. The student sued under Title IX. The Fifth Circuit determined that the school board was not vicariously liable because the board was not aware of the relationship. The Supreme Court affirmed that, without deliberate indifference in the face of actual notice, there was no implied right of action under Title IX. Conversely, of course, if a school district acts with deliberate indifference once someone with authority has actual notice of employee-on-student sexual harassment, a cause of action could be viable.<sup>240</sup>

The United States Supreme Court, in 1999, then addressed student-on-student sexual harassment in *Davis v. Monroe County Board of Education*.<sup>241</sup> A fifth grade female student sued the school district because of a series of sexually harassing actions taking against her by a fellow student. Although she reported the young man’s actions to her teacher and, ultimately, to the principal, no action was taken which corrected the problems. The Court held that a private cause of action for damages may lie against a school board under Title IX in cases of known student-on-student sexual harassment, where the district acts with deliberate indifference and the harassment is so severe and pervasive that it effectively bars the student’s access to an educational opportunity or benefit. The Court further held that such liability under Title IX is limited to circumstances where the school district exercises substantial control over the harasser and the context in which the known harassment occurs. The Court attempted to make it clear that monetary damages would not be available merely for student acts of teasing and name calling, even where such acts

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238. *Id.*

239. 524 U.S. 274, 118 S. Ct. 1989 (1998).

240. *Id.*

241. 526 U.S. 629, 119 S. Ct. 1661, 143 L.Ed.2d 839 (1999).

target students of one gender or another.<sup>242</sup>

In one of the first cases interpreting *Davis*, the Beaumont Court of Appeals ruled that a male student's act of touching a female student's leg in class is not actionable under Title IX because the harassment was not so severe, pervasive, or objectively offensive that it could be said to deprive the student of access to educational opportunities or benefits.<sup>243</sup> The Court further held that, the District, the teacher and the principal were not liable under section 1983 unless they were deliberately indifferent to the extent that they encouraged the specific incident of misconduct or in some other way participated in it, or unless they authorized, approved, or knowingly acquiesced in the harasser's conduct.

#### G. STUDENTS—DISCIPLINE

Students in the Austin ISD were suspended for three days each for wearing shirts that were "maroonish" or "reddish" and were alleged to contain gang insignia, indicating that the students were engaging in gang related activities.<sup>244</sup> The students sued, claiming that they did not receive procedural due process because they were suspended from school without a hearing. The district and the principal filed motions for summary judgment on the ground of qualified immunity, which were denied. The Fifth Circuit held that the parents' arguments to the principal that their children were not gang members was insufficient procedural due process for the students to have the opportunity to explain the students' versions of the facts.<sup>245</sup> The court held that, under some circumstances, a parent may serve as an acceptable surrogate for a student and explain his child's version of the facts.<sup>246</sup> However, the fact that the students were not allowed to tell their side of the story violated due process.<sup>247</sup> On rehearing, the court again addressed the issue regarding when a parent can speak on behalf of his/her child. The court clarified that its holding was that procedural due process is satisfied when there is a meaningful opportunity to tell the child's side of the story. The court further held that an administrator speaking with a parent will not create a meaningful opportunity to tell the child's side of the story in every case. The Fifth Circuit further held that, in this case, when parents merely denied the conduct which their children were alleged to have committed, due process was not satisfied.

A graduate student who failed to obtain his doctoral degree brought state court action against Texas Women's University (TWU) for an alleged violation of due process. The student, Wheeler, alleged that he was

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242. *Id.*

243. *Mosley v. Beaumont Indep. Sch. Dist.*, 997 S.W.2d 934 (Tex. App.—Beaumont 1999, no pet.).

244. *Meyer v. Austin ISD*, 161 F.3d 271 (5th Cir. 1998), *reh'g denied*, 167 F.3d 887 (5th Cir. 1999), *cert. denied*, 119 S.Ct. 1806 (1999), *reh'g denied*, 120 S. Ct. 15 (1999).

245. *See id.* at 274.

246. *See id.* at 275.

247. *See id.*

falsely accused of cheating, which resulted in inadequate grades, a punitive remediation plan, denial of participation in an internship program, and his ultimate dismissal from the program. He claimed that TWU never gave him a hearing on the cheating allegations. In *Wheeler v. Miller*,<sup>248</sup> a TWU psychology professor testified to testing irregularities committed by plaintiff Wheeler. When the same student applied to the school's psychology Ph.D. program, the same teacher voted against his admission to the program, expressing concerns about his performance in her class. After failing several courses, and his first and second set of oral examinations, and failing to comply with the remediation plan, the student was dismissed from the graduate program. The Fifth Circuit Court held that the University's dismissal of the graduate student from a doctoral program was academic, not disciplinary, in nature, for purposes of the student's procedural due process claim. Therefore, the graduate student's dismissal did not violate his right to procedural due process, where the University's decision was careful and deliberate, following a protracted series of steps to rate the student's academic performance, inform him of his weak performance, and provide him with a specially tailored remediation program in light of his performance. The court further held that the communications by the University's faculty members to other faculty members, and to a school district offering an internship to the graduate student, were subject to "qualified privilege" as communications made to persons having the corresponding interest or duty. The court held that the privilege was not defeated on the grounds of actual malice, absent evidence that the statements were false or made with knowledge of falsity or reckless disregard for the truth.<sup>249</sup>

Parents of Dallas ISD students, who received corporal punishment, filed suit against the former superintendent, a Principal, and two teachers, alleging that their children were excessively disciplined while in the middle school. The Court of Appeals in Dallas held that use of a wooden paddle to discipline students does not violate any substantive due process rights.<sup>250</sup>

In *Aledo v. Reese*,<sup>251</sup> a principal expelled a student for bringing a gun on school property. The superintendent then modified the discipline, allowing the student to attend evening alternative education program (AEP) classes. A local district court judge issued a temporary injunction requiring the student to participate in regular school functions and classes. The Court of Appeals held that the transfer of the student to evening AEP classes was not an expulsion from the student's regular campus within the Gun-Free Schools Act and that the board's decision to uphold the transfer to AEP was final and not appealable, thereby vacating the injunction.<sup>252</sup>

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248. 168 F. 3rd 241 (5th Cir. 1999).

249. *Id.*

250. *Johnson v. Resendez*, 993 S.W.2d 723 (Tex. App.—Dallas 1999, pet. granted).

251. 987 S.W.2d 953 (Tex. App.—Fort Worth 1999, pet. denied).

252. *See id.* at 958.

#### H. STUDENTS—ADMISSIONS

In *Texas v. Lesage*,<sup>253</sup> an African immigrant of Caucasian descent applied to the University of Texas (UT) for admission into a counseling psychology graduate program. Although receiving over 200 applications, the University only allowed admission to approximately 20 students. The department considered the race of the applicant in its decisionmaking. Lesage filed suit, alleging that by maintaining a race-conscious admissions process, the University violated the 14th Amendment. The University was able to show, that even if the school's admission process had not taken race into consideration, Lesage would not have been admitted, because a large number of students had higher grade point averages, higher test scores, or both, than Lesage. The Fifth Circuit rejected UT's arguments, stating that when an applicant is rejected for reasons based on race, the applicant suffers an implied injury. However, the U.S. Supreme Court overruled the Fifth Circuit and held that even if UT had considered an impermissible reason in making a decision to deny admission to a student, it could avoid liability by showing it would have made the same decision without the prohibited consideration.<sup>254</sup> However, the Supreme Court cautioned that this only applies in cases in which a plaintiff challenges a single governmental action, not an ongoing pattern of discrimination.<sup>255</sup>

#### IV. CONCLUSION

As always, lobbyists and litigators are currently at work seeking a myriad of changes to school laws and to court cases interpreting school laws. As a result, school attorneys on both sides of the bar will always be students themselves, updating and revising their knowledge of the vast number of issues involved in school law. Teachers and Administrators are, therefore, wise to seek the advice of learned legal counsel when their actions and decisions extend beyond curriculum and instruction, into legal rights and responsibilities.

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253. *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998).

254. *Texas v. Lesage*, 120 S.Ct. 467, 469 (1999).

255. *See id.*

