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EDUCATION LAW

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EACH year, the courts provide practitioners in the school law field with new cases to evaluate and apply to their practice. Each session of the state and federal legislatures adds excitement to the practice, making changes that sometimes result in a completely new area of focus for school lawyers and public school districts. This article summarizes relevant cases and legislative action from October 2001 through October 2002. Due to the volume of information that exists, this article focuses on the cases and legislative action that have greater impact on the public schools of Texas. The cases are grouped according to subject and issues. A brief synopsis of the federal No Child Left Behind (NCLB) Act is also included.[1]

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1. Due to the voluminous nature of the NCLB, the summary provided in this article is just that, a summary. An entire article can be dedicated to this legislative effort alone. For additional information regarding the NCLB, we suggest contacting the United States

A. STUDENT ISSUES

Because student issues routinely make the headlines across the nation and constantly change school law, it is fitting to begin this discussion with student issues. The phrase "students do not shed their constitutional rights . . . at the schoolhouse gate" has long been cited in favor of students.[2] However, as detailed below, the pendulum appears to be swinging back toward providing public school districts with increasing rights.

1. FERPA: What Constitutes an Education Record?

The Family Education Rights and Privacy Act (FERPA) has long been a subject of debate in the public schools. In particular, the debate has focused on the scope of FERPA protection for student identifiable information. Prior to a recent Supreme Court decision, school districts, in an abundance of caution, applied FERPA to any information or document that identified a student in any manner. On February 19, 2002, the Supreme Court clarified this issue with its holding in *Owasso Independent School District v. Falvo*.[3] The Court reversed the Tenth Circuit Court of Appeals decision and held that a school district does not violate FERPA by allowing students to engage in peer grading.[4] In this case, peer grading involved students exchanging papers with each other, scoring them according to the teacher's instructions, returning the work to the student who prepared it, and then either reading the score aloud to the teacher or walking to the teacher's desk and revealing it in confidence.[5]

A mother with three children attending school in Owasso Independent School District (OISD) in a suburb of Tulsa, Oklahoma, claimed the peer grading process embarrassed her children. She requested the district adopt a uniform policy banning peer grading and requiring teachers to grade assignments themselves or at least to forbid students from grading papers other than their own.[6] OISD refused to ban the peer grading practice and the mother brought a § 1983 claim against the district and individual school officials, alleging that the peer grading process violated FERPA.[7]

The specific FERPA condition at issue in this case was the requirement that school districts refrain from implementing any policies or practices permitting the release of a student's education records without the written consent of a parent.[8] To determine whether OISD was violating FERPA through its peer grading practice, the Court considered whether

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Department of Education No Child Left Behind website http://www.nclb.gov, or the Texas Education Agency website at http://www.tea.state.tx.us.

2. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).
3. Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002).
4. *Id.* at 436.
5. *Id.* at 429.
6. *Id.*
7. *Id.*
8. *Id.* at 428.

the grades revealed in the process constituted education records.[9]

The Court issued a narrow holding stating that a student assignment does not become an "education record" when it is graded by another student.[10] Therefore, the court found FERPA was not violated by the district's practice of allowing students call out their grade.[11]

In reaching its decision, the Court emphasized that FERPA defines "education records" as "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution."[12] The Court believed FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms.[13] The Supreme Court accepted the ordinary meaning of the word "maintained" as "to keep in existence or continuance; preserve; retain."[14] Accordingly, the Court reasoned that student assignments graded by other students are not education records because they are not "maintained" by an educational agency or institution. Furthermore, the Court stated that, even if they agreed that a student's act of grading another student's paper is an example of a student acting for the teacher, this action did not rise to a sufficient level to indicate that the student was acting for the educational agency or institution, as described by the statute.[15]

The holding in this case provides school districts with guidance as to how courts will interpret alleged violations of FERPA in the future. The Court listed several benefits of peer grading: teaching material again in a new context to reinforce the lesson; helping students learn how to assist and respect fellow students; and discovering whether the students understand the material.[16]

The Court indicated that classifying peer grading as a FERPA violation would allow federal power to exercise minute control over specific teaching methods.[17] Further, requiring school districts to ban this practice would impose substantial burdens on teachers across the country, forcing them to take time, which otherwise could be spent teaching or preparing lessons, to correct an assortment of daily student assignments.[18] The Supreme Court did not believe that Congress intended to intervene with this traditional state function and was unwilling to interpret the statute in

9. *Id.* at 431.
10. *Id.* at 436.
11. *Id.*
12. *Id.* at 426 (citing section 1232g(a)(4)(A)).
13. *Id.* at 940.
14. *Id.* at 433 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987)).
15. *Id.* at 433.
16. *Id.*
17. *Id.* at 435.
18. *Id.* at 435-36.

a way that would require peer grading practices to be banned.[19]

2. Student Searches

The Fourth Amendment, which prohibits unreasonable searches and seizures, has long been applied to the search of a student by a school official.[20] For a student search to be permissible under the Fourth Amendment, it must first have been justified at its inception and second, have been reasonably related in scope to the objectives of the search. According to the Supreme Court in *New Jersey v. T.L.O.*, a student search must not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[21] Until recently, however, it was unclear whether the *T.L.O.* standard for student searches by school officials also applied to student searches conducted by law enforcement officials, including school resource officers.[22] In *Russell v. State*, the Waco Court of Appeals clarified this issue. Specifically, the court held that the "twofold inquiry" adopted in *T.L.O.* for searches conducted by school officials also applies to searches conducted by school police officers or liaison officers acting on their own authority.[23]

In *Russell*, a parking lot attendant observed three students smoking in a car. The attendant sent the students to the principal's office. Russell, one of the students, wore baggy cargo shorts, which had been banned at other school campuses because of the ease with which weapons could be hidden in the shorts. Fearing that Russell might be concealing a weapon, the principal ordered Russell to empty his pockets and he refused. The principal then asked a police officer who was assigned to the high school to join the investigation.[24] When the officer entered the principal's office, the principal told the officer that she had seen Russell "messing with his pockets" and that he refused to empty them. The officer testified that the shorts were so "big and bulky" that he would not have been able to see a hidden weapon. The officer further testified that his past experience with students who refused to empty their pockets for a school administrator usually indicated the concealment of a weapon, marijuana, or cigarettes. The officer then conducted a pat-down search to determine whether Russell, in fact, had a weapon in his pocket. Instead of discovering a weapon, however, the officer discovered a small baggie containing marijuana.[25] Russell was charged with a misdemeanor offense of possession of less than two ounces of marijuana in a drug-free zone. At a pre-trial suppression hearing, Russell argued that the search violated his Fourth Amendment rights, but the trial court denied the motion. He then pled *nolo*

19. *Id.* at 436.
20. Russell v. State, 74 S.W.3d 887, 891 (Tex. App.—Waco 2002, pet. denied) (citing New Jersey v. T.L.O., 469 U.S. 325 (1985)).
21. *Id.* (quoting *T.L.O.*, 469 U.S. at 341-42).
22. *Id.* at 891.
23. *Id.*
24. *Id.* at 889.
25. *Id.*

contendere and appealed, arguing that the court abused its discretion by denying his motion to suppress.[26]

Based on the facts, the court concluded that the officer had reasonable grounds for suspecting that the search would reveal evidence that Russell was concealing a weapon in his pocket, thus satisfying the "justified at its inception" prong of the *T.L.O.* test.[27] Furthermore, the court viewed the search of Russell's pocket after the initial pat down as being reasonably related to the objectives of the search and, therefore, not excessively intrusive in light of the age and sex of the student and the nature of the infraction, thus satisfying the second prong of the test.[28] Under the *T.L.O.* standard, the court upheld the search of the student by the officer. This decision provides guidance for future situations in which a school administrator may choose to involve a school resource officer or other law enforcement officer in student searches.

3. *Student Discipline*

Parents regularly appeal student assignments to alternative education programs (AEP's). Generally, the dispute in these appeals is whether a student's assignment to AEP's violates the student's constitutionally protected property or liberty rights. In *Stafford Municipal School District v. L.P. & Y.P.*,[29] the court evaluated a student's right to appeal the assignment to an AEP to determine whether the student possessed a constitutionally protected property or liberty right. L.P. and Y.P. were parents of a public school student who was transferred to the district's AEP for disciplinary reasons when the student was arrested and charged with criminal mischief for "keying" two cars in the school parking lot.[30]

The parents filed suit against the district alleging that the district's failure to inform them of their right to appeal the transfer violated the student's due process rights.[31] Specifically, the parents asserted that the district denied their son his property and liberty interest in public education by his placement in AEP. The school district filed a plea to the jurisdiction claiming that the parents failed to state a cause of action within the subject matter jurisdiction of the court. The district argued that procedural due process applies only to the deprivation of interests protected by the Texas Constitution, and not to the right to appeal a disciplinary transfer to an AEP.[32]

The Fourteenth District Court of Appeals held that the transfer to the AEP did not involve a property or liberty interest.[33] The court empha-

26. *Id.* at 890.
27. *Id.* at 892-93.
28. *Id.* at 893.
29. Stafford Mun. Sch. Dist. v. L.P., 64 S.W.3d 559 (Tex. App.—Houston [14th Dist.] 2001, no pet.).
30. *Id.* at 561.
31. *Id.*
32. *Id.*
33. *Id.* at 564.

sized the court's decision in *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, which held that a student was not denied access to public education when placed in an AEP.[34] Rather, the court in *Nevares* found students were merely temporarily transferred from one school program to another program for stricter discipline. Additionally, the *Stafford* court determined that the student had no liberty interest in his reputation. Accordingly, the court held that the district's failure to inform the parents and student of their right to appeal did not violate the student's due process rights.[35] Thus, the case was reversed and remanded to the trial court for a ruling on the district's plea to the jurisdiction consistent with the court's holding.

4. Student Drug Testing

Many school administrators eagerly awaited a recent Supreme Court decision concerning the right of public school districts to require student drug testing. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the Court clarified this issue.[36] In *Earls*, high school students challenged the constitutionality of the school's suspicionless urinalysis drug testing policy. The district court for the Western District of Oklahoma upheld the school's policy, and the students appealed.[37] The Tenth Circuit reversed the district court, holding that the school district's drug testing policy violated the Fourth Amendment by requiring all students participating in competitive extracurricular activities to submit to drug testing.[38] The Supreme Court reversed the Tenth Circuit, holding that the school district's interest in preventing, deterring, and detecting drug use was sufficient to outweigh a student's Fourth Amendment right against unreasonable search and seizure.[39]

In support of its decision, the Court found the Fourth Amendment is implicated in drug testing cases because the collection of urine samples for use in drug testing is considered a "search" by public school officials.[40] Typically, in the criminal context, the Fourth Amendment requires a showing of probable cause.[41] However, according to the Court, and as seen in *Russell* and *T.L.O.*, the probable cause standard is not suited to determining the reasonableness of a search by school officials where the school seeks to "prevent the development of a hazardous condition."[42] Moreover, as previously held in *Vernonia Independent School*

34. *Id.* at 563 (citing Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26-27 (5th Cir. 1997)).
35. *Id.* at 561.
36. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 2559 (2002).
37. *Id.* at 2563.
38. *Id.*
39. *Id.* at 2564, 2568.
40. *Id.* at 2564.
41. *Id.*
42. *Id.* at 2564 (relying on Treasury Employees v. Von Raab, 489 U.S. 656, 667-668 (1989)).

District v. Acton,[43] the school district's interest in protecting its students outweighs the student's Fourth Amendment interest where the school district's policy is implemented in response to an immediate and legitimate concern that students are using drugs.[44] In reaching its decision in *Vernonia*, the Court balanced the intrusion on a student's Fourth Amendment right not to be subjected to unreasonable searches and seizures against a school district's legitimate interest in conducting drug testing.[45] According to the Court, one factor which tipped the scale of the balancing test in the school district's favor was that school officials knew that student athletes were using drugs and acting as leaders of the drug culture.[46]

In reversing the district court, the Court found the Tenth Circuit had mistakenly construed *Vernonia* to conclude that, in order for a school district's drug testing policy to be upheld, a school district must demonstrate that the policy was implemented to remedy an existing drug problem among the students who are the subject of the policy.[47] Both *Vernonia* and *Earls* make it clear, however, that a district does not have to show that a drug problem exists to justify the implementation of a drug testing policy.[48] A district need only demonstrate that a drug testing policy promotes a legitimate governmental interest that outweighs the intrusion on a student's Fourth Amendment right to privacy.[49]

In reaching its conclusion, the Court considered the nature of the Fourth Amendment "privacy" interest allegedly compromised by the school's drug testing policy. As with the Court's decision in *T.L.O.*, the Court in *Earls* held that the reasonableness of a search is determined by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests.[50] According to the Court, because the state is responsible for maintaining discipline, health, and safety in public schools, a student in a public school environment has a limited right to privacy.[51] Furthermore, as in *Vernonia*, student athletes have less expectation of privacy because they share open bathroom space in locker rooms.[52] According to the *Vernonia* Court, the intrusion imposed by requesting a student to produce a urine sample behind a closed stall was negligible, at best.[53] In addition, students choose to join a club or sport, voluntarily subjecting themselves to a degree of regulation higher than that imposed on students in general.[54] On this basis, the

43. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
44. *Id.* at 648-49.
45. *Id.* at 652-53.
46. *Id.* at 649.
47. *Earls*, 122 S. Ct. at 2563.
48. *Vernonia*, 515 U.S. at 653; *Earls*, 122 S. Ct. at 2564-65.
49. *Earls*, 122 S. Ct. at 2564-65.
50. *Id.*
51. *Vernonia*, 515 U.S. at 655-56; *Earls*, 122 S. Ct. at 2565.
52. *Vernonia*, 515 U.S. at 657.
53. *Id.* at 658.
54. *Id.* at 657.

Court determined that the "policy requiring all students who participated in extracurricular activities to submit to drug testing was a reasonable means of furthering the school district's important interest in preventing and deterring drug use among its schoolchildren, and therefore, did not violate the Fourth Amendment."[55]

Regardless of the decisions in *Vernonia* and *Earls*, most school lawyers recommend that school districts should exercise caution when developing drug testing policies. The *Earls* students argued that there was no real immediate, legitimate concern that non-athletes were using drugs.[56] While the Court clarified that a demonstration of a drug abuse problem among the students being tested is not necessary to validate a drug testing policy, the Court also implied that evidence of a drug problem will strengthen an argument in favor of a drug testing policy.[57] Additionally, important to the Court's decision in *Earls* was the Court's finding that the students affected by the policy had a limited expectation of privacy, the degree of intrusion was negligible given the method of collection of urine samples, and the only consequence of a failed test was to limit the students' privilege of participating in the extracurricular activity. These two points raised by the Court imply that school districts might want to: (1) continue to gather evidence of a drug problem in support of a drug testing policy; and (2) evaluate the method of collection to ensure that the degree of intrusion is as limited as possible.

Following this decision, on September 6, 2002, the Fifth Circuit reconsidered whether Tulia Independent School District's drug testing policy violated a student's Fourth Amendment rights in light of *Earls* and *Vernonia*.[58] The court vacated the decision.

5. *Sexual Harassment*

Sexual harassment, specifically student-on-student harassment, continues to be an issue faced in the public schools. In *Doe v. Dallas Independent School District*,[59] the mother of a five-year-old girl attending school in the Dallas Independent School District (DISD) brought a suit against the district alleging that DISD administrators acted with deliberate indifference to a sexual assault complaint involving her daughter. The mother alleged that the school district was familiar with John Doe's history of grabbing and fondling female classmates in an inappropriate manner, but the district took no steps to prevent him from repeating this type of behavior with her daughter.[60] The complaint alleged that John Doe as-

55. *Earls*, 122 S. Ct. at 2559.

56. *Id.* at 2567.

57. *Id.* at 2567-68.

58. Gardner v. Tulia Indep. Sch. Dist., 183 F. Supp. 2d 854 (N.D. Tex. 2000), *vacated by* 2002 WL 31049486 (5th Cir. Sept. 6, 2002) (Table).

59. Doe v. Dallas Indep. Sch. Dist., No. CIV.A.3:01-CV-1092-R (N.D. Tex. July 16, 2002) (unpublished opinion), 2002 WL 1592694.

60. *Id.* at *1.

saulted Jane Doe II in P.E. class by using his hand to violate her vagina.[61] The school counselor and the school nurse confirmed physical evidence existed that supported Jane Doe II's claims.[62] The district separated the students and restricted the victim from attending P.E.[63] The school principal allegedly gave inadequate attention to the problem, failed to take any significant steps to remedy the situation, and accused Jane Doe II of fabricating the entire incident.[64] John Doe assaulted Jane Doe II a second time.[65] Again, the mother alleged the administration acted with deliberate indifference when they told Jane Doe II to forget the incident and took no further remedial action.[66]

The mother filed suit alleging the DISD was deliberately indifferent to the complaints of sexual assault in violation of Title IX, 20 U.S.C. § 1681. Further, the mother alleged the DISD violated her daughter's due process rights by establishing customs and/or policies in violation of 42 U.S.C. § 1983.[67] The district court held that a cause of action existed as to the mother's Title IX, 20 U.S.C. § 1681 claim, but did not find that a cause of action existed as to the mother's 42 U.S.C. § 1983 claim.[68] The district court found the school district had not affirmatively placed Jane Doe II in danger and, therefore, the student's injuries were not caused by a school policy of the district. The court dismissed her § 1983 claim.[69]

However, the court did find that the mother's complaint satisfied the requirements for relief under Title IX.[70] Specifically, the court found the principal's response to Jane Doe II's complaint qualified as deliberate indifference and the administration had actual knowledge of physical symptoms of the abuse. Further, the court determined the manual penetration of the student's vagina qualified as "sufficiently severe one-on-one peer harassment" to establish a claim under Title IX. Finally, the court found that removing the student from P.E. may have deprived her of access to the educational activities or benefits provided by the school.[71]

6. *Student Discipline*

A claim of "disparate discipline" is frequently invoked in situations involving student athletes and students participating in extracurricular activities. In *Perkins v. Alamo Heights Independent School District*, the parents of a female student brought an action against the Alamo Heights ISD (AHISD) and its superintendent, alleging that the students were

61. *Id.*
62. *Id.*
63. *Id.* at *5.
64. *Id.* at *1.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at *9.
69. *Id.* at *3.
70. *Id.* at *9.
71. *Id.* at *5-6.

"disparately disciplined" based on their gender.[72] The incident at issue involved members of the varsity cheerleading squad who attended a party where hazing and alcohol consumption allegedly occurred.[73] Based on the allegations, the students accused of participating in the incident were told they would be ineligible to try out for any future "spirit positions."[74] However, the male student athletes who attended the party were not permanently removed from their extracurricular activities. The parents alleged that the school's actions: (1) had resulted in irreparable injury to the students "because they have been stripped of student honors and participation in their extracurricular activities;" (2) will have an irreparable adverse and negative effect on the students with regard to scholarships; and (3) negatively affected the students' good names (in which the parents asserted the students had a liberty interest).[75] Additionally, the parents claimed the school's actions violated: Article 7, Section 1 of the Texas Constitution because the school's actions were not consistent with an efficient educational system, the Texas Equal Rights Amendment, and the due process of law provision of the Texas Constitution.[76]

The parents filed a suit on their claims and a request for a temporary restraining order in district court.[77] The school district subsequently filed Notice of Removal in the United States District Court, Western District of Texas, on the basis that the parents' claims involved claims arising under federal law. The court held that removal was proper and a preliminary injunction was not warranted under the facts presented.[78]

In reaching its decision to deny the request for a preliminary injunction, the court scrutinized the evidence presented by the parents in support of their claims.[79] The court found no evidence of disparate treatment on the basis of gender, rather finding that the "involved educators and school board members agonized over their decision and afforded the students adequate due process."[80] Although the court noted that it might make a different decision, it upheld the prevailing interpretation of the courts that the personal decision of the court defers to the decision of the local school board.[81] Specifically, "the law does not provide for the courts to become super school boards except upon a strong showing of a violation of federal law or constitutional standards."[82]

72. Perkins v. Alamo Heights Indep. Sch. Dist., 204 F. Supp. 2d 991 (W.D. Tex. 2002).
73. *Id.* at 994.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 993.
78. *Id.* at 997.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954); Anderson v. Canton Mun. Separate Sch. Dist., 232 F.3d 450, 455-56 (5th Cir. 2000)).

7. *FERPA: Does It Provide a Private Cause of Action?*

In *Gonzaga University v. Doe*,[83] John Doe brought a § 1983 action against the university and a university employee, claiming a violation of FERPA. Doe was a former undergraduate and graduate student in the School of Education at Gonzaga University.[84] It was his intention to teach at a Washington public elementary school.[85] One of Gonzaga's "Teacher Certification Specialists" overheard one student tell another student that Doe had engaged in acts of sexual misconduct against a female undergraduate student.[86] The university employee launched an investigation and contacted the state agency responsible for teacher certification, identifying Doe by name and discussing the allegations against him.[87] John Doe was never informed of the investigation, never informed of any discussion with the state certifying body, and in fact, was never otherwise charged, nor were any other actions taken against him regarding the allegations of sexual misconduct.[88]

The jury awarded Doe compensatory and punitive damages on FERPA claim.[89] The Supreme Court held that FERPA does not support a private cause of action.[90] Specifically, the Court authorized the Secretary of Education to "deal with violations" of FERPA.[91] Because the Act confers responsibility to handle violations to the Secretary of Education, there was no clear and unambiguous conferring of a private cause of action against the school district.[92] Accordingly, the Supreme Court reversed the judgment of the Supreme Court of Washington, and remanded the case.[93]

B. Employment Cases

1. *Federal*

Traditionally, employment cases against public school districts have focused on issues of race and gender discrimination. The following cases are no different and represent a summary of these issues with the courts' analysis regarding school district liability. In *Goins v. Hitchcock I.S.D.*, a women's basketball and volleyball coach brought an action against the Hitchcock ISD (HISD) and its school board members (individual defendants) alleging race and gender discrimination under § 1981, and § 1983, Title VII, Title IX, and the Texas state tort law.[94] Specifically, the coach

83. Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002).
84. *Id.* at 2272.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 2279.
91. *Id.* at 2278.
92. *Id.* at 2279.
93. *Id.*
94. Goins v. Hitchcock Indep. Sch. Dist., 191 F. Supp. 2d 860 (S.D. Tex. 2002), *aff'd*, No. 02-41209 (5th Cir. Mar. 27, 2003) (Table).

claimed that the HISD misrepresented the fact that she would be compensated at a rate equal to the rate paid to her male co-workers and subsequently refused to offer her the amount promised. The coach also claimed the district attempted to "black ball" her for her refusal to accept the lower compensation, resulting in her resignation from the HISD.

The court analyzed the coach's claims, finding that the individual defendants were immune from liability in their official capacity. Additionally, the court held that the individual defendants were immune from the coach's Title IX, Title VII, § 1981, and § 1983 claims in their individual capacity.[95] Finally, the coach's intentional infliction of emotional distress claims against the individual defendants were dismissed based on the fact that the claim for intentional infliction of emotional distress and the Title VII claim arose from identical factual allegations and, therefore, the Title VII claim preempted the claim for intentional infliction of emotional distress.[96] Therefore, this case is relevant for the court's holdings that: (1) no private right of action exists for Title IX claims against school board members in their individual capacities; (2) individual school board members could not be individually liable for Title VII claims; and (3) a claim for intentional infliction of emotional distress is preempted by a Title VII claim based upon the same factual allegations.[97]

In *Chavera v. Victoria Independent School District*,[98] a former school employee brought a Title VII action against the school district, alleging that she was subjected to repeated sexual harassment and retaliation by a fellow employee and later supervisor. Chavera claimed she was constructively discharged from her position with the district because of the intolerable work environment created by her supervisor's conduct.[99] In response, the district filed a motion for summary judgment on the constructive discharge claim.[100]

The Fifth Circuit listed five factors to consider when addressing constructive discharge claims to determine whether a reasonable employee would have felt compelled to resign: (1) whether the employee was demoted, (2) whether the employee received a reduction in salary, (3) whether the employee had a reduction in job responsibilities, (4) whether the employee was reassigned to menial or degrading work (5) whether the employee was subjected to badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation, or (6) whether the employee was offered early retirement that would make the employee worse off whether the offer was accepted or not.[101] The fifth factor was the most relevant to the court's assessment of Chavera's

95. *Id.* at 869-71.
96. *Id.* at 871-72.
97. *Id.* at 869, 870.
98. Chavera v. Victoria Indep. Sch. Dist., 221 F. Supp. 2d 741 (S.D. Tex. 2002).
99. *Id.* at 747.
100. *Id.* at 742.
101. *Id.* at 748.

circumstances.[102]

In support of her case, Chavera produced affidavits, letters, and deposition testimony, evidencing the alleged harassment.[103] The evidence regarding the alleged harassment would be sufficient to support a jury finding that a reasonable employee in Chavera's circumstances would have felt compelled to resign. Accordingly, the district court denied the district's motion for summary judgment on the retaliation claim.[104]

In *Clark v. La Marque Independent School District*,[105] Trev Clark, a former history teacher and coach at La Marque Independent School District (LMISD) was indicted on criminal charges stemming from an allegation that he had a sexual relationship with a student. Clark was subsequently fired from the school district.[106] The coach accused the district of racial discrimination, deprivation of rights, conspiracy, and malicious prosecution.[107] The court denied the claim of racial discrimination, finding no racially-motivated conduct by the district.[108] Similarly, the court denied the conspiracy claim, finding that a school district and its employees are a single entity, and are therefore incapable of conspiring with themselves.[109] The court also denied the claim regarding the coach's constitutional rights, holding that the coach failed to show an official policy or custom that led to a deprivation of constitutional rights.[110] Finally, the court denied the claim of malicious prosecution based upon the school district's common law and statutory immunity from liability.[111]

In *Perez v. Region 20 Education Service Center*,[112] Daniel M. Perez was employed with Region 20 as a Data Processing Specialist. Perez wished to become a Database administrator for the Regional Service Center Computer Cooperative (RSCCC) group and submitted a request to Region 20 asking to be promoted to, or reclassified as, a Database Administrator.[113] Perez's request was denied because there was no Database Administrator position available in the RSCCC group.[114] He was told that if the position was ever created, he would get the job.[115] While employed with Region 20, Perez was treated for stomach problems and work-related stress, he filed several complaints with the EEOC, and he received several unfavorable reviews. Perez was discharged from Region

102. *Id.* at 748.
103. *Id.* at 751.
104. *Id.*
105. Clark v. La Marque Indep. Sch. Dist., 184 F. Supp. 2d 606 (S.D. Tex. 2002), *aff'd*, No. 02-40217, 2002 WL 31718006 (5th Cir. Nov. 4, 2002) (Table).
106. *Id.* at 609.
107. *Id.*
108. *Id.* at 610.
109. *Id.*
110. *Id.* at 611.
111. *Id.* at 615.
112. Perez v. Region 20 Educ. Serv. Ctr., 307 F.3d 318 (5th Cir. 2002).
113. *Id.* at 322.
114. *Id.*
115. *Id.*

20 on July 1, 1999.[116]

Subsequently, Perez filed suit in Texas state court, alleging that: (1) Region 20 discriminated against him based on his Hispanic national origin, in violation of Title VII when it failed to grant his request regarding the Database Administrator position; (2) Region 20 discharged him in retaliation for filing a discrimination claim with the EEOC in violation of Title VII; (3) Region 20 discharged him because of his Hispanic national origin in violation of Title VII; (4) Region 20 discriminated against him due to his mental illness disability in violation of the ADA; and (5) Region 20 discharged him in retaliation for reporting the sexual harassment of another Region 20 employee in violation of the Texas Whistleblower Act.[117] The district court granted summary judgment for Region 20 on all claims and Perez appealed.[118]

The district court found that Region 20 articulated a legitimate, non-discriminatory reason for its failure to promote Perez.[119] Perez was unable to demonstrate that Region 20's proffered reason was simply a pretext for discrimination, and thus did not violate Title VII.[120]

On his second claim, the district court found that Perez provided sufficient evidence of a causal connection between the filing of his EEOC complaints and his termination.[121] The court recognized that timing can constitute evidence of a causal connection between a protected activity and termination and looked to see whether Region 20 articulated a legitimate, non-discriminatory reason for the termination.[122] The court found that the reason proffered by Region 20, including Perez's poor work performance, was adequate to shift the burden back to Perez to disprove the proffered reason.[123] Perez was unable to disprove the reason stated by Region 20 for his termination. In particular, Perez was unable to prove that his termination was due to anything other than his poor work performance.[124] Thus, Perez was unable to sustain a claim that he was fired because he filed complaints with the EEOC or because of his Hispanic national origin.[125]

Perez was also unable to sustain an ADA claim or a Texas Whistleblower Act Claim because the State of Texas did not consent to suit in federal court, and, therefore, Region 20 was protected by Eleventh Amendment immunity. The court of appeals affirmed the judgment of the district court dismissing each of Perez's five claims.[126]

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116. *Id.* at 323.
117. *Id.* at 318.
118. *Id.*
119. *Id.* at 324.
120. *Id.*
121. *Id.* at 325.
122. *Id.* at 318.
123. *Id.*
124. *Id.*
125. *Id.* at 326.
126. *Id.* at 333.

2. State

Defamation cases frequently occur in the public school context due to the unique nature of the issues, including personnel issues, faced by a district board of trustees. In *Brashear v. Rojas*, a superintendent who was terminated from the Dallas Independent School District (DISD) brought a slander action against the members of the DISD school board in their individual capacities.[127] Specifically, the superintendent alleged that board members used the media to attack him, falsely accused him of violating both board policy and State law, and distributed a packet of defamatory material about him.[128] The board members filed a motion for summary judgment on the grounds of official immunity, and the district court denied the motion.[129] On appeal, the court of appeals affirmed the district court's decision.[130]

The court, as in previous decisions, outlined the standard for determining whether a governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's authority; and (3) for acts performed in good faith.[131] The court examined the requirement that the employee establish that he/she acted in good faith.[132] The evidence presented by the defendants regarding the good faith requirement were affidavits that did not address all of the employee's complaints.[133] "The affidavit of a defendant may be sufficient to establish good faith if the affidavit is clear, positive, direct, otherwise credible, free from contradiction, and readily controvertible."[134] The court determined, therefore, that the affidavits did not meet the burden to establish that the defendants acted in good faith.

In *Griffin v. Nelson*,[135] an employee with a continuing contract claimed that he had a property interest in maintaining a level of local supplement components to his compensation, in addition to receiving the increased state base salary. The district reduced the employee's supplemental stipend and his local increment from the previous year; but, because the state base pay had increased, the employee's total salary was more than the previous year.[136] The court found that a district that historically offers supplements is not bound to continue offering supplements and that a property interest is not created in future supplements.[137] The court de-

127. Brashear v. Rojas, No. 05-01-01187-CV (Tex. App.—Dallas Feb. 20, 2002, no pet.) (not designated for publication), 2002 WL 253939.
128. *Id.* at *1.
129. *Id.*
130. *Id.* at *3.
131. *Id.* at *1.
132. *Id.*
133. *Id.* at *2.
134. *Id.* at *1 (quoting Smith v. Davis, 999 S.W.2d 409, 415 (Tex. App.—Dallas 1999, no pet.)).
135. Griffin v. Nelson, No. 03-01-00323-CV (Tex. App.—Austin Feb. 14, 2002, no pet.) (not designated for publication), 2002 WL 220316.
136. *Id.* at *1.
137. *Id.* at *2.

termined that the state increase in the employee's base salary more than offset the district's reductions to the employee's local supplements.[138] Accordingly, the court of appeals affirmed the judgment of the district court.

As in the court's opinion in *Brashear v. Rojas* outlined above, in *Llanes v. Corpus Christi Independent School District*, a school employee brought an action against the Corpus Christi Independent School District (CCISD) alleging wrongful termination in violation of the Texas Whistleblower Act and breach of contract.[139] The employee was a secretary for the associate superintendent and she applied for another position in the CCISD, but was not chosen for the position.[140] The employee then proceeded to complain about the hiring process; however, her supervisor and the superintendent told the employee they believed the CCISD was in compliance with their policies.[141] When the employee was then terminated less than two months later, she brought this action.[142]

The district court severed the Whistleblower claim and granted summary judgment in favor of the CCISD.[143] The court of appeals upheld the district court's decision finding that the employee failed to state a Whistleblower claim.[144]

The focus of the court's decision was the interpretation of the first element of a Whistleblower claim that requires the employee to provide evidence that she reported an alleged violation of law to an appropriate authority.[145] In this case, the employee only alleged that "the hiring process violated board policy and the law."[146] The court determined that although "an employee need not identify a specific law when making a report, and need not establish an actual violation of law, there must be some law prohibiting the complained of conduct to give rise to a Whistleblower claim. . . . Thus, to recover under the Act, an employee must have a good-faith belief that a law, which in fact exists, was violated."[147] On this basis, the court affirmed the lower court's decision because there was no evidence that the employee reported an alleged violation of law.

In *Peters v. Nelson*,[148] a former elementary classroom teacher was terminated because she was not in compliance with the terms of her contract. The Commissioner of Education affirmed her termination, and the trial court upheld the Commissioner of Education's decision. The teacher

138. *Id.*
139. Llanes v. Corpus Christi Indep. Sch. Dist., 64 S.W.3d 638 (Tex. App.—Corpus Christi 2002, pet denied).
140. *Id.* at 640.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 643.
145. *Id.* at 641.
146. *Id.* at 642.
147. *Id.* at 642-43.
148. Peters v. Nelson, No. 05-01-01304-CV, 2002 WL 531485 (Tex. App—Dallas April 10, 2002, no pet.) (not designated for publication), 2002 WL 531485.

appealed.[149] The teacher asserted that the Commissioner's decision was in error for three reasons: (1) the district failed to file a local record as required by law; (2) the district was aware that she was not certified when she was hired; and (3) the district did not provide her with notice as required by § 21.253 of the Education Code.[150] Her arguments in (1) and (2) were defeated by her own admission that she lacked certification.[151] Additionally, she acknowledged that she was aware that her contract was conditioned upon obtaining certification.[152] Finally, the court found that the notice she referred to in her last argument is required for due process purposes and that, without a valid contract, she had no property interest in her continued employment. The court of appeals properly upheld the trial court's judgment affirming her termination.[153]

C. CONTRACTS

In *La Villa Independent School District v. Gomez Garza Design, Inc.*,[154] Gomez Garza Design, Inc. (Garza) brought a breach of contract claim against La Villa Independent School District (LVISD). Following a jury finding in favor of Garza, LVISD brought an appeal.[155] Specifically, the LVISD asserted that a valid contract did not exist between LVISD and Garza for two reasons: (1) the LVISD claimed no authenticated minutes of a school board meeting existed to indicate the school board's authorization of the contract; and (2) the LVISD's superintendent did not have the authority to bind the LVISD by signing the contract.

The court of appeals engaged in a two step analysis to determine whether a contract existed between LVISD and Garza.[156] First, the court found that the district did have authenticated minutes of a school board meeting that indicated the Board authorized a contract directing Garza to design a new elementary school.[157] Second, the court determined the Board had the power to authorize, approve, and sign the contract at issue.[158] Additionally, the court found the superintendent was acting with the Board's knowledge, and implicit approval, when he signed the contract on behalf of the Board. For these reasons, the court of appeals determined a valid contract existed and upheld the jury's finding in favor of Garza.[159]

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149. *Id.* at *1.
150. *Id.* at *2-4.
151. *Id.* at *2.
152. *Id.* at *3.
153. *Id.* at *4.
154. La Villa Indep. Sch. Dist. v. Gomez Garza Design, Inc, 79 S.W.3d 217 (Tex. App.—Corpus Christi 2002, pet. denied).
155. *Id.* at 219.
156. *Id.* at 219-20.
157. *Id.* at 220-21.
158. *Id.* at 221.
159. *Id.* at 222.

D. PROCEDURAL LESSONS

In *Goodie v. Houston*,[160] the Houston Independent School District (HISD) Board of Educators disregarded the Commissioner of Education's decision that a terminated teacher should be reinstated. After the board terminated the teacher's contract, the teacher appealed, and the Commissioner ordered that she be reinstated.[161] The board then appealed to the district court, which upheld the board's termination of the teacher and stated that the Commissioner may not reverse the board's decision.[162] The teacher and the Commissioner both appealed.[163] The court of appeals granted the teacher's and Commissioner's appeal.

This decision focused on the application of section 21.259(d) of the Texas Education Code, which requires that a board must comply with the requirement that a recommendation of a hearing examiner should not be changed without stating a reason and legal basis for the change. Specifically, the Legislature enacted section 21.259(d) of the Texas Education Code to prevent school boards from making arbitrary, capricious, and unlawful decisions that may conflict with a decision made by the Commissioner of Education.[164] The HISD board failed to comply with this statute.[165] The board contended that even if it did not meet the requirements of section 21.259(d), this failure was merely a procedural error that did not justify a reversal of the board's decision by the Commissioner.[166] The court of appeals noted the Texas Supreme Court's acknowledgement that the requirement to state in writing the reason and legal basis for any change or rejection of the examiner's findings, conclusions, or recommendations is designed to protect "the independent nature of the hearing examiner process."[167] Therefore, the board's failure to comply with section 21.259(d) resulted in the court's reaching the decision to uphold the Commissioner's decision to reinstate the teacher.[168]

In *Port Arthur Independent School District v. Klein & Associates Political Relations*,[169] a website published an article about a fight at Thomas Jefferson High School within the Port Arthur Independent School District (PAISD). PAISD sued the author and the sponsor of the website for defamation.[170] The court found that PAISD, as a government entity of the state, could not sue for defamation.[171]

160. Goodie v. Houston Indep. Sch. Dist., 57 S.W.3d 646 (Tex. App.—Houston [14th Dist.] 2001, pet denied).
161. *Id.* at 650.
162. *Id.*
163. *Id.* at 649, 650.
164. *Id.* at 649, 651.
165. *Id.* at 651.
166. *Id.*
167. *Id.* (citing Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 564. (Tex. 2000)).
168. *Id.*
169. Port Arthur Indep. Sch. Dist. v. Klein & Assocs. Political Relations, 70 S.W.3d 349, 351 (Tex. App.—Beaumont 2002, no pet.).
170. *Id.*
171. *Id.* at 352.

In *Vela v. Waco Independent School District*,[172] an elementary school principal, who had been demoted to work in the district's central office, brought claims against the Waco Independent School District (WISD), claiming sex discrimination and racial discrimination. The Superintendent told Vela that the demotion was due to "widespread unhappiness" among her employees and that "many" of her employees feared her.[173]

Vela filed a suit against WISD in state district court and, in response, WISD filed a plea to the jurisdiction claiming that Vela had not exhausted her administrative remedies with the Commissioner of Education before filing the suit.[174] Vela had filed a claim of discrimination with the Texas Commission on Human Rights (TCHRA), but she did not file an appeal of her demotion with the Texas Education Agency (TEA).[175] The court reversed the trail court's order of dismissal, holding that Vela's appeal to the TCHRA was sufficient and that she did not need to exhaust both the TCHRA process and the TEA appeal process.[176]

E. IMMUNITY

1. *Governmental Employee Immunity under 42 U.S.C. § 1985(2) claims, 42 U.S.C. § 1983 First Amendment Claims, and 42 U.S.C. § 1983 Due Process Claim*

In July of 2002, the Fifth Circuit Court of Appeals in *Kinney v. Weaver*, was asked to consider whether law enforcement officers employed by the State of Texas were entitled to qualified immunity in various circumstances.[177] Specifically, the court addressed the issue of qualified immunity in the context of violations of the right to testify freely under 42 U.S.C. § 1985(2), the right to free speech under the First and Fourteenth Amendments, the right to due process of law under the Fourteenth Amendment, and the right to "official immunity" against a state law claim.[178]

Dean Kinney and David Hall were instructors at the East Texas Police Academy (ETPA), a division of Kilgore College in Kilgore, Texas, where they provided basic and advanced training for law enforcement officers.[179] In August of 1998, Kinney and Hall (the instructors) testified as expert witnesses in a murder trial stating that, in their opinion, Kerrville police officers had used excessive force and had failed to implement proper policies necessary to direct the conduct of "snipers."[180] As a result of this testimony, the instructors suffered adverse employment action

172. Vela v. Waco Indep. Sch. Dist., 69 S.W.3d 695 (Tex. App.—Waco 2002, pet. withdrawn).
173. *Id.* at 697.
174. *Id.* at 698.
175. *Id.* at 697-98.
176. *Id.* at 702.
177. Kinney v. Weaver, 301 F.3d 253 (5th Cir. 2002).
178. *Id.* at 256.
179. *Id.* at 257.
180. *Id.*

against them, including losing their jobs and being forced to accept lower paying jobs. They alleged that a large group of police chiefs and sheriffs (supervisors) were angered by their testimony and retaliated by canceling current enrollment in their classes and refusing to allow future enrollment.[181]

a. The Instructors' § 1985(2) Claim

The Court of Appeals affirmed the district court's denial of qualified immunity for the supervisors on the § 1985(2) claim. The supervisors argued that the instructors' § 1985(2) claim should fail for two reasons.[182] First, the supervisors argued that a § 1985(2) claim can be sustained only when the claimant can prove that it was motivated by or based on racial animus.[183] Second, the supervisors argued that § 1985(2) only applied to fact witnesses and not expert witnesses.[184] The district court held that a racial animus is not necessary to establish a § 1985(2) claim. Furthermore, the district court viewed the supervisors' attempts to restrict the application of § 1985(2) to fact witnesses was unreasonable.[185]

b. The Instructors' § 1983 Claims Invoking Their Rights to Freedom of Speech

The court of appeals affirmed the district court's denial of qualified immunity for the supervisors on the § 1983 claims. Relying on the balancing inquiry set forth in *Pickering v. Board of Education*, the court found that the instructors' testimony was speech of public concern outweighing any governmental interest in this case.[186] Furthermore, the court of appeals confirmed that the instructors had suffered adverse action as a result of the supervisors' boycott of their courses.

The final part of the analysis applied by the court was the question whether the supervisors' actions violated a "clearly established" right of the instructors.[187] Specifically, the relevant question was whether it would have been apparent to a reasonably competent officer that the alleged conduct against the instructors violated the First Amendment?[188] The supervisors argued that no controlling case existed directly addressing a First Amendment claim where a plaintiff had provided services to the governmental defendant but was neither an employee of the defendant nor in a contractual relationship with the defendant.[189] The supervisors characterize the instructors as "employees of a disappointed bidder, i.e., Kilgore College," and claimed that it was not clearly established that

181. *Id.* at 259.
182. *Id.* at 264.
183. *Id.*
184. *Id.* at 262.
185. *Id.* at 264.
186. *Id.* at 276-77 (relying on Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
187. *Id.* at 278.
188. *Id.*
189. *Id.* at 279.

the First Amendment imposed any restrictions on their conduct with the instructors in their capacity as training instructors.[190]

The court of appeals disagreed, stating that the supervisors would have known they had the power to deny the instructors significant financial benefits as ETPA instructors and that it is the existence of that sort of power, and not mere labels describing governmental relationships, that is determinative in First Amendment "denial of benefit" cases.[191] The court emphasized that recognizing the distinction between governmental employees and regular service providers would invite manipulation by governmental entities in order to avoid constitutional liability simply by attaching different labels to particular jobs.[192] The court, therefore, upheld the instructors' § 1983 claims.

c. The Instructors' State Tort Claims Prohibiting Tortious Interference with Business

The court of appeals also affirmed the district court's denial of qualified immunity for the supervisors on the state tort claims. Texas law provides government officials with "official immunity from suit arising from the performance of their discretionary duties in good faith as long as they are acting within the scope of their authority."[193] It is undisputed that the supervisors had the authority to decide where, and by whom, their respective agencies' officers were trained, and that such decisions were among the supervisors' discretionary duties.[194] The issue was whether they acted in good faith in refusing to enroll their officers in the instructors' courses.[195] To prove they were acting in good faith, the supervisors were required to show that a reasonable officer could have believed that denouncing Kinney and Hall in various communications and boycotting their courses was justified because of their expert testimony containing opinions against law enforcement.[196] The court of appeals found that the supervisors were unable to make such a showing and, therefore, affirmed the district court's denial of qualified immunity.[197]

d. The Instructor's § 1983 Claims Invoking their Fourteenth Amendment Right to Due Process of Law

The court held that the supervisors did have qualified immunity from the instructors' § 1983 due process claims.[198] Specifically, the court held that the instructors failed to demonstrate any deprivation of a property or

190. *Id.*
191. *Id.* at 280-81.
192. *Id.* (citing O'Hare Truck Servs., Inc. v. City of Northlake, 518 U.S. 712, 722 (1996)).
193. *Id.* at 285 (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 563 (Tex. 1994)).
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*

liberty interest grounded in state law.[199] Consistent with this opinion, the case was affirmed in part, and reversed and remanded in part to the district court for entry of judgment in favor of the supervisors on the instructors' § 1983 due process claims and for trial on the remaining claims.

2. Governmental Employee Immunity under Texas Tort Claims Act

In *Lowry v. Pearce*,[200] Joy Pearce brought a wrongful death action against the state school, its superintendent, various school employees, and the Texas Department of Mental Health and Mental Retardation (MHMR). Pearce alleged that her son, Robert, died from the ingestion of medication prescribed for a school employee, Sheldon Harris.[201] Robert allegedly removed the medication from the pocket of Harris's coat after Harris left it on a hook on Robert's bedroom door.[202] Pearce asserted that Harris was negligent in leaving the pills where Robert could access them.[203] She further asserted that employees William Lowry and Evelyn Thomas were negligent in their supervision of Harris by allowing him to have his prescription drugs around the patients.[204] The petition also alleged that the school and MHMR were liable for the conduct of Lowry and Thomas.[205]

The trial court granted Lowry and Thomas's motion for summary judgment on Pearce's claims brought pursuant to the Texas Tort Claims Act but denied their motion as it related to the Patient's Bill of Rights.[206] The court of appeals reversed the portion of the trial court's judgment denying the motion for summary judgment with respect to Pearce's claims under the Patient's Bill of Rights and rendered judgment in favor of Lowry and Thomas.[207]

The court of appeals determined that the trial court was mistaken in its reasoning that a cause of action must arise under the Texas Tort Claim Act to invoke governmental employee immunity under section 101.106.[208] Specifically, the court relied on the Texas Supreme Court's decision in *Newman v. Obersteller*, in which the court held that the immunity conveyed to a governmental unit's employees by section 101.106 is triggered by any judgment in a Texas Tort Claim suit against a governmental unit.[209] Therefore, in holding that the employees were entitled to immunity, the court found that "[s]ection 101.106 unequivocally grants immunity for all employees whose acts or omissions gave rise to the claim against the governmental unit when the allegations against the employees

199. *Id.* at 285.
200. Lowry v. Pearce, 72 S.W.3d 752 (Tex. App.—Waco 2002, pet. denied).
201. *Id.* at 753.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 754.
207. *Id.* at 755.
208. *Id.* at 754-55.
209. *Id.* (citing Newman v. Obersteller, 960 S.W.2d 621, 622-23 (Tex. 1997)).

are based on the same occurrence as addressed in the judgment for or against the governmental unit."[210]

In *Tarkington Independent School District v. Aiken*,[211] Aiken brought a claim against the Tarkington Independent School District (TISD) for personal injuries sustained while he was riding on the tailgate of a privately owned pick up truck driven by an employee, Roberts. Aiken sought to bring his claim within the Texas Tort Claims Act by maintaining his injuries were caused by the "use" or "operation" of a motor vehicle.[212] The Texas Supreme Court has stated that "use" means to "put or bring into action or service; to employ for or apply to a given purpose," and "operation" means a "doing or performing of a practical work."[213] The court of appeals reasoned that employee Roberts did not bring the privately-owned vehicle into service or action, did not employ it for or apply it to a given purpose, and did not perform a practical work with it.[214] Complaints alleging negligence and/or omissions relating to the improper supervision of non-employees and the improper training of school district employees do not fall within the "use or operation" of a motor vehicle exception to the Texas Tort Claims Act.[215]

Even so, Aiken argued that sovereign immunity was waived because the employee, Roberts, the only supervisor on site, exercised control and direction over the program participants' actions and, in that sense, "used" or "operated" the vehicle.[216] This argument was unsuccessful due to the limitation on the Act's waiver of immunity provision.[217] A school district is not liable for personal injuries proximately caused by a negligent employee unless the injury "arises from the operation or use of a motor driven vehicle or motor driven equipment."[218] The trial court relied on a decision from the Texas Supreme Court which stated, "[w]hile the statute does not specify whose operation or use is necessary—the employee's, the person who suffers injury, or some third party—we think the most plausible reading of the immunity provision is that the required operation or use is that of the employee."[219] The court of appeals reversed the trial court's decision, holding that, because there was no nexus between Aiken's injuries and an employee's negligent operation or use of the vehicle, the complaint did not fall within the scope of the waiver of immunity under the Tort Claims Act.[220]

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210. *Id.* at 755.
211. Tarkington Indep. Sch. Dist. v. Aiken, 67 S.W.3d 319 (Tex. App—Beaumont 2002, no pet.).
212. *Id.* at 323.
213. *Id.* (citing LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992)).
214. *Id.* at 324.
215. *Id.* at 323-324.
216. *Id.* at 325-26.
217. *Id.*
218. *Id.* at 324 (citing *LeLeaux*, 835 S.W.2d at 51).
219. *Id.* (quoting *LeLeaux*, 835 S.W.2d at 51).
220. *Id.* at 326.

F. State Law

1. *Texas Tort Claims Act*

In *Axtell v. University of Texas at Austin*,[221] a former University of Texas basketball player, Luke Axtell, brought claims against the university, the athletic director, and the head basketball coach for alleged negligence and violations of FERPA. Axtell's grades were allegedly faxed by a UT employee to a local radio station, which then broadcast the grades to the public.[222] Axtell conceded that he could not maintain a cause of action under FERPA.[223] However, Axtell maintained that the university used tangible personal property to send his confidential education records and that this use of the fax machine caused his injuries.[224] Therefore, according to Axtell, the university waived its immunity from suit.[225]

The court of appeals affirmed the district court's ruling, holding that the tangible personal property exception to governmental immunity under the Texas Tort Claims Act did not properly apply to alleged tort liability resulting from the disclosure of confidential information.[226] Specifically, the court found that it was the disclosure of the information, not the use of the fax machine, that caused the alleged injury; therefore, the student's appeal was denied.[227]

2. *Official Immunity*

As with prior years, decisions regarding official immunity, shielding a governmental employee from individual liability, are always of great interest to public school district administrators. In *Kudesia v. Morgan*, the El Paso Texas Court of Appeals examined the "good faith" element of an individual's claim of official immunity.[228] In *Kudesia*, a physician in the residency program at Texas Tech University Health Science Center in Odessa, Texas, claimed that the director of the program intentionally, maliciously, and willfully interfered with his program agreement by preventing his promotion to the second-year of residency without cause or justification. The physician had been placed on performance contracts to address his poor ratings and evaluations. The decision not to promote him to a second-year residency was made by the faculty based upon their determination that his "continued course as a resident would place patients at risk."[229]

In examining the physician's claims, the court reiterated the appropriate standard for summary judgments based upon the affirmative defenses

221. Axtell v. Univ. of Tex., 69 S.W.3d 261 (Tex. App.—Austin 2002, no pet.).
222. *Id.* at 263.
223. *Id.* at 264.
224. *Id.*
225. *Id.*
226. *Id.* at 264-67.
227. *Id.* at 267.
228. Kudesia v. Morgan, No. 08-01-00113-CV (Tex. App.—El Paso Jan. 18, 2002, pet. denied) (not designated for publication), 2002 WL 64542.
229. *Id.* at *1.

of official immunity and sovereign immunity.[230] Specifically, the court identified that a motion for summary judgment based upon these affirmative defenses should be granted only if the defendants establish all of the elements of the applicable affirmative defenses as a matter of law.[231] Therefore, to establish the elements of the affirmative defense of official immunity, the director of the program was "required to establish by competent summary judgment evidence that the acts complained-of were: (1) discretionary; (2) performed in good faith; and (3) within the scope of his official duties."[232] To establish the "good faith" element, the director was required to establish "that a reasonably prudent person could have believed that his or her actions were justified under the circumstances."[233] Because the evidence presented by the director that the decision regarding the physician's lack of promotion was based on the faculty's concerns about his clinical abilities including his clinical judgment and decision-making skills, the court found a reasonably prudent person could have believed that the director's actions were justified under the circumstances.[234] Therefore, summary judgment for the director on the basis of official immunity was affirmed.[235]

Mold cases abound throughout the State and concern most building owners, including public school districts. However, mold cases against school districts have not been entirely successful. In *Foster v. Denton Independent School District*, an elementary school teacher brought an action against the Denton ISD (DISD) for intentional nuisance and pollution and alleged violations of statutes relating to the provision of safe work environments, hazardous conditions.[236] The teacher allegedly became ill from mold and fungal spores in her classroom that were spread by the school's heating and cooling system.[237] The court denied the teacher's claims against the DISD finding: (1) her nuisance claim did not fall within the exception to sovereign immunity for takings-related nuisance claims; (2) her claims for intentional pollution were barred by sovereign immunity; (3) the DISD was protected from her claim that the district violated the statute regarding their duty to provide a safe workplace by sovereign immunity; and (4) she did not plead a cognizable cause of action against the DISD under the Hazard Communication Act.[238] This decision assuaged many districts' concerns regarding potential liability in mold cases. However, this case has not deterred potential plaintiffs in these actions.

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230. *Id.* at *2.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at *3.
235. *Id.*
236. Foster v. Denton Indep. Sch. Dist., 73 S.W.3d 454 (Tex. App.—Fort Worth 2002, no pet.).
237. *Id.* at 457.
238. *Id.* at 459-64.

H. RELIGION

1. *School Voucher Programs*

In 1995, a federal district court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control.[239] In 1996, in response to the education crisis in Cleveland, the State of Ohio established the Pilot Program Scholarship Program.[240] The program provided educational choices in the form of tuition vouchers to parents and students in the Cleveland school district.[241] Parents could use the tuition voucher to send their child to any religious private school, nonreligious private school, or public school of their choice within the district.[242] In 1996, a group of Ohio tax payers, challenged the program claiming that it violated the Establishment Clause of the United States Constitution. On June 27, 2002, the Supreme Court reversed the Sixth Circuit Court of Appeals decision, holding that the program did not offend the Establishment Clause.[243]

The taxpayers claimed that the program had the "primary effect" of advancing religion in violation of the Establishment Clause.[244] The Supreme Court viewed the Ohio program as being entirely neutral with respect to religion.[245] The Establishment Clause of the First Amendment prevents a state from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion.[246] The Court determined there is no dispute that the Ohio program was enacted for the valid secular purpose of providing assistance to poor children in a failing public school system.[247] Furthermore, the Court found that, under this program, government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients.[248] "The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual aid recipients not the government, whose role ends with the disbursement of benefits."[249] Based on this finding, the Supreme Court upheld the tuition voucher program.

2. *School Prayer*

Following the Supreme Court's decision regarding school prayer at football games, many thought school prayer would be at the forefront of decisions over the past year. The conflict between church and state will continue in the foreseeable future. The Fifth Circuit addressed some of

239. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 648, 663.
244. *Id.* at 648.
245. *Id.* at 653.
246. *Id.* at 648.
247. *Id.* at 653.
248. *Id.*
249. *Id.* at 652.

these issues in *Doe v. School Board of Ouachita Parish*.[250] In *Doe*, school children and their parents sought a declaration that a Louisiana statute providing for verbal prayer in the schools was unconstitutional and an injunction ending the practice of verbal prayer at the schools.[251]

In order to determine whether the statute at issue violated the Establishment Clause, the Court relied on a three-prong test introduced by the Court in *Lemon v. Kurtzman*.[252] First, the statute must have a secular purpose; second, its principal effect must neither advance nor inhibit religion; and third, it must not foster excessive government entanglement with religion.[253] Failure on any prong of the test results in a finding that a statute is unconstitutional.[254] In this case, the Court found there was no doubt that the statute was motivated by a wholly religious purpose, which ran afoul of the Establishment Clause.[255] The court of appeals held that because the statute was not adopted with a secular purpose, it violated the Establishment Clause and was, therefore, unconstitutional.[256]

I. STATE CREATED DANGER

Breen v. Texas A&M University,[257] involved a lawsuit regarding the Texas A&M Bonfire tragedy. The plaintiffs in this action alleged that Texas A&M and various former and present high-level University employees violated 42 U.S.C. § 1983 when they deprived the Bonfire victims of their Fourteenth Amendment right to due process by acting with deliberate indifference to the state created danger that killed or injured them.[258]

The court recognized that the Constitution imposes a duty on the state to protect particular individuals only in "certain" limited circumstances.[259] The Fifth Circuit has recognized two such limited scenarios: (1) when the state has a special relationship with a person; or (2) when the state exposes a person to a danger of its own creation, or a "state created danger."[260] The two basic requirements of the state created danger theory are: (1) state actors created or increased the danger to the plaintiff; and (2) state actors acted with deliberate indifference.[261] Even if the court were to agree that the defendants created an environment that was dangerous to the Bonfire victims, it is quite clear that they did not do so with "deliberate indifference."[262] The Supreme Court has

250. Doe v. Sch. Bd. of Ouachita Parish, 274 F.3d 289 (5th Cir. 2001).
251. *Id.* at 289.
252. *Id.* at 293 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
253. *Id.*
254. *Id.*
255. *Id* at 294-95.
256. *Id.* at 295.
257. Breen v. Tex. A&M Univ., 213 F. Supp. 2d 766 (S.D. Tex. 2002).
258. *Id.* at 768.
259. *Id.* at 774.
260. *Id.*
261. *Id.* (citing Piotrowski v. City of Houston, 51 F.3d 512, 515 (5th Cir. 1995)).
262. *Id.*

made it clear that "deliberate indifference" is defined as reckless or grossly negligent conduct.[263] The plaintiffs failed to demonstrate that the defendants' actions rose to a level of recklessness or gross negligence. Therefore, the court granted the university's motion for summary judgment with respect to the plaintiffs' federal law claims.[264]

McKinney v. Irving Independent School District[265] also discussed the issue of state-created danger. David McKinney, an employee who served as a teacher and bus driver, reported that students on his bus had multiple serious behavior problems.[266] He requested a monitor to supervise the students, but the Irving Independent School District (IISD) denied his request.[267] A student then attacked him while he was driving by spraying a fire extinguisher in his eyes.[268] McKinney sued IISD for his injuries alleging common law negligence, negligence under the Texas Tort Claims Act, and violations of his Fourteenth Amendment due process rights.[269] In particular, he alleged the IISD "created a dangerous environment" by placing the special education students with known behavior problems on one bus and refusing to equip the bus with a monitor.[270]

The Fifth Circuit has not adopted the state-created danger theory of recovery under § 1983.[271] The court expressed doubt that the plaintiff would prevail on such a claim even if they did recognize the theory.[272] The court assumed that in order for the plaintiff to recover under this theory he would have to show, at a minimum that: (1) the state actors created or increased the danger to the plaintiff; and (2) the state actors acted with deliberate indifference.[273]

Although the pleadings described a dangerous environment, the court found there were no allegations of fact showing that the defendant's conduct increased the danger.[274] It was the student's conduct that made McKinney's working environment dangerous and the court reasoned that, while the defendant may have failed to limit or reduce the danger, that was not the same as having increased it.[275] Additionally, the complaint did not allege facts sufficient to establish that the defendant was deliberately indifferent because the student's attack on McKinney could have happened regardless of whether a monitor was placed on the bus.[276] Thus, the court of appeals affirmed the district court's judgment dis-

263. *Id.* at 775.
264. *Id.* at 777.
265. McKinney v. Irving Indep. Sch. Dist., 309 F.3d 308 (5th Cir. 2002).
266. *Id.* at 310-12.
267. *Id.* at 310-11.
268. *Id.* at 311.
269. *Id.*
270. *Id.*
271. *Id.* at 313.
272. *Id.* at 313-14.
273. *Id.* at 313 (citing *Piotrowski*, 51 F.3d at 512, 515).
274. *Id.* at 314.
275. *Id.*
276. *Id.*

missing each of the McKinney's claims.[277]

J. Special Education

In *Samuel Tyler W. v. Northwest Independent School District*,[278] a special education student's parents filed a request for a due process hearing to determine whether the Northwest Independent School District (NISD) provided the student with a free appropriate public education (FAPE). The student suffered from autism and Pervasive Developmental Disorder (PDD).[279] In this case, the court detailed three years of history of admission review dismissal (ARD) committee meetings, treatment, testing, and complaints by the parents regarding the education of their mentally handicapped son.[280]

The parents argued that "any fool would know that there is only one method proven to be effective in treating children with autism." The parents claimed that because the district refused to devote itself exclusively to following that methodology, it had failed to provide the student with a FAPE. None of the cases cited by the parents supported the proposition that parents alone can decide whether the FAPE requirement is met. The law does not require that a school district provide a student with a "Cadillac education." Rather, the Court held that the Individuals with Disabilities Education Act (IDEA) simply mandates a "basic floor of opportunity" to receive an education benefit. The school district had not failed to meet this standard simply because it used a variety of methodologies.[281]

In *Adam v. Keller*,[282] the parents of a child diagnosed with Asperger's Disorder disagreed with an individual education program (IEP) proposed by the ARD committee for the 2001–2002 school year and brought an administrative claim against the school district. The parents claimed that the district failed to provide FAPE, as required by the IDEA.[283] The plaintiff was unable to prove that he received little or no educational benefit from his IEP.[284] Plaintiff's teachers and others who worked with him testified as to the progress he made while enrolled in the district. Plaintiff took the same courses as other students, only they were tailored to meet his special needs. He earned credits toward graduation and it was anticipated that he would continue to do so. There was also testimony that plaintiff stated he chose not to do well in school so that he would cause trouble at home, and stated that he would rather be arrested then sent

277. *Id.* at 315.
278. Samuel Tyler W. v. N.W. Indep. Sch. Dist., 202 F. Supp. 2d 557 (N.D. Tex. 2002).
279. *Id.* at 560.
280. *Id.* at 560-561.
281. *Id.* at 563.
282. Adam J. v. Keller Indep. Sch. Dist., No. 4:01-CV-0797-A (N. D. Tex. Aug. 15, 2002) (unpublished opinion), 2002 WL 1906001, *aff'd*, No. 02-11032, 2003 WL 1894693 (5th Cir. May 2, 2003).
283. *Id.* at *3.
284. *Id.* at *4.

home. As IDEA recognizes, the school district must provide the opportunity for educational benefits; it cannot guarantee results.[285]

Both courts upheld the hearing officer's decision holding: (1) that the defendant complied with the procedures set forth in IDEA; (2) that the IEPs developed through the Act's procedures were reasonably calculated to enable plaintiff to receive educational benefits; and (3) that the plaintiff was not entitled to be reimbursed for the alternative placement.[286]

K. School Finance

The state legislature is currently debating the issues of Texas public school finance. In an effort to reach a resolution through judicial intervention, several school districts filed suit against the Commissioner of Education, the Texas Education Agency, the Comptroller of Public Accounts, the State Board of Education, and several other school districts.[287] The districts brought a declaratory judgment against the defendants seeking a declaration that the school finance system in Texas had become a state ad valorem tax and was, therefore, unconstitutional.[288]

The district court dismissed the case on special exceptions and granted the State's plea to the jurisdiction.[289] The court of appeals affirmed the decision finding the districts failed to state a cause of action by not referring to their ability to meet their obligation to provide an accredited education.[290] Further, the court determined the case was not ripe for review.[291]

The districts argued they were forced to tax at or near the $1.50 tax cap to educate their students and that they would be required to continue to take cost-saving measures to remain under the cap.[292] Specifically, the court found "the allegation that a district is forced to tax at the highest allowable rate to provide the bare, accredited education is a necessary element of a cause of action brought by a district challenging the cap."[293] Finally, the court found the case was unripe because the districts challenging the system failed to plead that they had no further discretion in setting the rate of tax to meet their education obligations.[294]

L. No Child Left Behind

On Jan. 8, 2002, President Bush signed into law the No Child Left Be-

285. *Id.*
286. *Id.*
287. W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 78 S.W.3d 529 (Tex. App.—Austin 2002, pet. granted).
288. *Id.* at 531.
289. *Id.* at 538.
290. *Id.* at 543.
291. *Id.*
292. *Id.* at 542.
293. *Id.* at 539.
294. *Id.* at 542.

hind Act of 2001 (NCLB).[295] NCLB contains President Bush's reform plan for education, including extensive changes to the Elementary and Secondary Education Act (ESEA). Public schools across the nation are now accountable to the federal government because they are required by the NCLB to report individual school and district success based on student achievement. The NCLB outlines "four basic education reform principles: stronger accountability for results, increased flexibility and local control, expanded options for parents, and an emphasis on teaching methods that have been proven to work."[296]

Under NCLB, as "accountable" education systems, states must immediately create their own standards for what a child should know and learn for all grades and develop standards for science by the 2005-06 school year.[297] Further, once standards are established, states must test every student's progress toward the standards by using tests aligned with the standards.[298] The expectations under the NCLB are that each state, school district, and school will be expected to make adequate yearly progress (AYP) toward meeting the established state standards. AYP will be measured for all students by categorizing test results for students into subcategories including: students who are economically disadvantaged, students from racial or ethnic minority groups, students who have disabilities, or students who have limited English proficiency.[299] District and state report cards will be published detailing the performance of individual schools, individual school districts, and statewide performance.[300] A school or school district that repeatedly fails to meet its AYP goal will face corrective action.[301]

As states and local school districts struggle to interpret, analyze, and apply NCLB, it is anticipated that many cases and further legislation will result. NCLB will be an issue to watch over the coming years to determine its effectiveness, its challenges, and its effect on existing school law precedent and legislation.

295. No Child Left Behind Act, Publ. L. No. 107-110, 115 Stat. 1425 (2002); *see also* United States Dep't of Educ., Introduction: No Child Left Behind, *at* http://www.nclb.gov/next/overview/index.html (last visited Apr. 7, 2002).
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*