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A Look inside . . .

Our lead article this month is a much-needed review of new laws enacted by the 83rd Texas Legislature earlier this year. Sarah Orman, a member of the *Legal Digest's* Editorial Advisory Board, provides a thorough review of new legislation that is sure to serve as a valuable resource during the upcoming school year. Following that, we have reported thirteen court cases, including five from the United States Supreme Court, three from the 5th Circuit, as well as six decisions from the Commissioner of Education. Here are the highlights.

Governance

The first Supreme Court case we report, *Shelby County, Ala. v. Holder* (page 8), involves a challenge to the Voting Rights Act. First enacted in 1965, the law was designed to address racial discrimination in voting and was only meant to be temporary. However, Congress has reauthorized the Act since then expanding its reach and prohibitions. The Supreme Court recognized that, even though circumstances have improved, the law's coverage formula continued to be "based on 40-year-old facts having no logical relation to the present day." Ultimately, the Court deemed the coverage formula unconstitutional.

Labor & employment

The next opinion, also from the Supreme Court, clarifies what it means to be a "supervisor" under Title VII of the Civil Rights Act of 1964, for the purposes of determining employer liability for harassment and discrimination. In *Vance v. Ball State University* (page 8), the Court observed that liability under Title VII may depend on the status of the alleged harasser. In that case, the alleged harasser did not meet the definition of "supervisor" and the evidence was insufficient to attach liability to the employer.

Another Supreme Court decision, *University of Tex. Southwestern Medical Center v. Nassar* (page 9), sets out the legal standard courts will use in retaliation claims under Title VII. Since these claims appear to be on the rise, it is a must-read for all school administrators and personnel directors.

Caleb v. Grier (page 11) involves interesting legal theories raised by five co-workers against their school district, superintendent, and several outside investigators hired by the district to investigate alleged improprieties at a middle school. The plaintiffs raised constitutional free speech claims, violations of their right to freedom of association, as well as violations of their due process rights. Although the court dismissed most of the suit, one employee was allowed to proceed on her free speech and due process claims.

Liability

The Dawg's Award for Most Interesting Case of the Month goes to *Wyatt v. Fletcher* (page 12), involving claims of student privacy rights and an alleged unlawful seizure. According to the suit, two softball coaches questioned the student against her will in a closed locker room and later disclosed the student's sexual orientation to the student's mother. This case is featured in this month's Web Exclusive, in which Melanie Charleston, from the Walsh Anderson firm's Houston office, will shed light on why the Court ultimately concluded that the school employees were entitled to qualified immunity.

special education & disability Law

The 5th Circuit surprised many when it vacated its ruling earlier this year in *Stewart v. Waco ISD* (page 15). In the prior opinion reported in our April 2013 issue, the appeals court held that a student had stated a valid claim under § 504 of the Rehabilitation Act stemming from alleged student-on-student sexual harassment. However, in this latest ruling, the appeals court vacated its decision and returned the case to the trial court to determine whether the plaintiffs had properly exhausted their administrative remedies.

students

The much-anticipated Supreme Court decision in *Fisher v. University of Texas at Austin* (page 17), failed to resolve the burning issue regarding affirmative action in public school admissions policies. Instead, the Court sent the case back to the lower court with guidance on the correct legal standard to use in analyzing the claims.

Miscellaneous

The last Supreme Court case we report, *United States v. Windsor* (page 18), struck down § 3 of the Defense of Marriage Act (DOMA), finding it an improper imposition on state authority to define marriage. While the case has no direct impact on school operations, it is likely to be used to support future challenges by same-sex partners related to school policies and practices.

We offer all of this and some needed clarifications by the Law Dawg on new legislation regarding qualified voters, charter school patriotism, and student absenteeism. Hope you enjoy!

2013 LeGisLATiVe UPdATe: WHAT YoU need To knoW BeFoRe THe neXT sCHooL YeAR BeGins

By Sarah Orman
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It is not every session that the Texas Legislature passes a zillion laws affecting public education, but the 83rd Legislative Session of 2012-2013 was such a session. This article reviews some of the highlights of the session. Unless otherwise noted, the new laws discussed in this article are effective in the 2013-2014 school year. In the footnotes we have included references to the statutes added or amended by the new legislation. We are not sure how these new laws will be interpreted when put to the test, but here are some issues you may encounter and our predictions. Should you want to read further, any of the bills discussed below (and more!) can be found at the website of the Texas Legislature: http://www.capitol.state.tx.us/.

i. ACCoUnTABiLiTY And CURRiCULUM

HOUSE BILL 5: THE BIG NEWS

In the era of No Child Left Behind, the accountability movement has generally been synonymous with increased standardized testing in schools. Parents, educators and critics have debated the merits of this policy for years, and now the 83rd Texas Legislature has weighed in with sweeping changes to assessments, curriculum and measures of accountability. Note that many provisions of the bill do not go into effect until after 2013-2014.

- As an overview, HB 5 includes the following:
- New requirements and standards for accelerated instruction;
- Fewer end of course ("EOC") exams and no more 15% rule;
- New graduation requirements; and
- Revisions to state accountability standards.

Here are a few specific areas to familiarize yourself with now.

90 percent rule applies K-12. HB 5 clarifies that students in grades K-12 cannot get credit or a final grade unless they are in attendance 90% of the days a class is offered. The exception allowing a student to get credit based on at least 75% attendance if the student follows a plan approved by the principal still applies.

Accelerated instruction. Without written parental consent, a student may not be removed from class for remedial tutoring or test preparation if, "as a result of the removal, the student would miss more than 10% of the school days on which the class is offered."[1]

Comment: *Early readers have questioned whether this new standard would limit a school's discretion to assign students to remedial classes or to provide intensive instruction in preparation for testing in a subject while a student in the class for that particular subject. Our view is that the law does not impact these scenarios but appears aimed at students being removed from their regularly assigned class.*

In addition, schools must provide accelerated instruction for high school students who fail to perform satisfactorily on an EOC exam. This may require participation before or after normal school hours or even outside the normal school calendar. This section of HB 5 is subject to the Commissioner of Education's certification by July 1 of each year that adequate funding is available.[2] The law also requires each district to provide free accelerated instruction for students who fail any EOC exam required for graduation prior to the next administration of the test.[3] There must be a separate budget for this matter, an evaluation of the effectiveness, and a public hearing to consider the results. The definition of "at risk" student has also been changed to include students under the age of 26 rather than 21.[4]

Accountability. Beginning in 2016-2017, TEA will rate districts with an A, B, C, D or F, based on the district's state rating with regard to academic and financial performance, and a local rating system that accounts for community and student engagement.[5] The new letter system will apply only to district-wide ratings; campuses will still be rated as exemplary, recognized, acceptable, and unacceptable. Beginning in 2013-2014, the new law also encourages local communities to engage in the accountability process by requiring districts to set goals and evaluate performance locally in addition to state ratings.[6] Each district

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will evaluate its own performance, and that of each campus, on community and student engagement and compliance. The law sets out which programs must be evaluated, but the criteria for ratings will be developed by a local committee.[7]

Comment: *Most districts will likely delegate this responsibility to an existing District-level planning committee such as the District Advisory Committee ("DAC").*

Assessment. The number of EOC exams are reduced from 15 to 5 in the following subject areas: Algebra I, English Language Arts (ELA) I, ELA II, biology and U.S. History.[8] (Do we hear applause?) Further, EOC exams may not be used to determine class rank, including entitlement to automatic college admission under the so-called "10% rule."[9] The new law also eliminates the 15% rule for considering EOC exams in calculation of course grades. EOC exams will be scored on a 100 point scale rather than the prior cumulative score requirement. Effective in 2015-2016, the Texas Education Agency (TEA) will develop optional assessments for Algebra II and English III, but districts may use these tests for diagnostic purposes only and may not administer a benchmark test to prepare students for the tests.[10]

HB 5 also provides for greater transparency by requiring TEA to release question and answer keys for STAAR exams when no longer in use.[11] In addition, the bill aims to reduce testing by prohibiting schools from administering more than two benchmark tests for each state-administered exam.[12] Parents of students with special needs may request additional benchmark testing of their child.[13] Further, the bill specifies that administration of assessment instruments must minimize disruptions to normal school operations.[14]

Counseling. Counseling about postsecondary education (referred to in current law as "higher education") is now required in every year of high school rather than just the freshman and senior year. Effective in 2014-2015, the principal must designate a counselor or administrator to review graduation options with each incoming freshman and parents.[15] This counseling must also include the advantages of the distinguished level of achievement and graduating with an endorsement or performance acknowledgements, as explained in more detail below. [16]

Graduation plans. Add these terms to your vocabulary: (1) Endorsement; (2) Personal Graduation Plan (PGP); (3) Foundation Program; and (4) Distinguished Level of Achievement (DLA).

Effective in 2014-2015, HB 5 eliminates the minimum, recommended, and advanced programs for graduation, replacing them with the foundation program of 22 credits.[17] Upon entering ninth grade in 2014-2015, each student must indicate an endorsement that the student intends to earn. A student graduating with an endorsement would earn four credits (one math, one science and two electives) in addition to the basic foundation plan. The student can change endorsements at any time but may only graduate under the foundation program without an endorsement if the parents provide written permission, after the student's sophomore year, and after having been advised by a school counselor about the benefits of graduating with an endorsement.[18] A student may also graduate with a DLA by completing all the requirements of the foundation program plus Algebra II and at least one endorsement. Once the new graduation system goes into effect, only students who achieve a DLA will be eligible for automatic college admission under the "10% rule" unless an exception applies.[19]

The State Board of Education (SBOE) must develop standards for endorsements in (1) Science, Technology, Engineering, and Math ("STEM"); (2) business and industry; (3) public services; (4) arts and humanities; and (5) multidisciplinary studies.[20] Each district must offer courses to satisfy at least one endorsement; of the five available endorsements, only multidisciplinary studies is required to be offered. Students may also earn a "performance acknowledgement" for outstanding performance in a dual credit course, in bilingualism and biliteracy, on a college advanced placement or international baccalaureate exam, or on the P-SAT, SAT or ACT. All of this is to be reported to TEA through the Public Education Information Management System ("PEIMS") with disaggregation of data by race, ethnicity, socioeconomic status, gender and special education.[21]

Students entering the ninth grade prior to 2014-2015 may graduate under one of the prior programs or may opt to graduate under the new foundation program. Seniors in 2013-2014 who do not satisfy the requirements for the program they are currently in may also graduate by satisfying the foundation program requirements.[22]

For the 2014-2015 school year, TEA, in conjunction with the Texas Workforce Commission and Higher Education Coordinating Board, must prepare and make available information in English and Spanish that explains the advantages of achieving the DLA and each endorsement. The information must be posted on each district's website; and, if at least 20 students in a grade level speak a language other than English or Spanish, the language must also be available in that language.[23]

Comment: *HB 5 was designed to prevent districts from "tracking" low performing students in order to increase test scores. For example, once the new graduation requirements go into effect in 2014-2015, the Commissioner's authority to conduct a "special accreditation investigation" will be expanded to include situations where an excessive amount of students fail to complete advanced courses, including Algebra II; a disproportionate number of students in a particular demographic group is completing the same endorsement; or an excessive number of students graduate with the same endorsement.[24] Also note that a district must not discourage a student from pursuing a PGP that includes a DLA or an endorsement.[25]*

Instructional materials. Effective immediately, TEA must provide districts with estimates of Instructional Material Allotment (IMA) funds, and districts may purchase instructional materials, including college preparatory material, for up to 80% of the allotment with proper notice to publishers.[26]

HOUSE BILL 866: REDUCING STAAR TESTING

HB 866 requires testing in math and reading in the grades 3, 5 and 8, thus eliminating the requirement to test in grades 4, 6 and 7. However, students who fail to achieve a satisfactory score on the testing in grades 3 or 5 will be tested again in grades 4 and/or 6; and students who fail to achieve a satisfactory score in grade 6 will be tested again in grade 7. To the extent that this conflicts with federal law, the Commissioner must seek a waiver. The law goes into effect when the waiver is received

or when the state is informed that a waiver is not necessary so long as this happens prior to September 1, 2015.[27]

HOUSE BILL 462: JUST SAY NO TO COMMON CORE

In case you were wondering, the term "common core" refers to the national curriculum standards developed by the Common Core State Standards Initiative ("CCSSI"), a national initiative to align curriculum and instruction standards from different states. Texas is one of only five states that is not a part of this initiative.[28] Now forget we even mentioned it. HB 462 makes clear that SBOE may not adopt common core state standards and schools may not use them to comply with TEKS requirements. Testing instruments adopted by TEA may not be adopted or developed based on common core state standards. However, college advanced placement and international baccalaureate tests may be provided.

SENATE BILL 1406 & SENATE BILL 1474: HOW TO PREVENT CSCOPE 2.0

You may recall the flap in the spring of 2013 regarding CSCOPE, the curriculum support system developed by the Texas Education Service Center Curriculum Council (TESCCC). A product of the accountability movement, CSCOPE was criticized by some teachers who felt constrained by the lesson plans. In a debate that reached the national level, Attorney General Greg Abbott reprimanded school districts for allegedly refusing parents access to CSCOPE's content, and conservative talk show host Glenn Beck also alleged that CSCOPE promoted an anti-American agenda. Due to an agreement reached towards the end of the 83rd Legislative session,[29] the TESCCC has been dissolved and is winding up its affairs. Thus, CSCOPE lesson plans will no longer be available through TESCCC. However, T.E.A. general counsel, David Anderson, reported to the SBOE that the individual lesson plans are now in the public domain, and thus available for those districts that wish to continue using them. Expect more push and pull on this issue. The SBOE has placed the matter on its agenda for September. Meanwhile, the Legislature has acted to prevent a recurrence of CSCOPE with SB 1406, which provides that any instructional lessons developed as part of a curriculum management system by an educational service center, or a group of service centers, is subject to review and adoption by the SBOE.[30]

SB 1474 represents a further legislative response to the CSCOPE kerfuffle. Before adopting a "major curriculum initiative, including the use of a curriculum management system," a district must use a process that includes teacher input and provides district employees with the opportunity to express opinions. (We think many districts were probably already doing this.) The board must hold a meeting, provide information about the initiative, including cost, and provide opportunity for feedback.[31]

ACCOUNTABILITY FOR DROPOUT RECOVERY SCHOOLS AND "RF" STUDENTS

Senate Bill 1538 will provide relief in the state accountability system to districts and charter schools designated as "dropout recovery schools." A district, charter school or campus serving students in grades 9-12 may achieve this designation if more than 50% of students are 17 and older as of September 1 of the school year and the school is registered under the alternative education accountability procedures adopted by the Commissioner.[32]

Under Texas Education Code § 39.055 as modified by SB 360, districts and charters that serve students in residential facilities ("RF") will be relieved to hear that students in an RF for any reason are no longer considered students of the district in which the facility is located, nor of an open enrollment charter school, for accountability purposes.

COMING SOON TO A HEALTH CLASS NEAR YOU: FLOSSING AND CPR

Due to House Bill 2483, the coordinated health program made available to districts by TEA must now include oral health education for elementary, middle and junior high students.[33] In addition, HB 897 repealed the requirement to provide instruction on the use of automated external defibrillators but requires school districts and open enrollment charter schools to provide CPR training to students in grades 7-12.[34]

ii. TRUsTees, eLeCTions And oPen GoVeRnMenT

21ST CENTURY BOARD MEETINGS

Two new bills in the 83rd Legislative Session were intended to expand the ability of governmental entities, including school districts, to use technology as a method of efficient communication while preserving the traditional open meetings requirements of TOMA.

Meetings by videoconference call. Previously, the Texas Open Meetings Act ("TOMA") allowed governmental bodies to hold a meeting where a member or members attended by videoconference call, as long as a quorum was present at one location (or a majority of the quorum for state entities or governmental bodies extending into three or more counties).[35]

HB 2414 amends TOMA by expanding the circumstances under which a governmental body may hold a meeting by videoconference call, defined in the bill as "a communication conducted between two or more persons in which one or more of the participants communicate with the other participants through duplex audio and video signals transmitted over a telephone network, a data network, or the Internet."[36] Under the new law, a member of a governmental body may participate in a meeting by videoconference call as long as the governmental body establishes one suitable physical space, located in or within a reasonable distance of the jurisdiction of the governmental body, where the presiding officer is physically present, a camera and microphone are set up for public participation, and a member of the public who is present at the physical space can participate in the meeting to the same extent as if the meeting was not being held by videoconference call.[37]

Comment: *While HB 2414 eradicated the requirement that a quorum of the governmental body be present at the same location, another bill, SB 984, retained this requirement for all governmental bodies except those that are statewide, or cover at least three counties. Perhaps the Attorney General will clear up any confusion for us regarding when a school district may conduct a meeting by videoconference call.*

Board communications via online message board. HB 2414 and its companion bill, SB 1297, also add certain provi-

sions to TOMA regarding use of an online message board by the members of a governmental body.[38] The new law, Government Code § 551.006, provides that a communication among members of a governmental body about public business or public policy does not constitute a meeting or a deliberation under TOMA if the communication is in writing, posted to an online message board or similar online application that is accessible and searchable by the public; and the communication is displayed in real time on the online message board for at least 30 days after the communication is posted. Once a communication has been removed, it must be maintained for six years and disclosed in accordance with the Public Information Act (PIA).

Although certain social media sites immediately spring to mind, the new law provides additional guidelines restricting which online fora may be used for these purposes: the governmental body may only have one online message board; it must be controlled or owned by the governmental body; displayed "prominently" on the governmental body's website; and must be accessible by viewers no less than "one click away" from the governmental body's primary website.[39] In addition, only members of the governmental body or specifically authorized staff members may post communications to the online message board.[40]

Governmental bodies are prohibited from using the online message board to vote or take any action required to be taken at a meeting. Further, the law specifies that a communication on the online message board shall not be construed under any circumstances as an action of the governmental body.[41]

SENATE BILL 1368: DEFINITION OF "PUBLIC INFORMATION" EXPANDED

Traditionally, information subject to the PIA, Government Code §§ 552 *et seq*., was defined as information "collected, assembled or maintained" by a governmental entity in connection with official business or under law or ordinance, or such information "collected, assembled and maintained" for a governmental entity to which the governmental entity had a right of access or ownership.[42] Effective September 1, 2013, SB 1368 will add to this definition information that is *written or produced* under a law or ordinance or in connection with official business; and information that the governmental entity expends public funds in order to write, produce, collect, assemble or maintain.[43] The bill also specifies that public information includes information written, produced, collected, assembled or maintained by an individual officer or employee of a governmental body in that person's official capacity if the information pertains to official business of the governmental body—including any electronic communication created, transmitted, received or maintained on any device.[44] The bill defines "official business" broadly as "any matter over which a governmental body has any authority, administrative duties, or advisory duties."[45]

Comment: *While the new law may appear to represent a dramatic expansion in the definition of public information, it also codifies what many school district attorneys have been advising for years. School district officers and employees must be made aware that any communications related to official school business may be subject to the PIA, even if the communications are made and maintained using the individual's personal device. If school officials responsible for processing a PIA request have reason to believe that information on an employee or official's personal electronic device may be responsive to the request, the district must promptly take steps to preserve and obtain the information.*

HOUSE BILL 628: REQUESTS FOR INFORMATION BY TRUSTEES

A school board member acting in the member's official capacity may access information maintained by the school district without making a formal request under the PIA.[46] The bill appears to allow the district processing such a request to withhold or redact information confidential under the PIA or other law without going through the necessity of requesting a determination from the Attorney General. The bill has no effect on the district's duty to redact or withhold information that is not subject to disclosure under the federal Family Educational Rights and Privacy Act (FERPA).[47]

SENATE BILL 122: TRUSTEE SUBJECT TO REMOVAL

The position of school board trustee has been added to the list of officials who are subject to removal by a district court judge. This is not a significant change in the district court judge's authority but merely codifies what was widely considered to be true prior to the change in law.

Comment: *School districts dodged a bullet in the form of an unsuccessful bill that would have made trustees subject to a recall election. SB 137 was put forward by legislators following the recent accountability scandal in El Paso but was not ultimately signed into law.*

HOUSE BILL 259: ELECTIONEERING ON DISTRICT PREMISES

An entity that owns or controls a public building where voting occurs may not restrict "electioneering" on the building's premises beyond the 100-foot line established by law.[48] The bill defines "electioneering" as the posting, use, or distribution of political signs and literature.[49] The bill also explicitly permits the governmental entity to impose reasonable time, place, and manner regulations on the electioneering.[50]

iii. sTUdenT issUes

STUDENT DISCIPLINE

The 83rd Legislative Session included a notable trend in reaction to the view, promulgated by groups such as the Texas Appleseed Project, American Civil Liberties Union and others, that current public school discipline policy has relied too much on criminal sanctions, particularly for minor offenses. Two significant new bills, Senate Bill 393 and Senate Bill 1114, curtail the ability of schools to seek criminal penalties against students for low-level criminal conduct conducted on school premises or vehicles. The goal of the legislation is to reduce the number of children in the justice system.

Specifically, SB 393 amends the Texas Penal Code to prohibit charging students under the age of 12 with the criminal offense of "disruption of classes" or "disruption of transportation." Prior law applied this restriction to students in sixth grade or lower; thus, this is not a big change. Note that students under age 12 who engage in disruptive behavior may still be subject to school discipline under the student code of conduct.

SB 393 also adds an entirely new subchapter to Chapter 37—Subchapter E-1, CRIMINAL PROCEDURE. It says that a peace officer may not issue a citation to a "child" who is alleged to have committed a "school offense."[51] A "child" is a student from 10 to 16 years old. A "school offense" is any Class C misdemeanor other than a traffic offense that is committed on property under the control and jurisdiction of the school district.[52] The new provisions also permit, but do not require, a school district that commissions peace officers to develop "graduated sanctions" to be imposed prior to students being charged with certain offenses. The system of graduated sanctions must include multiple levels of sanctions and must require a warning letter to the student and parents, a behavior contract, community service, and counseling. Schools that adopt these sanctions must use them before the child can be charged. [53]

Schools that do not adopt a system of graduated sanctions, or that do not commission peace officers, may file complaints against a child in criminal court.[54] However, the complaint must be sworn to by a person with personal knowledge of the facts that give rise to the complaint and must specify 1) whether the child is eligible for special education services; and 2) whether the graduated sanctions were imposed.[55]

SB 1114 reinforces and, in some cases, overlaps with SB 393 in the movement against criminal penalties for school-related misdemeanors by students. The bill adds a provision to the Texas Code of Criminal Procedure requiring a law enforcement officer filing a complaint in court based on conduct by a child 12 or older alleged to have committed a misdemeanor offense on school property or a school vehicle to include with the complaint: an offense report; a statement from a witness to the alleged conduct; and a statement by a victim of the alleged conduct, if any. The state may not proceed in a case against the child without this documentation.[56] In addition, a misdemeanor complaint for alleged conduct on school property or a school vehicle may not be filed against students younger than 12.[57]

Comment: *The new legislation contains several provisions that require amendments to the student code of conduct. For example, your code must now specify the circumstances under which a student might be removed from a vehicle owned or operated by the district.[58] As with any school year following a legislative session, now is a good time to review your student code of conduct and discuss necessary changes with your school district's attorney.*

TRUANCY

In addition to the provisions discussed above, Senate Bill 393 specifies that a court must dismiss a truancy complaint unless it includes a statement from the school certifying that (1) the school applied "truancy prevention measures" as required by the statute and (2) those measures "failed to meaningfully address" the problem. The statement also must specify whether the student is eligible for special education services. The requirement to provide the truancy prevention measures and these statements was in the law before. SB 393 specifies that the complaint will be dismissed if the statements are not provided.[59]

STUDENTS IN FOSTER CARE

Senate Bill 1404 provides that students under the conservatorship of the Department of Family and Protective Services (DFPS) who transfer schools in 11th or 12th grade and who are not eligible to graduate in the new school may receive a diploma from the old school, at the request of the student, if they meet that school's graduation requirements.[60] The bill also requires TEA to develop procedures for students in foster or "substitute" care addressing: 1) awarding partial credit to students moving from one school to another if appropriate; 2) allowing such students to complete courses required for graduation for which they were enrolled, prior to the start of the next school year and at no cost; 3) ensuring that students who are not likely to graduate within five years have their course credit accrual and PGP reviewed; and 4) providing information to students in grades 11-12 about tuition and fee exemptions for dual credit or other courses for which the student might receive college and high school credit.[61]

House Bill 2137: ELIGIBILITY FOR SUMMER SCHOOL PROGRAMS

Children who reside in your district but are not enrolled (including charter school, private school, and home school students) can now attend summer school programs offered by the district on the same conditions as enrolled students, including course eligibility requirements and fee payments. This does not apply to intensive remediation programs.[62]

FOUR NEW REASONS TO MISS SCHOOL

A high school student may be excused for a maximum of two days per school year (including election day) to serve as an early voting clerk (SB 553).[63]

Students must be excused from attendance due to a health care appointment for the student's child, if the student commences classes or returns to school the same day (HB 455).[64]

Students get excused absences for visiting a parent, stepparent or legal guardian who is on active duty and is called to duty for, on leave from, or just returned from continuous deployment of at least four months outside of the soldier's residence. A student can take up to five days, may not be penalized, is counted in average daily attendance, and must be given an opportunity to make up work. These days must be either within 60 days before deployment, or 30 days after return (SB 260).[65]

- A student under the conservatorship of DFPS shall be excused from attending school to participate in an activity ordered by a court if it is impracticable to schedule the participation outside of school hours (SB 1404).[66]

BREAKFAST FOR ALL

Beginning in the 2014-2015 school year, if 80% of the students at your campus or open enrollment charter school are eligible for free or reduced price breakfast, free breakfast must be available to all students. The Commissioner can grant a one-year waiver to this requirement upon request, if the board votes to request the waiver.[67]

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LAW dAWG

by Jim Walsh
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DEAR DAWG:
I heard that the legislature passed a new law that helps election officials figure out when a voter is deceased. How exactly does this work? ALWAYS WONDERED ABOUT HOW DEAD PEOPLE VOTE.

DEAR ALWAYS WONDERED:
Yes, you are referring to HB 3593, which concerns "determining that a voter is deceased." We sort of hate to see this happen, as voting by dead people is a cherished tradition in Texas, dating back to the days of "Landslide Lyndon" and the Senate election in 1948. But now we are not going to allow this anymore. The method is pretty simple. If the voter spends an inordinate amount of time in the voting booth, a representative of the Secretary of State's office is required to bop in there and check on things. If the voter can no longer fog a mirror, he or she is to be declared a "deceased voter." The DV should then be removed from the polling place as discreetly as possible. However, if the vote was cast before the DV passed on, the vote counts.

DEAR DAWG:
I heard that charter schools now have to be run by Americans, and that they have to recite the Pledges and fly the flags. I hope this is so. Last year I visited a charter school and they did not even have a flag in the building, much less in each classroom. No pictures of George Washington, Abraham Lincoln, or Barack Obama. I just wonder how American some of these people are. PROUD TO BE AN AMERICAN.

DEAR PROUD TO BE:
SB 2 doesn't specifically say that the charter school has to be run by Americans, but it does require that a majority of the members of the governing body of the charter school or charter holder must be qualified voters. Of course, to be a qualified voter you have to be a U.S. citizen, so this does address your concerns. And it does, indeed, require open enrollment charter schools to begin the school day like the traditional schools do, with a minute of silence and pledges to the U.S. and Texas flags. Moreover, the flags must fly in every classroom. However, that part of the law does not go into effect until 2016-17. Go figure! Are flags that expensive? Do they really need three years to obtain U.S. and Texas flags? The Dawg has been unable to figure out why the "fly the flag" requirement has been postponed until 2016-17. Perhaps some Alert Reader can help out.

DEAR DAWG:
Merry Christmas!! I am so glad that Governor Perry signed the "Merry Christmas" bill! Now we don't have to worry about teachers greeting each other with a "Merry Christmas" in the school hallways. We can send out school greeting cards that wish people a Merry Christmas. We can go back to calling it Christmas Break, rather than this watered down P.C. "winter break" nonsense. And we won't have to worry about litigation over any of this!! At our school, we are preparing our Nativity Scene which we will display from Thanksgiving until CHRISTMAS! We figure we will also put up a Christmas tree, a Christmas wreath and some reindeer, and of course, SANTA. JOY TO THE WORLD!

DEAR JOY:
Ho Ho Ho--Hold on there, partner! Governor Perry did indeed sign HB 308 at a cheerful ceremony in front of a bunch of Santas and one rabbi. But don't let this give you a false sense of security. The legal issues about celebrating Christmas in the public schools come from the U.S. Constitution. You can't avoid that or override it by passing a state law. The Fox News website described this bill as "protecting Christmas and other holiday celebrations in Texas public schools from legal challenges." Baloney. There will still be legal challenges and some of them will have merit. Federal judges will interpret the Establishment Clause of the U.S. Constitution and will not be influenced by the adoption of a state law. We never did think that a teacher wishing her students or fellow teachers "Merry Christmas" amounted to much of a legal issue. But when the public school creates a prominent display featuring the birth of Jesus, along with the secular symbols that are associated with it (trees, wreaths, reindeer, Santa), don't be surprised if you get a legal challenge. We suggest you take the community's pulse on this issue, but also-- get some legal advice.

DEAR DAWG:
I'm going into my senior year and I want to see how many ways I can miss school with an excused absence this year. Suggestions? SENIORITIS STRIKES EARLY

DEAR SENIORITIS: (1) Have a baby and take some time off for taking the baby to the doctor (HB 455); (2) get one of your parents deployed in the military and take time off to go visit them (SB 260); (3) serve as an election clerk for the early voting period (SB 553); (4) get in foster care and have court-ordered therapy or family visitation (HB 2619).

That's just the new stuff. Take a look at Texas Education Code § 25.087 for the other reasons—observing religious holy days, a required court appearance, completing paperwork for your citizenship application, attending your naturalization ceremony, not to mention your routine illnesses. Have a good year!

Got a comment or question for the *Dawg?* Send it to jwalsh@wabsa.com.

NOTE TO READERS: THE DAWG NOW TWEETS! OLLOW THE LAW DAWG ON TWITTER: @JWalshtxlawdawg

LeGAL deVeLoPMenTs

GoVeRnAnCe

U.S. Supreme Court Case

Voting Rights Act

SUPREME COURT DEEMS VOTING RIGHTS ACT FORMULA UNCONSTITUTIONAL

Case citation: Shelby County, Ala. v. Holder, 133 S.Ct. 2612 (U.S. 2013).

Summary: Shelby County is located in Alabama, which was covered by certain restrictions under the Voting Rights Act. In 2010, Shelby County sued the United States Attorney General seeking an order declaring sections 4(b) and 5 of the Voting Rights Act unconstitutional. It also sought a permanent injunction prohibiting the enforcement of those sections of the Voting Rights Act. The trial court ruled against Shelby County and upheld the Act. The Court of Appeals for the D.C. Circuit affirmed, and the County appealed to the United States Supreme Court.

Ruling: In a 5-4 ruling, the United States Supreme Court declared § 4 of the Voting Rights Act unconstitutional. Chief Justice Roberts delivered the majority opinion, recognizing that when it was enacted in 1965, the Voting Rights Act "employed extraordinary measures to address an extraordinary problem." The purpose of the Act was to address racial discrimination in voting, "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."

When first enacted, § 4's formula made the VRA applicable only to those States that had maintained a test or device as a prerequisite to voting as of November of 1964, and had less than 50 percent voter turnout in the 1964 Presidential election. Section 5 requires these States to obtain preclearance, or permission before enacting any changes in voting laws or procedures. Originally, both § 4 and § 5 were intended to be temporary and were set to expire after five years. However, Congress has reauthorized the Act and extended its reach to more states, and has expanded the definitions of what constitutes a voting test. Most recently, in 2006, Congress reauthorized the Act for an additional 25 years, without changing the coverage formula first approved in 1965, and further expanding the prohibitions under § 5.

Chief Justice Roberts observed that the Tenth Amendment provides the States power to regulate their own elections. In addition to State sovereignty under the Constitution, there is also a "fundamental principle of *equal* sovereignty" among the States. According to Roberts, the Voting Rights Act represented a sharp departure from those two fundamental principles by regulating State elections and singling out certain States. At the time, the U.S. Supreme Court recognized that these extraordinary legislative measures were justified by "exceptional conditions."

Nearly 50 years later, however, Congress employs the same coverage formulas that were used in the 1960's and has expanded the prohibitions in § 5, despite the record showing vast improvements related to election discrimination. For example, the record showed that in the most recent election, African-American voter turnout exceeded white voter turnout in 5 out of the 6 States first covered by § 5. In 2006, Congress observed that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices."

Nevertheless, in 2006, Congress reenacted the coverage formulas "based on 40-year-old facts having no logical relation to the present day," wrote Chief Justice Roberts. Because Congress did not update the coverage formulas, the Court determined that § 4 was unconstitutional and, as a result, the formulas in that section no longer could be used as a basis for subjecting jurisdictions to preclearance under § 5. The Court clarified that its decision "in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2." Further, it did not touch on the constitutionality of § 5. Roberts concluded, "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

Things to Remember: ***Texas was not one of the six states originally covered by the VRA. Texas was added in 1975, when Congress expanded the definition of "test or device" to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English. Thus, Texas was covered by the VRA not because of discrimination against African-Americans, but because of discrimination against Hispanics.***

LABoR & eMPLoYMenT

U.S. Supreme Court Case

Discrimination

WHAT IS A "SUPERVISOR" UNDER TITLE VII?

Editor's Note: *This case does not involve a school district but involves claims often asserted against school districts. It involves an employee's claims for retaliation and constructive discharge. The legal analysis in this case applies equally in the school district context.*

Case citation: Vance v. Ball State University, 133 S.Ct. 2434 (U.S. 2013).

Summary: Maetta Vance, an African-American woman, worked at Ball State University as a catering assistant in the University Banquet and Catering division of the University's Dining Services. During Vance's employment, a white woman, Saundra Davis, worked as a catering specialist in the same division. In 2005 and 2006, Vance lodged many complaints with the University and charges with the Equal Employment Opportunity Commission (EEOC) alleging racial harassment and discrimination. Many of the complaints pertained to Davis. For example, Vance alleged that Davis gave her a hard time at work by glaring at her, slamming pots and pans around, and intimidating her. She claimed that Davis "smiled" at her, blocked her on the elevator, and gave her weird looks. Despite efforts by the University to remedy the situation, the harassment allegedly continued.

Labor and Employment, continued

Vance filed suit against the University claiming, among other things, that she had been subjected to a racially hostile work environment in violation of Title VII. In her complaint, she alleged that Davis was her supervisor and that the University was liable for Davis's conduct. The trial court granted a pretrial judgment in favor of the University, explaining that because Davis could not "hire, fire, demote, promote, transfer, or discipline" Vance, she was not Vance's supervisor. Further, the University responded reasonably to the incidents of which it was aware. The Seventh Circuit Court of Appeals affirmed the ruling and Vance sought an appeal with the United States Supreme Court. The Supreme Court agreed to hear the case on the issue of who qualifies as a "supervisor" in a case in which an employee asserts a Title VII claim for workplace harassment.

Ruling: By a vote of 5 to 4, the Supreme Court affirmed the judgment in favor of the University. According to the Court, an employer's liability under Title VII may depend on the status of the alleged harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. If the harasser is a "supervisor," the employer is strictly liable if the harassment culminates in a tangible employment action. If no tangible employment action is taken, the employer may avoid liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. Thus, the analysis under Title VII is different depending on whether the harasser is a "supervisor" or merely a co-worker.

The Court held that an employee is a "supervisor" for purposes of holding an employer liable under Title VII "if he or she is empowered by the employer to take tangible employment actions against the victim." The Court observed that lower courts have disagreed about the meaning of "supervisor" under Title VII. Some courts have held that an employee is not a supervisor unless they have the power to hire, fire, demote, promote, transfer, or discipline the victim. Other courts have followed the approach advocated by the EEOC's Enforcement Guidance, which classifies supervisors as those who (1) wield authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment," and (2) have sufficient authority to assign more than a "limited number of tasks." The Court rejected the EEOC's definition of "supervisor," describing it as a "study in ambiguity," in that it did not provide enough guidance to courts and juries to assess whether the alleged harasser should be treated as a co-worker or supervisor.

Instead, the Court held that an employer may be held strictly liable for an employee's unlawful harassment "only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In this case, the record showed that Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. Davis did not set Vance's work schedule and she only occasionally gave her an assignment list that had been generated by the general manager of the Catering Division. Further, no evidence suggested that Davis directed Vance's day-to-day activities. Because Davis did not meet the definition of a "supervisor" under Title VII and the University was not negligent in its handling of the alleged harassment, the Court upheld the pretrial judgment in favor of the University.

Things to Remember: It will be interesting to see how courts apply this standard in the school setting. Is the head coach a "supervisor" of the other coaches? Is the director of special education a "supervisor" of the diagnosticians? Is the principal a "supervisor" of all teachers and aides on the campus? We shall see. You can expect school district attorneys to argue that not even the superintendent is a "supervisor" with regard to professional staff, since most "tangible employment actions" pertaining to teachers have to be approved by the school board.

U.S. Supreme Court Case

Retaliation

HOW DOES AN EMPLOYEE PROVE A RETALIATION CLAIM UNDER TITLE VII?

Editor's Note: *This case does not involve a school district but involves claims often asserted against school districts. It involves an employee's claims for retaliation and constructive discharge. The legal analysis in this case applies equally in the school district context.*

Case citation: University of Tex. Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (U.S. 2013).

Summary: Dr. Naiel Nassar worked for the University of Texas Southwestern Medical Center (UTSW) as an Assistant Professor of Internal Medicine and Infectious Diseases and Associate Medical Director of Parkland Hospital's Amelia Court Clinic. His immediate supervisor was Dr. Phillip Keiser, Professor of Internal Medicine and the Clinic's Medical Director. Keiser's supervisor at UTSW was Dr. Beth Levine.

Upon being hired, Levine began inquiring about Nassar's productivity and billing practices. In late 2005, when referring to another doctor of Middle Eastern descent, Levine said in Nassar's presence, "Middle Easterners are lazy." In the spring of 2006, in reference to the hiring of that same doctor, Levine said they have "hired another one" in Keiser's presence. Keiser interpreted this comment as indicating that Parkland had hired another "dark skin[] Muslim like Nassar," and Keiser told Nassar what Levine had said.

Keiser also informed Nassar that Levine scrutinized Nassar's productivity more than that of other doctors. Levine continued criticizing Nassar's billing practices although she did not take into account that Nassar's salary was funded by a federal grant that precluded billing for most of his services. Also, while Levine suggested to Nassar that he consider applying for a promotion to become an Associate Professor, she also incorrectly told Nassar that he was unlikely to be promoted because another doctor did not like him. Nassar later found out that that doctor was not on the Promotions and Tenure Committee ("the Committee") nor did he oppose Nassar being promoted. In reviewing Nassar's promotion application, the Committee and UTSW made a number of billing and productivity inquiries about Nassar and his work, which came back relatively positive but with a few criticisms. Levine also asked Keiser why Nassar wanted to stay at UTSW instead of moving back to California, where his family was.

Levine ultimately signed letters of recommendation composed by Keiser in support of Nassar's promotion. On March 1, 2006, the Committee decided to promote Nassar. Despite the eventual promotion decision, Levine's harassment led Nassar to look for

a way to continue working at the Clinic without being a UTSW faculty member subject to Levine's supervision. In 2005, Nassar began discussions with the Hospital about continuing his work in the Clinic as a Parkland staff physician rather than as UTSW faculty. On a number of occasions before April, 2006, Nassar met with Dr. Gregory Fitz, UTSW's Chair of Internal Medicine and Levine's immediate superior, and complained that Levine and the Committee scrutinized his productivity and billing more than that of other doctors. There was a dispute as to whether a UTSW and Parkland affiliation agreement required Parkland to fill its staff physician posts with UTSW faculty. Nevertheless, Parkland staff told Nassar that if he would resign from his post at UTSW then Parkland would be able to hire him. On June 3, 2006, Parkland offered Nassar a job as a staff physician on Parkland's payroll, starting on July 10, 2006. Nassar resigned from UTSW on July 3, 2006.

In his letter of resignation, Nassar wrote that the primary reason for resigning was the "continuing harassment and discrimination against me by the Infectious Diseases division chief, Dr. Beth Levine," as a result of her bias against Arabs and Muslims. Fitz opposed Parkland's hiring of Nassar, asserting that UTSW had a right to fill Parkland doctor positions with UTSW faculty. Fitz's opposition prompted Parkland to withdraw the offer giving Nassar the July 10 start date.

Nassar filed suit claiming that UTSW had constructively discharged and retaliated against him, in violation of Title VII of the Civil Rights Act of 1964. A jury found that Nassar's resignation from UTSW was the result of constructive discharge, and that UTSW blocked Parkland from hiring Nassar in retaliation for Nassar's statements in his resignation letter. UTSW timely appealed, raising challenges to the sufficiency of the evidence, jury instructions, back pay and compensatory damages awards, and award of attorneys' fees. Nassar timely filed a cross-appeal challenging the district court's denial of front pay. The appeals court determined that although there was sufficient evidence to support the jury's verdict on the retaliation claim, there was insufficient evidence of constructive discharge. [See, Nassar v. University of Texas Southwestern Medical Center, Dkt. No. 11-10338 (5th Cir. 2012); *Texas School Administrators' Legal Digest,* April 2012]. UTSW appealed the decision to the United States Supreme Court.

Ruling: The United States Supreme Court vacated the 5th Circuit decision and returned the case to the lower court, finding that the 5th Circuit had used the incorrect legal standard for the retaliation claim under Title VII. This case required the Supreme Court to define the proper standard for causation for Title VII retaliation claims. Title VII prohibits "status-based" discrimination in the workplace on the basis of race, color, religion, sex, and national origin. Under the status-based discrimination provision of Title VII, 42 U.S.C. §2000e-2(a), an employee need not show that the causal link between the injury and wrong is so close that the injury would not have occurred but for the employee's status. Instead, the employee must show that discrimination was a motivating factor in the employment decision, "even if the employer also had other, lawful motives that were causative in the employer's decision."

According to the Supreme Court, the 5th Circuit erred when it used the "motivating factor" standard in analyzing the Title VII retaliation claims in this case. Title VII's retaliation provision, 42 U.S.C. §2000e-3(a), prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." In a separate case dealing with claims under the Age Discrimination in Employment Act (ADEA), *Gross v. FBL Financial Services, Inc.*, the Court held that the statutory requirement to show that an employer took adverse action "because of" age meant that age must be the reason that the employer took adverse employment action. In other words, the employee has to show under the ADEA that age is the "but-for" cause of the employer's adverse employment decision.

Similar statutory language is used in Title VII's anti-retaliation provision. The Supreme Court stated: "Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." Thus, to establish retaliation under Title VII, a plaintiff would have to show that the adverse employment action would not have occurred "but for" the employee's Title VII protected conduct. The Court declined to rule on the merits of the case and instead vacated the 5th Circuit opinion and returned the case to the lower court to employ the correct legal standard.

Things to Remember: This is an important ruling concerning the standard courts will use in retaliation claims. These claims are on the rise. This case makes the plaintiff's burden of proof harder. Employers will be able to present evidence along the lines of: "we were going to fire/nonrenew/reassign this person anyway." Plaintiffs will have to override that with evidence that satisfies the "but-for" test imposed by the Supreme Court.

COULD THE SCHOOL CUSTODIAN PURSUE DISCRIMINATION CLAIMS AGAINST THE DISTRICT?

Case citation: Mesquite ISD v. Mendoza, __ S.W.3d __, 2013 WL 2389857 (Tex. App. – Dallas 2013).

Summary: Tomasa Mendoza worked as a custodian for the Mesquite Independent School District. During the spring of 2010, the district implemented a system for dirty mop heads to be collected and taken from each school to another location to be safely cleaned. The new policy was in response to an incident in which a custodian started a fire by placing a mop head in a school dryer. Following implementation of the new system, Mendoza noticed several dirty and smelly mop heads at the school. The mop heads needed cleaning because Carlos Gudiel, the employee responsible for collecting them and delivering them to the cleaning facility, had not done so. Mendoza washed the mop heads and put them in a dryer. The mop heads caught fire in the dryer. After Mendoza admitted to putting the mop heads in the dryer, the district terminated her.

Mendoza filed suit against the district alleging violations of the Texas Commission on Human Rights Act (TCHRA) for discrimination on the basis of her sex and Mexican national origin by terminating her. The district filed a plea to the jurisdiction, arguing that the trial court did not have jurisdiction over either of the claims, but the trial court denied the district's motion. As a result, the district filed an immediate pretrial appeal.

Ruling: The appeals court dismissed the sex discrimination claim, but let Mendoza proceed on her national origin discrimination claim. The appeals court observed that to prove a discrimination case, a plaintiff can produce direct evidence of a discriminatory motive. If no direct evidence exists, a plaintiff must use a burden-shifting framework, in which the plaintiff first establishes a prima facie case of discrimination. The employer then articulates a legitimate,

non-discriminatory reason for its employment decision. The plaintiff then must show that the employer's reason is false and that discrimination was the real reason for the employment action.

In this case, the school district argued that Mendoza failed to meet her prima facie burden which required her to show that she was (1) a member of a protected class, (2) she was qualified for her employment position, (3) she was subjected to an adverse employment decision, and (4) she was replaced by someone outside of the protected class, or was treated less favorably than similarly-situated members of the opposite class. The trial court agreed, with respect to the sex discrimination claim, that Mendoza failed to establish a prima facie case. It was undisputed that Mendoza was replaced by a woman. In addition, she could not show that she was treated less favorably than a similarly-situated male employee. Mendoza claimed that Gudiel violated the policy regarding off-site cleaning of mop heads but was not terminated. The appeals court held, however, that Gudiel was not "similarly-situated" because he worked at a different location, had a different supervisor and job duties, and engaged in different misconduct. Because Mendoza could not meet her prima facie burden to show that she was either replaced by a male employee or was treated less favorably than a similarly-situated male employee, the appeals court held that the sex discrimination claim should have been dismissed.

The appeals court, however, determined that genuine issues of material fact precluded dismissal of the national origin discrimination claim. The district argued, again, that because Mendoza could not show that she was replaced by a non-Mexican employee, she could not make out a prima facie case. The district maintained that it moved a night-shift custodian to Mendoza's day shift and that employee also was Mexican. In contrast, Mendoza produced an internal e-mail and other documents from the district stating that she was replaced by a white female. This evidence created a fact issue on whether Mendoza was replaced by a non-Mexican employee. Thus, the appeals court declined to dismiss the national origin discrimination claim.

Things to Remember: ***This case teaches us something about discrimination cases, but is also an important lesson about mop heads: don't put them in the dryer!***

Constitutional Rights

DID THE EMPLOYEES STATE VALID FIRST AMENDMENT AND DUE PROCESS CLAIMS?

Case citation: Caleb v. Grier, 2013 WL 2902785 (S.D. Tex. 2013) (unpublished).

Summary: Mable Caleb formerly worked as the principal of Key Middle School and Jackie Anderson, Diann Banks, Herbert Lenton, and Patrick Cockerman all worked at the middle school in various capacities. All five employees sued the school district, Superintendent Terry Grier, and three outside investigators, alleging violations of their constitutional rights. Plaintiffs alleged generally that Grier targeted Caleb for dismissal because of things she said and people with whom she associated. They claimed that Grier initiated a harassing investigation carried out by the three investigators regarding the alleged improper transfer of property by Caleb from the middle school to another school to which she had been transferred. The investigation also included allegations of cheating on standardized tests, and other improprieties at Key Middle School. Plaintiffs Anderson, Banks, Cockerham, and Lenton claimed they were also targeted by Grier because they worked closely with Caleb.

The plaintiffs alleged that their First Amendment rights to free speech and free association were violated, and Caleb also claimed a deprivation of her constitutionally-protected liberty interests in the form of a procedural due process name-clearing hearing. Finally, Caleb accused Grier of denying her equal protection of the law by discriminating against her on the basis of her race.

Ruling: The trial court dismissed the claims against the three investigators and all claims against the district and Grier, except for one free speech claim and the due process claim by Caleb. The claims against the three investigators were dismissed because the allegations did not give rise to a constitutional violation. The plaintiffs had alleged that the investigators conducted their investigation in a manner that was abrasive, insulting, and demeaning to the plaintiffs. The lawsuit further alleged that one investigator leaked the investigation report to the press. According to the trial court, those allegations did not state constitutional violations. In addition, there were no allegations suggesting that the investigators, who were not district employees, had any authority to make employment decisions regarding any of the plaintiffs. The trial court dismissed all of the claims against the three investigators.

The trial court let Caleb proceed on only one of her free speech claims. Caleb alleged that the district and Grier retaliated against her for five instances in which she allegedly exercised her right to free speech. The court held that Caleb's alleged speech that occurred in 2005 and 2007 could not form the basis of a free speech claim because that speech was too remote in time, and was made long before Grier became superintendent. Caleb also claimed to have made statements in November of 2009 to Grier in person and publicly at a town hall meeting. The trial court held that Caleb's speech on this occasion was not protected by the First Amendment because statements made to Grier were part of a private conversation, not made public. Also, Caleb's statements at the town hall meeting were not controversial and were made in her role as a school principal. Thus, she was speaking as a part of her public employment, rather than as a citizen on a matter of public concern. The trial court, however, allowed Caleb to proceed on her remaining free speech claim. In that instance, Caleb alleged that she spoke to the *Houston Chronicle* in March of 2010, rebutting allegations of misconduct that were made against her. Caleb sufficiently alleged that she was speaking as a citizen on a matter of public concern and that her speech motivated an adverse employment action against her. The trial court, therefore, declined to dismiss that free speech claim.

The trial court dismissed each of the free speech claims raised by Anderson, Banks, Lenton, and Cockerham. The suit claimed that the investigators hired by the district engaged in rude and abrasive treatment of the plaintiffs. The suit, however, failed to allege that the four made any protected speech or that they were deprived of a constitutionally protected right to refrain from speaking. In addition, their statements during the investigation were made pursuant to their official duties, rather than as private citizens on a matter of public concern. The suit failed to allege viable First Amendment claims on behalf of Anderson, Banks, Lenton, and Cockerham.

The plaintiffs also claimed that the district and Grier violated their First Amendment rights to freedom of association. The First Amendment encompasses two categories of association: (1) the choice to enter into and maintain certain intimate human relationships (*i.e.*, marriage, bearing children, child rearing and education, and cohabitation with familial relatives); and (2) the right to associate for the purposes of engaging in expressive activities (*i.e.*, speech, assembly, petition for the redress of grievances, and

exercise of religion). However, relationships with colleagues usually are not afforded protection as intimate associations. None of the plaintiffs alleged any facts to support a claim related to intimate associations. In addition, none of them alleged association for the purpose of engaging in expressive activities. The allegations, therefore, were insufficient to raise freedom of association claims.

The trial court, likewise, dismissed Caleb's equal protection claim based on alleged racial discrimination. According to the trial court, Caleb failed to state sufficient facts that she was treated less favorably than similarly-situated, non-African Americans. Although she named several individuals in the suit, she did not state any facts regarding their conduct, how they were similarly-situated to her, or how any of them were treated by the district. Thus, Caleb failed to state a valid equal protection claim.

The trial court held, however, that Caleb could proceed on her due process claim. She alleged a deprivation of her liberty interests. The trial court observed that a discharge from public employment "under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to clear one's name." Caleb alleged that at the time of her separation from employment an investigation had raised allegations of improprieties by Caleb. She alleged that the district did not afford her due process by providing her a hearing to clear her name. The trial court declined to dismiss the due process claim. Thus, the trial court dismissed all but one First Amendment claim and Caleb's due process claim.

Employee Leave

COULD THE DISTRICT REQUIRE THE EMPLOYEE TO USE SICK LEAVE BEFORE TAKING PERSONAL LEAVE?

Case citation: Mullins v. Aldine ISD, Dkt. 013-R1-1010 (Comm'r Educ. June 5, 2013).

Summary: William Mullins worked as a teacher for the Aldine Independent School District. From May 4, 2010, until May 10, 2010, Mullins took time off from work when his wife was in the hospital and his child was born. The district required Mullins to use his state personal leave for the time period when he did not report to work and did not allow him to use district sick leave. Mullins filed a grievance challenging the district's decision to make him take personal leave. After the district denied Mullins's grievance over the matter, Mullins appealed to the Commissioner of Education.

Ruling: The Commissioner upheld the district's decision to require Mullins to use personal leave before using sick leave. Mullins argued that the district violated Education Code § 22.003(a)(2), which prohibits a district from restricting the "order in which an employee may use the state minimum personal leave and any additional personal leave provided by the school district." Mullins claimed that "sick leave" under district policy was a form of personal leave under § 22.003(a)(2) and, thus, the district was not allowed to dictate the order in which he took sick leave.

The main issue was whether district sick leave is a form of personal leave provided by the district. The Commissioner determined that sick leave was not personal leave as contemplated by Education Code § 22.003(a)(2). "Personal leave" is thought to be leave taken for any reason; and "sick leave" is thought to be leave taken for medical reasons. The Commissioner observed further that Education Code § 22.003(d) "makes clear that school districts may offer sick leave and that such leave is distinct from

personal leave offered by a school district." Thus, sick leave created by a school district's policy is not personal leave. A school district policy can specify that a teacher must use state personal leave days prior to using sick leave created by district policy.

Things to Remember: ***Most districts address leave issues at Policies DEC and DEC (Local). However, Aldine ISD is one of the few in the state that does not adopt policies from TASB. They have their own policies, which were the subject of this case.***

Liability

Qualified Immunity

ALLEGED DISCLOSURE OF STUDENT'S SEXUAL ORIENTATION TO HER MOTHER DID NOT VIOLATE CLEARLY ESTABLISHED LAW

Case citation: Wyatt v. Fletcher, ___ F.3d ___, 2013 WL 2371280 (5th Cir. 2013).

Summary: S.W. was a 16-year-old student in the Kilgore Independent School District who played on the softball team. S.W. alleged that, after a softball team meeting, coaches Rhonda Fletcher and Cassandra Newell lead S.W. into an empty locker room and locked the door. The coaches allegedly questioned S.W. about her relationship with an 18-year-old girl, Hillary Nutt, and accused S.W. of spreading a rumor that the 18-year-old was "Coach Newell's ex-girlfriend." According to S.W., the coaches yelled at her, threatened her, and told her she could not play on the softball team until they spoke with her mother. The coaches later met with S.W.'s mother, Barbara Wyatt, and allegedly revealed S.W.'s sexual orientation to her.

Wyatt filed suit on behalf of S.W. against Fletcher, Newell, and the school district claiming violations of S.W.'s right to privacy under the Fourteenth Amendment. The suit claimed further that the district had a policy requiring disclosure of students' sexual orientation to their parents and failed to train its employees concerning the confidentiality of student sexual orientation. Wyatt also raised a Fourth Amendment claim for unlawful seizure, asserting that the coaches locked the locker room door and ordered her to remain there while they confronted her about the relationship with Nutt. In response, the coaches argued that they were entitled to qualified immunity and the district asserted that Wyatt had not demonstrated a district policy, custom, or practice that led to any constitutional deprivation. The trial court held that the coaches were not entitled to qualified immunity and denied a request for pretrial judgment. The coaches then appealed to the United States Court of Appeals for the Fifth Circuit.

Ruling: The Fifth Circuit reversed and held that the coaches were entitled to qualified immunity. Qualified immunity protects government officials from personal liability unless the plaintiff can show that the official violated a clearly established statutory or constitutional right. The Fourth Amendment seizure claim failed because "there is simply no clearly established constitutional right – and Wyatt cites none – that protects students from being privately questioned, even forcefully, even in a locked locker room." According to the appeals court, the Fourth Amendment applies differently in the school context and particularly with regard to student athletes in locker rooms. Citing *Vernonia School District 47J v. Acton,* the appeals court noted that by choosing to be part of a team, students voluntarily subject themselves to a heightened degree of regulation, even higher than that imposed on students generally. In addition, verbal abuse does not rise to the level of a constitutional violation. So, the alleged threats and

intimidation, behind locked doors, by the coaches in this case did not violate S.W.'s Fourth Amendment rights.

The privacy claim, likewise, failed because Wyatt did not allege the violation of a clearly established constitutional right stemming from the disclosure of her sexual orientation to her mother. According to the Fifth Circuit, it has "never held that a person has a constitutionally-protected privacy interest in her sexual orientation, and it certainly has never suggested that such a privacy interest precludes school authorities from discussing with parents matters that relate to the interests of their children." Nothing in the case law cited by the plaintiffs prohibits school officials from communicating with parents regarding minor students' behavior and welfare, even if disclosure of a child's sexual orientation results. The appeals court noted that, in this case, the alleged disclosure was only to the student's mother and was not discussed with other teachers, staff, or students. Further, the disclosure of S.W.'s relationship was in the interest of the student and "became necessary only when S.W., allegedly influenced by Nutt, violated team rules and policy, which were in place for the benefit and safety of students."

Because the Fourth and Fourteenth Amendment rights asserted in Wyatt and S.W.'s lawsuit were not clearly established, the Fifth Circuit held that Newell and Fletcher were entitled to qualified immunity. Circuit Judge James E. Graves, Jr. dissented and criticized the court for not extending the right to privacy in personal sexual matters to high school students. According to the majority, however, it concluded only that the right was not clearly established at the time of the events at issue. Further, Wyatt had the burden to show that Newell and Fletcher were not entitled to qualified immunity and she simply failed to do so in this case.

Things to Remember: ***We think it significant that the coaches disclosed the girl's sexual orientation only to the girl's mother. Moreover, the reason for the meeting with the mother was to discuss concerns over the student's behavior and compliance with team rules. Outside of that context, disclosure of a student's sexual orientation could well be viewed as a violation of clearly established law.***

Sovereign Immunity

WAS THE SCHOOL DISTRICT IMMUNE FROM THE BREACH OF CONTRACT ACTION?

Case citation: Santa Rosa ISD v. Rigney Construction & Development, LLC., 2013 WL 2949566 (Tex. App. – Corpus Christi 2013) (unpublished).

Summary: In August 2009, Santa Rosa Independent School District and Rigney Construction and Development, LLC (Rigney) entered into a written contract for the construction of a new cafetorium and replacement of the roof of the district's administration building. While construction was underway, Rigney's subcontractors made several large openings in the administration building. During that time, one or more rainstorms occurred. As a result, the building suffered substantial water damage.

The contract between the district and Rigney provided that under certain specified circumstances, the architect for the project could authorize the district to withhold payment of amounts due and owing to Rigney under the contract. According to the district, the architect expressly authorized it to withhold amounts necessary to repair the water damage to the administration building. The district further contended that the architect authorized it to withhold payment from Rigney until the construction and repairs were resolved. The district withheld payment. Thereafter, Rigney sued for breach of contract.

The district filed a plea to the jurisdiction with supporting evidence, arguing that it was entitled to sovereign immunity. The trial court denied the district's plea to the jurisdiction. The district then filed an immediate pretrial appeal.

Ruling: The appeals court held that the trial court properly denied the district's plea to the jurisdiction. The appeals court observed that § 271.152 of the Texas Local Government Code waives a school district's immunity from suit for certain breach of contract claims. The statute provides that a "local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter."

For waiver of immunity to apply under § 271.152, three elements must be established: (1) the party against whom the waiver is asserted must be a "local governmental entity" as defined by § 271.151(3), (2) the entity must be authorized by statute or the Constitution to enter into contracts, and (3) the entity must in fact have entered into a contract that is "subject to this subchapter," as defined by § 271.151(2). A "contract subject to this subchapter" is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity."

The district argued that there was no waiver of its immunity because it "negated the existence of a contract" as defined by § 271.152. The appeals court disagreed. The district claimed that there was no change order signed by the district and, thus, Rigney was not entitled "to any payment over and above the original price of the contract." The district acknowledged, however, that "change orders" were expressly provided for in the contract. Thus, according to the appeals court, Rigney's claim for "unpaid change orders" and the district's defense to that claim were both based on the parties' written contract. The appeals court, therefore, held that for purposes of § 271.152, the district had not "negated the existence of a contract." The school district failed to demonstrate that the trial court committed reversible error in finding a waiver of immunity pursuant to § 271.152.

The appeals court also rejected the district's argument that Rigney's claims are barred by § 271.154 of the Texas Local Government Code because Rigney failed to comply with the contract's requirement that it file a grievance pursuant to district policy before filing suit. According to the appeals court, compliance with the contract's adjudication procedures is not a prerequisite to invoking the waiver in § 271.152. The appeals court affirmed the trial court's decision to deny the school district's plea to the jurisdiction.

Things to Remember: ***The court basically perceived the district as arguing that it was going to win the case on the merits, and therefore, the court lacked jurisdiction. The court thought this was a premature argument. The issue here was the court's jurisdiction, which does not require an examination of the merits of the claim.***

Practice & Procedure

Commissioner Jurisdiction

DID THE COMMISSIONER HAVE JURISDICTION OVER THE STUDENT'S CLAIMS STEMMING FROM DENIAL OF CLASS CREDIT?

Case citation: Child v. Killeen ISD, Dkt. No. 074-R10-0710 (Comm'r Educ. June 5, 2013).

Summary: The parent of a student in the Killeen Independent School District filed a grievance complaining that the district did not have a policy requiring the award of partial credit to students who pass one semester of a two-semester course. The district denied the parent's grievances and the parent appealed to the Commissioner of Education. On appeal, the parent complained that the district's actions violated Texas Administrative Code § 74.26(d).

Ruling: The Commissioner concluded that he did not have jurisdiction over the parent's claims. The district argued that the Commissioner lacked jurisdiction because the parent had not alleged the violation of the "school laws of this State" as required by Texas Education Code § 7.057 and failed to timely file the appeal. The parent was required to file the appeal within 45 calendar days after the decision, order, or ruling complained of was first communicated to the parent. The record showed that the parent was at the board meeting at which the board denied the grievance on March 2, 2010. The petition was filed on July 21, 2010, more than four months after the board's vote was communicated to the parent. Because the parent failed to timely file the appeal, the Commissioner held that they did not exhaust administrative remedies. The Commissioner did not have jurisdiction over the appeal.

In addition, the Commissioner held that the claims were moot. The evidence showed that the student had been granted full credit for the course at issue and, as a result, there was no actual controversy remaining between the parties. The case was dismissed for the parent's failure to exhaust administrative remedies and because the case became moot.

WHAT IS A "DISTRICT BUSINESS DAY"?

Case citation: Kraeft v. North Zulch ISD, Dkt. No. 079-R10-0810 (Comm'r Educ. June 5, 2013).

Summary: Angie Kraeft filed a grievance in the North Zulch Independent School District. The Level II decision was issued on Friday, May 21, 2010. District policy DGBA(LOCAL) requires an appeal of a Level II grievance decision to be filed within 10 days of the date of the Level II decision. "Days" are defined as "district business days." However, the policy did not specifically define "district business days." Kraeft appealed the Level II decision on June 4, 2010. The district determined that Kraeft's appeal of the Level II decision was not timely filed. According to the district, the tenth district business day from the date of the Level II response was June 3, 2010. Kraeft appealed the board's decision to the Commissioner of Education.

Ruling: The Commissioner upheld the district's determination that Kraeft's appeal was not filed timely. Kraeft argued that her appeal of the Level II grievance decision was timely because May 29 and May 31 should not have been counted as "district business days." May 29 was a Saturday and May 31 was Memorial Day. It was undisputed that if May 29 and May 31 were not counted, then Kraeft's appeal of the Level II grievance would be timely.

The Commissioner observed that a district's interpretation of its own policy should be deferred to as long as the interpretation is reasonable. The Commissioner held that the district reasonably interpreted May 29 as a "district business day" even though it was a Saturday. The record showed that May 29 was listed on the district calendar as an in-service day, used by teachers to clean up their classrooms at the end of the spring semester. The district also reasonably interpreted May 31 as a "district business day," because summer school teachers were directed to report to work on May 31, even though it was Memorial Day. While most teachers did not teach summer school, the district was open for business and district work was being done on May 31. Because May 29 and May 31 were considered "district business days," Kraeft did not timely file her appeal of the district's Level II grievance decision. Thus, the Commissioner dismissed Kraeft's appeal for her failure to exhaust administrative remedies.

Things to Remember: The commissioner here affords the district a good deal of deference in defining terms in its polices that are not otherwise defined. The decision will surprise a lot of people.

DID THE WOMAN PROPERLY APPEAL THE TERMINATION OF HER CONTINUING CONTRACT?

Case citation: Whitney v. El Paso ISD, Dkt. No. 088-R2-0810 (Comm'r Educ. June 5, 2013).

Summary: Marda Whitney was employed by the El Paso Independent School District under a continuing contract. In July of 2010, the district proposed the termination of Whitney's contract. On August 3, 2010, Whitney sent a letter to the Texas Education Agency. However, it did not request the assignment of an independent hearing examiner. The Commissioner docketed the letter as a Petition for Review, but notified Whitney that the appeal did not invoke the jurisdiction of the Commissioner because it did not identify any section of the Texas Education Code or Texas Administrative Code that she believed was violated. Whitney filed an Amended Petition for Review and alleged that the district violated Texas Education Code § 21.301.

Ruling: The Commissioner did not have jurisdiction over Whitney's appeal. Education Code § 21.301 requires a teacher to file an appeal of the termination of a teaching contract not later than 20 days after the board announces its decision. An appeal to the Commissioner under Education Code § 21.301 can only occur after the entire process set forth in Education Code Subchapter F has been exhausted. In this case, Whitney never properly requested a hearing before a certified hearing examiner and, therefore, she did not exhaust administrative remedies under Subchapter F. Thus, the appeal was dismissed for lack of jurisdiction.

DID THE PARENTS' ALLEGATIONS FALL WITHIN THE COMMISSIONER'S JURISDICTION?

Case citation: Parents and Concerned Citizens v. Galveston ISD, Dkt. No. 008-R10-0910 (Comm'r Educ. June 5, 2013).

Summary: A group of parents calling themselves "Parents and Concerned Citizens" filed an appeal with the Commissioner of Education alleging trustee misconduct and negligence by the district toward special education students, the district as a whole, employees, and the community. The Commissioner informed the group that he did not have jurisdiction over their claims because they had not identified any section of the Texas Education Code or Texas Administrative Code that they believed was violated.

Practice and Procedure, continued

The Commissioner offered the group two opportunities to cure the defects in their appeal.

Ruling: The Commissioner of Education dismissed the appeal for lack of jurisdiction. Under Texas Education Code § 7.057, the Commissioner has jurisdiction over violations of written employment contracts that cause or would cause monetary harm and violations of the school laws of this state. The "school laws of this state" are the first two titles of the Texas Education Code and the rules adopted under those titles. Those rules are adopted by the Commissioner and the State Board of Education.

In this case, the parents' appeal did not identify a "school law of this state" that may have been violated. The parents were given two opportunities replead, but they did not cure the deficiencies in their appeal. Thus, the Commissioner did not have jurisdiction over the parents' claims.

THE COMMISSIONER LACKED JURISDICTION OVER THE WOMAN'S NONRENEWAL APPEAL

Case citation: Lugo v. Santa Maria ISD, Dkt. 079-R1-0611 (Comm'r Educ. June 5, 2013).

Summary: Belinda Lugo appealed the nonrenewal of her term contract to the Commissioner of Education. She alleged that the district improperly nonrenewed her contract. The district argued that the Commissioner did not have jurisdiction over Lugo's appeal.

Ruling: The Commissioner held that he did not have jurisdiction over the appeal. The Petition for Review asserted jurisdiction solely based on Texas Education Code § 7.057. However, Lugo's nonrenewal appeal was brought under Education Code, Subchapter G, Hearings Before Hearing Examiners. Texas Education Code § 7.057(e) explicitly states that it does not apply to a case brought under Education Code, Subchapter G. Thus, the Commissioner concluded that jurisdiction based on Education Code § 7.057 did not exist over Lugo's appeal pursuant to Education Code, Subchapter G.

special education & disability Law

§ 504 Discrimination

APPEALS COURT VACATES RULING ALLOWING STUDENT TO PROCEED ON § 504 PEER HARASSMENT CLAIM

Case citation: Stewart v. Waco ISD, __ Fed. Appx. __, 2013 WL 2398860 (5th Cir. 2013).

Summary: Andricka Stewart, a student in the Waco Independent School District, sued the school district claiming that she had mental retardation, a speech impairment, and a hearing impairment. She attended high school in the district and received special education services. After an incident involving sexual contact between Stewart and another student in November of 2005, the district modified Stewart's individualized education program (IEP) to provide that she be separated from male students and remain under close supervision while at school.

The suit alleged, however, that Stewart was involved in three other instances of sexual conduct, which she characterized as "sexual abuse" over the next two years. According to the suit, the district did not take any steps to further modify her IEP or to prevent further abuse. Stewart sued the school district alleging claims under Title IX of the Education Amendments of 1972, the Americans with Disabilities Act (ADA), and § 504 of the Rehabilitation Act of 1973. The trial court dismissed the case in its entirety because it was an attempt to hold the district liable for the actions of a private actor. Stewart appealed to the Fifth Circuit Court of Appeals, but only with respect to the dismissal of the § 504 claim. The Fifth Circuit held that Stewart had stated a valid claim under § 504. [*See,* Stewart v. Waco ISD, 711 F.3d 513, 2013 WL 1091654 (5th Cir. 2013); *Texas School Administrators' Legal Digest,* April 2013]. The district then sought rehearing of the case.

Ruling: The Fifth Circuit granted the district's request for rehearing and vacated its prior opinion. The Fifth Circuit observed that Stewart's appeal presented "difficult questions that, in our view, should not be reached unless necessary." The district court had not addressed whether Stewart had exhausted administrative remedies or whether her alleged failure to do so barred the claims. The issue of exhaustion may be dispositive of the entire matter, according to the appeals court. The 5th Circuit held that the trial court should have considered the district's defense regarding exhaustion of administrative remedies. Because no ruling had been made on that issue, the Fifth Circuit vacated its early ruling and returned the case to the trial court.

Things to Remember: ***The vacated decision would have opened the door to much more liability for school districts under Section 504. We will continue to monitor this one.***

ADA

DID THE TEACHER RAISE VALID DISABILITY CLAIMS?

Case citation: Whetstone v. Jefferson Parish Public School Board, __ Fed. Appx. __, 2013 WL 3001882 (5th Cir 2013); Whetstone v. Jefferson Parish Public School Board, 2012 WL 1032894 (March 27, 2012).

Summary: Joyce Whetstone was a special education teacher in Louisiana's Jefferson Parish Public School System. In February of 2001, she was teaching mostly autistic middle school students, but would also be assigned students from other special education programs. On February 22, 2001, Whetstone entered her classroom and was attacked by an autistic student who weighed at least two hundred pounds. She was punched repeatedly on her right upper body, neck, upper right arm, right shoulder, and right breast and crouched in a corner trying to protect herself. Another teacher and the head of the special education department became aware of the attack and successfully distracted the student and removed him from the classroom. Following the incident, Whetstone asked that the student be removed from her classroom, but the request was denied.

On March 8, 2001, approximately two weeks after the first attack, Whetstone took a group of students to a grocery store as part of a community skills education program, along with an assistant who was an elderly woman. Although Whetstone requested that she not be required to take the student who had attacked her on February 22 to the grocery store; her supervisor denied that request. Whetstone nonetheless left the student behind. At the grocery store, a different student bit Whetstone on the hand. Whetstone remained at work for another week, until March 15, 2001. On March 15, 2001, she was placed on disability leave pursuant to the opinion of a doctor that she was

temporarily totally disabled on the basis of neck pain. Whetstone received "assault pay" pursuant to a Louisiana statute.

Whetstone attempted to return to work for part of one day on October 30, 2001, but was sent home after the school nurse found that she had very high blood pressure. Other than October 30, 2001, Whetstone remained on disability leave through August or October, 2005 and did not work at all during that period. She also alleges that she was terminated, but she does not state the specific day. The parties dispute whether Whetstone was terminated or whether she took a medical retirement.

Following the February 22 and March 8, 2001 attacks, Whetstone began to receive medical treatment. She was initially referred by her Workers Compensation Carrier to Dr. Jeffrey J. Sketchler for evaluation and examination. Dr. Sketchler recommended further treatment and the Workers Compensation Carrier approved evaluation and treatment at the Medical Musculoskeletal Institute ("MMI"). At the MMI, Whetstone was treated by Dr. Kevin J. Bianchini, a neuropsychologist, and Dr. Karen Ortenberg, a physician who is board certified in physical medicine and rehabilitation. Whetstone was treated by Dr. Ortenberg from December 5, 2001, through approximately March of 2004. While Dr. Ortenberg was treating Whetstone, the doctor was also communicating certain information about the treatment and Whetstone's progress to the School Board and their Workers Compensation Carrier. These communications often contained opinions and recommendations about Whetstone's progress and her ability to return to work under certain conditions.

Whetstone filed suit against the school board, Dr Bianchini and Ortenberg, raising claims under the Americans with Disabilities Act ("ADA"), constitutional violations of procedural and substantive due process, and state law claims for negligence, intentional infliction of emotional distress, and the breach of the standard of care owed by a doctor to their patient. Dr. Bianchini and Dr. Ortenberg filed motions to dismiss, which the Court granted on May 12, 2010. The trial court also granted a pretrial judgment in favor of Jefferson Parish School Board and Whetstone appealed.

Ruling: The Fifth Circuit upheld the judgment on behalf of the Jefferson Parish Public School Board and Bianchini and Ortenberg. The appeals court observed that to bring a claim under the Americans with Disabilities Act (ADA), a plaintiff must first satisfy certain *prima facie* elements of discrimination. Here, Whetstone failed to meet her threshold requirements. In particular, she failed to show (1) that the physical ailments from which she suffered constituted "disabilities" as that term is defined under the ADA, (2) that being able to teach in one specific location (namely, the classroom where she was attacked) is *not* "essential" to her profession, a finding she must prove in order to be considered a "qualified individual" under the ADA, and (3) that the external manifestations of her injury were enough to put the school on notice of her disability.

In addition, Whetstone's remaining, non-ADA claims for intentional infliction of emotional distress, due process violations, and disability-based harassment were not adequately briefed. She, therefore, waived those issues on appeal. Whetstone's claims against Bianchini and Ortenberg also failed. Although she brought an ADA discrimination claim against each doctor, the claims were not cognizable because neither doctor was Whetstone's employer or another kind of ADA "covered entity." The doctors also could not be sued for due process violations, since both were private citizens, not state entities. The appeals court upheld the judgment against the teacher.

Things to Remember: This case was decided based on the law prior to the changes to the ADA and Section 504 that went into effect in 2009. However, it is unlikely that the result would have been different under the new law, as the plaintiff would still have to show that she was "substantially limited" and that she was able to satisfy the "essential" components of the job.

Bullying

DID THE STUDENT STATE VALID DISABILITY CLAIMS STEMMING FROM BULLYING AT SCHOOL?

Case citation: Patrick v. Leander ISD, Dkt. A-12-CA-155-SS (W.D. Tex. 2013) (unpublished).

Summary: Taylor Patrick was a special education student in the Leander Independent School District, who had been diagnosed with Asperger's Syndrome. During middle school and high school, Leah Patrick, Taylor's mother, repeatedly complained to the district that Taylor had been the subject of constant bullying at school. The Patricks alleged that in middle school the bullying included throwing things at him, harassment, ridicule, humiliation and physical harm. After the mother complained and the student was hospitalized as a suicide risk, the district transferred Tayler to another middle school.

When Taylor enrolled in Leander High School the bullying allegedly continued. The district provided Taylor with an individualized education program (IEP) and placed him in a program to provide him with coping strategies for dealing with the other students. The Patricks claimed that the district still did nothing to stop the bullying, which then included name-calling, throwing things at him in class, whispering about him and laughing at him, among other things. In January of 2008, bullying in science class caused Taylor to have a meltdown, resulting in the teacher moving him to the back of the classroom. Taylor's mother continued to complain throughout his time in Leander High School, but the bullying continued, culminating in a fight at school in March of 2010, in which several students beat him up. Following the fight, Taylor received homebound services and ultimately transferred to another high school, where he remained without incident until he graduated.

Following his graduation, Taylor and Leah Patrick sued, claiming the district (1) failed to do enough to prevent the bullying, (2) did not provide a free appropriate public education under the Individuals with Disabilities Education Act, (3) failed to accommodate Taylor's disabilities under § 504 of the Rehabilitation Act, and (4) violated his Fourteenth Amendment due process rights under 42 U.S.C. § 1983. The district sought judgment in its favor prior to trial on each of the claims. Meanwhile, after filing suit, the Patricks filed a request for a due process hearing but the proceedings ultimately were dismissed because the Patricks failed to prosecute (*i.e.,* pursue) their claims.

Ruling: The trial court entered judgment in favor of the school district on each of the Patricks' claims. While Leah Patrick had standing to sue for alleged out-of-pocket expenses under the IDEA and/or § 504, the claims nevertheless failed because the Patricks failed to exhaust administrative remedies and their claims were barred by the statute of limitations. The trial court observed that the Patricks failed to exhaust administrative remedies under the IDEA and § 504 because they did not request a due process hearing

Special Education & Disability Law, continued

until after they filed suit. They also failed to properly pursue their administrative due process claims, resulting in dismissal.

The IDEA's one-year statute of limitations also had expired on the Patricks's suit. The last event in question was the fight in the cafeteria on March 2, 2010. Accordingly, the limitations period expired on March 2, 2011. The Patricks did not seek administrative relief, or file this lawsuit, until February 17, 2012. Thus, any relief under the IDEA was barred. Even if the Court presumed that the provision of homebound services to Taylor for the remainder of his junior year was also a basis of the lawsuit, the limitations period would still have expired in May or June of 2011, a year after Taylor's junior year ended. Further, the Patricks did not allege any failing on the part of Leander ISD during Taylor's senior year after he transferred out of Leander High School. Thus, the statute of limitations barred the suit.

The trial court observed that Taylor had an independent cause of action under § 504 for the alleged failure to reasonably accommodate him. However, the Patricks produced insufficient evidence to support such a claim. The record showed, instead, that Taylor "was at all times provided with a wide array of accommodations for his disability, including special instructional settings, and special privileges to leave the regular class in order to attend a learning lab if other students were making him upset." In addition, the district twice allowed Taylor to transfer schools, provided him with homebound services, and continued to engage in the "interactive ARD process as envisioned by IDEA." The Patricks failed to establish any of their claims and the trial court granted judgment in favor of the school district.

sTUdenTs

U.S. Supreme Court Case

University Admissions

UNIVERSITY AFFIRMATIVE ACTION CASE YET UNRESOLVED BY THE SUPREME COURT

Case citation: Fisher v. University of Texas at Austin, 133 S.Ct. 2411 (U.S. 2013).

Summary: Abigail Fisher was denied summer and fall admission into the 2008 freshmen class at the University of Texas at Austin. Among the applicants for the 2008 entering class, 81 percent of students were admitted under the university's Top 10 Percent Law, in place at the time, which guaranteed admission to students who graduated in the top 10 percent of their class. The remaining 19 percent (and applicants who ultimately were rejected) were evaluated under the "AI/PAI Plan," a multi-faceted, individual review process. Under that plan, two scores were given to each applicant, an Academic Index (AI) score and a Personal Achievement Index (PAI) score. The AI was based on the student's class rank, standardized tests, and high school curriculum. The PAI was a more subjective, multi-factor, individualized assessment that included consideration of leadership qualities, extracurricular activities, honors and awards, work experience, community service, and "special personal circumstances." The "special personal circumstances" component included, among other things, consideration of a candidate's race. Finally, if a Texas resident's scores fell just below those selected for admission, the University would take a second look at the application. The University then would decide whether to admit the student for the summer, the fall, or to its Coordinated Admissions Program.

Fisher sued alleging that the University's admissions policies and procedures discriminated on the basis of race and in violation of the right to equal protection of the law under the Fourteenth Amendment to the United States Constitution. When the district court entered judgment in favor of the University, Fisher appealed.

The Fifth Circuit Court of Appeals upheld the University's admissions policies. *Fisher v. University of Texas at Austin,* 631 F.3d 213 (5th Cir. 2011). According to the appeals court, the admissions process was modeled on Michigan Law School's program which the United States Supreme Court approved in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Grutter*, the Court recognized that the pursuit of diversity was a compelling interest in higher education and that public universities had the right to increase enrollment of underrepresented minorities. However, any measures used to consider race as a factor in the admissions process had to be narrowly tailored to accomplishing the goal of diversity. The Fifth Circuit held that the University of Texas policy complied with the mandates set out in *Grutter,* and that Fisher failed to establish that the University's admissions policy violated the Equal Protection Clause or otherwise discriminated against her on the basis of her race.

Ruling: By a vote of 7 to 1, the United States Supreme Court ruled that the Fifth Circuit did not apply the correct legal standard to equal protection claims challenging the University of Texas' race-based components of its admissions process. According to the Court, the Fifth Circuit erred because it did not properly apply the strict scrutiny standard to the equal protection claims. Looking to its prior decisions in *Grutter, Regents of Univ. of Cal. v. Bakke,* and *Gratz v. Bollinger,* the Court observed that any racial classification in university admissions must meet strict scrutiny, which requires a showing that racial classifications are "narrowly tailored to further compelling governmental interests."

To establish that its admissions policy was "narrowly tailored" to meet that goal, the University must demonstrate that the use of race as a factor is "necessary" to achieve the educational benefits of diversity and that no race-neutral alternatives would produce the same benefits. According to the Court, the Fifth Circuit erred because it "confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications." The Court stated that good faith does not "forgive an impermissible consideration of race." Thus, the Court returned the case to the Fifth Circuit to consider whether the university's consideration of race is narrowly tailored to achieve the benefits of diversity.

Things to Remember: Many people expected the Court's conservatives to use this case to reverse earlier decisions that authorized affirmative action in university admissions. That did not happen. The majority noted that Fisher had not specifically asked the Court to do that, but had, instead, asked the Court if UT's practices squared with the earlier decisions. The Court said they did not, and thus put the issue back on the 5th Circuit's docket. This case will continue.

Injury

DID THE LAWSUIT ALLEGE VIOLATIONS OF THE STUDENTS' CONSTITUTIONAL RIGHTS?

Case citation: Penny v. New Caney ISD, 2013 WL 2295428 (S.D. Tex. 2013) (unpublished).

Special Education & Disability Law, continued

Summary: H.P. was a 13-year-old special education student in the New Caney Independent School District, who received instruction in the self-contained special education classroom of New Caney Elementary School. On October 11, 2010, H.P. came home with marks and abrasions that had not been present when she left home that day. H.P. told her parents that the marks were made by Tracie Barnett, a special education aide. Following the incident, H.P. was reluctant to return to school, exhibited signs of post-traumatic stress disorder, and received counseling and therapy.

H.P.'s parents sued the district, claiming that the district (1) failed to provide appropriate services to H.P., (2) did not adequately train and supervise staff, and (3) knew that Barnett previously had been investigated and reprimanded for alleged abuse of self-contained students. They sued under 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), § 504 of the Rehabilitation Act, and negligence under Texas law. The parents also sued Leslie Thomas, the school principal, and Barnett. The defendants then sought dismissal of the suit.

Ruling: The trial court dismissed all but the ADA and § 504 claims, as well as the § 1983 claims against Barnett in her individual capacity. The parents claimed that the defendants violated H.P.'s Fourteenth Amendment rights by depriving her of life, liberty, and bodily integrity. They claimed that the district failed to enact procedures to protect H.P. from a known and inherently dangerous situation. These claims against the school district failed, however, because the suit did not allege facts to show deliberate indifference or that the district had a policy of permitting student abuse. Nor did the suit allege that the district lacked policies requiring it to train, supervise, and discipline employees. The parents alleged that a substitute teacher had reported improper conduct by Barnett on a previous occasion in May of 2010. The record showed, however, that the district investigated the allegations and disciplined Barnett for her conduct. Thus, the plaintiffs' allegations insufficiently claimed deliberate indifference on the part of the district. The trial court dismissed the 42 U.S.C § 1983 claim against the school district. For the same reasons, the trial court granted qualified immunity to Thomas. The allegations simply did not show that Thomas, as the school principal, knew or should have known that Barnett posed a threat of physical violence to H.P.

The trial court declined to dismiss the ADA and § 504 claims, which generally require a showing that (1) the student was a qualified individual, (2) was excluded from participation in or denied the benefits of services, programs, or activities for which a public entity is responsible, or was otherwise subjected to discrimination, and (3) such discrimination was by reason of the student's disability. Section 504 has the additional requirement that the entity be a recipient of federal funds. According to the trial court, the parents' allegations stated claims under the ADA and § 504. The suit alleged that H.P. was qualified as a disabled person under the statutes, that she was denied her education because of the alleged abuse and its consequences, and that the denial was discriminatory by reason of her disability. The trial court, therefore, denied the motion to dismiss the ADA and § 504 suit. The parents, therefore, were allowed to pursue those claims against the district and the constitutional claims against Barnett.

MisCeLLAneoUs

U.S. Supreme Court Case

Same-Sex Marriages

SUPREME COURT HOLDS DEFENSE OF MARRIAGE ACT § 3 UNCONSTITUTIONAL

Case citation: United States v. Windsor, 113 S.Ct. 2675 (U.S. 2013).

Summary: Edith Windsor and Thea Spyer, women residents of New York, were married in a lawful ceremony in Ontario, Canada, in 2007. The women later returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought the estate tax exemption for surviving spouses. She was barred from doing so, however, by the federal Defense of Marriage Act (DOMA), which excluded a same-sex partner from the definition of "spouse" as that term is used in federal statutes. After paying the taxes, Windsor filed suit challenging the constitutionality of that provision. The trial court and federal appellate court ruled that this portion of the statute was unconstitutional and ordered the United States to pay Windsor a refund. The United States sought review by the United States Supreme Court, which granted certiorari.

Ruling: By a vote of 5-4, the Supreme Court affirmed the judgment in favor of Windsor, holding that § 3 of DOMA violated the Fifth Amendment to the United States Constitution. The Court observed that through history, the federal government has deferred to the states to make policy decisions with respect to domestic relations. For example, as a general rule, federal courts do not adjudicate issues of marital status, such as divorce or custody issues, even if there is otherwise a basis for federal jurisdiction. While state laws defining and regulating marriage must comply with the U.S. Constitution, the regulation of domestic relations has long been within the exclusive province of the states.

In this case, New York law recognized same-sex marriages performed in other jurisdictions and authorized same-sex marriages in New York, thus giving same-sex marriages lawful status. According to the Court, this status "is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." The Court stated further that DOMA injured the "very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government." The Court, thus, affirmed the lower court rulings in favor of Windsor.

Things to Remember: This highly publicized decision by the Supreme Court has no immediate and direct impact on school operations, but the sweeping language in the majority opinion is likely to be cited in future cases in which same-sex partners challenge various school policies and practices, such as the scope of insurance benefits.

UPDATE continued from page 6

iV. sPeCiAL edUCATion

EVALUATION TIMELINES

To the relief of diagnosticians throughout the state of Texas, Senate Bill 816 moves the deadline for the initial evaluation for special education services to 45 school days after the district receives written parental consent from the parent, rather than the current deadline of 60 calendar days after the consent is signed. If the student is absent three or more days, the timeline is extended per day of absence. For those not enrolled in the school, such as private school, home school, and preschool students, the deadline is also 45 school days after receipt of consent, however there is no extension based on the student's absence. [68]

If the consent is obtained with more than 45, but less than 35 school days left in the year, then the evaluation must be done and delivered to the parent by June 30, with the Admission, Review, and Dismissal Committee (ARDC) meeting held within the first 15 school days of the next year. However, if the student is absent three or more days, the deadline is 45 school days. If consent is obtained with less than 35 school days left in the year, the evaluation is due 45 school days after consent. If a parent or guardian makes a request in writing for an initial evaluation to the director of special education, or any other administrative employee, then the district must respond to the request within 15 school days by seeking consent to conduct the evaluation or giving written notice of refusal along with procedural safeguards.[69]

Comment: *The federal Individuals with Disabilities Education Act (IDEA) allows states to set their own timeline for the initial evaluation, but this is the first time that Texas has done so. During the school year, the difference between 45 school days and 60 calendar days may not be significant. The impact of the new timelines will be most appreciated when consent for an initial evaluation is obtained close to a school holiday. The Commissioner may provide rules to define the timelines for year-round schools.*

SENATE BILL 542: FACILITATED ARDC MEETINGS

Beginning in 2014-2015, TEA must provide information to parents about the use of "facilitation" as a method of Alternative Dispute Resolution (ADR). Districts that use facilitation shall provide information to parents about this. If the district chooses to offer facilitation as an ADR method, it may use an independent contractor, district employee or other qualified person, but it must do so at no cost to the parents. Use of this method must be voluntary and cannot delay or deny the right of the parent to seek mediation, file a complaint, or seek a due process hearing. Districts may also choose to use facilitated techniques routinely at ARD meetings.[70]

REPRESENTATION IN DUE PROCESS HEARINGS

Senate Bill 709 amends the Education Code to specify that parties in a special education due process hearing may be represented by a lawyer or by a non-attorney who "has special knowledge or training with respect to problems of children with disabilities," and who satisfies additional rules to be developed by the Commissioner. These rules must require that the individual have knowledge of due process rules, hearings and procedures, and federal and state special education laws. The hearing officer will determine if the person satisfies the requirements. Former employees of the district may not serve in this capacity if the district objects.[71]

Comment: *Federal law provides for the awarding of attorney fees to a prevailing party in a due process hearing under the Individuals with Disabilities Education Act (IDEA). This remedy would not be available to a party represented by a non-attorney. The new state law does not change the standards for a due process hearing; such hearings are subject to legal rules of evidence and civil procedure and may be appealed in a federal court of law.*

HOUSE BILL 617: TRANSITION PLANNING

Each district or shared services arrangement (SSA) must designate one employee as the "designee on transition and employment services" for special education students. The Commissioner will develop training guidelines. This designee must work with district or SSA staff, students, parents, and local and regional staff of various agencies specified in the statute to provide information and resources about effective transition planning and services. TEA must also develop a "transition and employment guide" by September 1, 2014, that must be posted on school district websites. In addition, districts must inform parents about the guide at the first ARDC meeting at which transition is discussed, or at the first ARDC meeting that occurs after the guide becomes available.[72]

HOUSE BILL 489: INDIVIDUALS WITH DISABILITIES AND SERVICE ANIMALS

This bill, which was not specifically aimed at school districts, was intended to bring state law regarding public facilities and service animals in alignment with the federal Americans with Disabilities Act (ADA). Effective January 1, 2014, the new law will specify that only dogs may be defined as a "service animal" for the purposes of access to public buildings. [73]

Comment: *HB 489 also adds individuals with post-traumatic stress disorder (PTSD) to the definition of a person with a disability under state law.[74] PTSD is not explicitly covered under the ADA.*

SENATE BILL 906: ALTERNATIVE ASSESMENT

For students in grades 3-8 who receive special education services, TEA may not adopt a performance standard that indicates that a student's performance on the alternate assessment does not meet standards if the lowest level of the assessment accurately represents the student's developmental level as determined by the ARDC.[75]

Comment: *In keeping with the trend indicated by HB 5 and other bills this session, SB 906 adds an element of local control to state assessment instruments.*

HOUSE BILL 1264: STUDENTS WITH DYSLEXIA

School districts and open enrollment charter schools must report the number of students identified as having dyslexia through PEIMS.[76]

V. PeRsonneL

TEACHER CERTIFICATION PROGRAMS AND APPRAISALS: HOUSE BILL 2012

This comprehensive legislation looks at how teachers are trained, how they are appraised, what they are paid and what they think.

Educator preparation programs. HB 2012 requires each educator preparation program to provide information regarding skills and responsibilities of educators, the performance over time of the program, and other issues.[77] The bill also requires the State Board for Educator Certification (SBEC) to adopt a minimum GPA to be admitted to an educator preparation program, including alternative certification programs. This does not apply to those seeking career and technology certification. If an aspiring teacher seeks initial certification, he or she must either (1) pass a test approved by the Commissioner; or (2) have 12 credit hours in the content area, or 15 credit hours if the content area is math or science grades 7-12. SBEC rules must permit programs to admit "in extraordinary circumstances" candidates who fail to meet the GPA standard, but these cannot comprise more than 10% of those admitted to a program in a year. In addition, the program director must certify, with documentation, that the candidate's "work, business, or career experience demonstrates achievement comparable to the academic achievement represented by the grade point average requirement."[78]

Teacher appraisals. In addition to the appraisals required by current law, a district must require that "appropriate components" of the appraisal process, such as classroom observations and walk-throughs, "occur more frequently as necessary to ensure that a teacher receives adequate evaluation and guidance." Districts must also give priority to conducting these components more frequently for inexperienced teachers or experienced teachers with identified areas of deficiency.

A teacher is entitled to a written copy of an appraisal "promptly on its completion."[79] Districts must also use a teacher's "consecutive appraisals from more than one year," if available, in making employment decisions. [80]

Comment: *Principals, take note! Regular and frequent informal evaluations of teacher performance, always a recommended practice, is now required by law. Failure to provide adequate evaluations and guidance may be grounds to overturn a disciplinary decision. Districts may also consider holding appraisals earlier in the year in order to comply with the timing requirement. And about those disciplinary decisions, note that HB 2012 does not define "employment decisions" for which a district is required to review past appraisals. Arguably, this broad term would include nonrenewals or terminations based on conduct.*

Teacher surveys. TEA must collect information on educator salaries in order to allow comparisons based on geography and job classification. TEA must report this information to state leadership and provide it on the agency website by December 1, 2014.[81] The Commissioner will also be required to conduct an online survey of full-time, certified professional educators at least every other year regarding teaching and learning conditions and how they relate to student achievement, attendance and graduation, teacher retention and other issues. The results will be provided to the public and school districts, which must use the survey results to review and revise district and campus level improvement plans as appropriate.[82]

Teacher mentors. Whereas former law required districts to provide release time to teacher mentors, HB 2012 also requires districts to release new teachers in order to meet with their mentors and participate in mentoring activities. The commissioner must report to the legislature annually on the effectiveness of teacher mentor programs. The law also directs state leaders to create a committee by November 1, 2013, to evaluate the implementation of Texas Education Code § 21.458 regarding teacher mentoring programs and to recommend guidelines.[83]

PUBLIC HEARING BEFORE PAYMENT IN EXCESS OF CONTRACT: HOUSE BILL 483

This short bill, which was not targeted at school districts, may have significant consequences for districts considering mid-contract incentive payments or severance payments to employees. The bill prohibits a political subdivision from paying an employee or former employee more than an amount owed under a contract with the employee unless the political subdivision holds at least one public hearing, at which the governing body must state (1) the reason the payment in excess of the contractual amount is being offered, including the public purpose that will be served; and (2) the exact amount of the payment, the source of the payment, and the terms of the payment that will effect and maintain the stated public purpose.[84]

Comment: *Based on the legislative record, HB 483 was intended to promote transparency and enforce the constitutional prohibition on gifts of public funds. The new law raises many unanswered questions. What is the relevant "contract"? How will the bill be interpreted in light of longstanding legal assurances of confidentiality in settlement agreements? An argument could be made that a payment pursuant to an amended contract or a settlement agreement would not require a public hearing. Nonetheless, until the effect of HB 483 is clarified by a judicial ruling, any district contemplating a mid-contract payment to an employee or former employee should consult with an attorney regarding compliance with this new law.*

GRIEVANCE REPRESENTATION BY TELEPHONE: HOUSE BILL 2607

A district's grievance policy must now permit an employee to be represented by an attorney or other person who participates by telephone conference call if the district has the necessary equipment. This only applies to conferences at which the employee is entitled to representation according to the district's grievance policy.[85]

EMPLOYEE SOCIAL SECURITY NUMBERS: HOUSE BILL 2961

This law requires districts to adopt a policy prohibiting the use of an employee's social security number as an identifier other than for tax purposes.[86] Current law permits school districts to withhold social security numbers of employees (and others) in responding to a PIA request, without the necessity of seeking an attorney general determination.[87] HB 2961 clarifies

that a school district must not require an employee or former employee to choose whether to allow public access to his or her social security number.[88]

Comment: *Districts should review human resources forms to ensure compliance with HB 2961. Note that existing federal law also requires a governmental entity that requests a social security number of any person to inform the person whether providing the social security number is mandatory or voluntary, the statutory authority for the request and the purpose of the request.*[89]

NEW REQUIREMENTS IN PROFESSIONAL DEVELOPMENT

Principals or other appropriate administrators who oversee student discipline must attend professional development training at least every three years regarding removal of students from class for disciplinary reasons (HB 1952).[90]

Continuing education for teachers, principals, and counselors must contain certain components outlined by statute, including instruction regarding recognizing early warning indicators of at-risk students and integrating technology into the classroom (for principals and classroom teachers), and assisting students in developing high school graduation plans, and implementing dropout prevention strategies (for counselors) (HB 642).[91]

Training for certification must include instruction on detecting emotional or mental disorders, and schools must also provide training for teachers, counselors, principals and all other appropriate personnel regarding identifying students at risk of suicide, being a victim or perpetrator of bullying, or mental health problems (SB 460).[92]

Staff who regularly interact with students must be trained in recognizing students who need substance abuse intervention. The training must include providing notice to parents or guardians (SB 831).[93]

All new school district and charter school employees must receive training on identifying and reporting sexual abuse and maltreatment of children. This bill expands the former requirement, which applied only to certain employees. DFPS has created a free online course that can be used for this purpose. The bill also requires districts and open enrollment charter schools to post a clearly visible sign in English and Spanish, in a location accessible to students, with the toll-free DFPS hotline number for reporting child abuse or neglect (SB 939).[94]

Comment: *Multiple bills passed during this legislative session will impact public school counselors, including HB 5 (graduation plans), and many of the increased professional development requirements listed above. In addition, SB 715 made amendments throughout the Texas Education Code to clarify that the term "school counselor" means the same thing as "counselor," "guidance counselor" and "high school counselor," and that these individuals must be certified by SBEC, employed under a Chapter 21 contract, and paid according to the state minimum salary schedule. This bill also specifies that the employment of a "licensed professional counselor" by a district is regulated by different laws and licensure requirements than school counselors.*

Vi. CHARTeR sCHooLs

The big news for Texas charter schools this legislative session was Senate Bill 2. This bill addressed long-term concerns of the charter community by expanding the cap on new charters, increasing the opportunities to purchase charter school facilities, and setting new standards for campus charters and charter school accountability.

New charters. SB 2 expanded the number of open enrollment charters to 215 through the fiscal year ending August 31, 2014. The cap is then expanded to 225 charters beginning September 1, 2014, rising by 15 with each year until 2019 when it will rise to 305.[95] Whereas the responsibility for granting or revoking charters previously belonged to the State Board of Education (SBOE), this duty has now been transferred to TEA. The law previously required a charter to specify the period of validity; pursuant to SB 2, all charters are created for a five-year period.

In granting new charters, the Commissioner must give priority to applications from charters that would open in the boundaries of a school district rated "unacceptable" for the preceding two school years.[96]

Charter school use of district facilities. School districts cannot sell, lease or allow non-district use of any unused or underused facility without first giving notice to charter schools located "wholly or partly" within the district. The board is not required to accept the charter school's offer.

Comment: *This law creates an additional procedural hurdle any time a district seeks to sell, lease, or allow the use of district property to a third party. Feeling overwhelmed? Take heart: at one point this bill, later revised, would have required districts to offer unused or underused facilities to charters schools within district boundaries for $1.*

Campus charters. SB 2 added to the existing authority of school districts to establish a campus charter under Texas Education Code § 12.0521. When presented with a petition to create a campus charter, the school board must either grant or deny the petition with a record vote. The petitions must be signed by a majority of both the classroom teachers and the parents at the campus.[97] Such charters can be granted at schools that contain no more than 15% of a district's total student population, and they do not count against the cap on open enrollment charter schools. If a district grants a campus charter, it may not require the charter to buy or rent the facility. School districts may not require campus charters, or open enrollment charters, to pay for any service provided by the district that exceeds the actual cost to the district of providing the service.

Criminal background of employees. Another significant bill for charters, HB 647 revises the standard for criminal histories of open enrollment charter school employees. Under current law, an open enrollment charter may not employ any person who has been convicted of any crime of moral turpitude, any offense requiring mandatory expulsion of a student, or any offense requiring registration as a sex offender.[98] An OECS may now employ a person in a position other than teacher or aide if a school district could hire the person. The higher standards still apply to an officer of the OECS or members of the OECS or charter holder governing body.[99]

CHARTER SCHOOLS AND PATRIOTIC OBSERVANCES

HB 773 requires open enrollment charters to fly the U.S. and Texas flags in every classroom, but this does not apply until 2016-17.[100] SB 2 also extended the law requiring students to recite the Pledge to the U.S. and Texas flags to open enrollment charter schools.[101]

Vii. sCHooL sAFeTY

PROTECTION OF TEXAS CHILDREN ACT: HOUSE BILL 1009

This new law, also known as the "School Marshal Bill," authorizes school boards and open enrollment charter schools to appoint a "school marshal" for every 400 students in average daily attendance (ADA).[102] Because the school marshal is not a peace officer, school districts are not required to create a school law enforcement agency in order to appoint a school marshal. The school marshal must be an existing employee of the school and must be certified as eligible by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE).[103] To receive certification, a person must 1) be an employee of a school district or open enrollment charter; 2) hold a concealed handgun license; 3) undergo 80 hours of training; and 4) demonstrate psychological fitness through a psychological exam to be devised and administered by TCLEOSE. TCLEOSE has until January 1, 2014 to develop the training program necessary to license school marshals. Schools may pay for the training, but are not required to.[104]

A school board that opts to appoint a school marshal must adopt written regulations regarding the possession and use of the handgun by the marshal.[105] Marshals may possess and carry a handgun only in accordance with these regulations and only at a specific school as designated by the board. In addition, the marshal may only access the handgun under circumstances that would justify the use of deadly force—i.e., when the marshal reasonably believes that it is necessary to protect him or herself, or a third person, against the attempted use of deadly force or to prevent the imminent commission of a Title 5 felony.[106]

Further, if the marshal's primary job duty involves "regular, direct contact with students," the marshal may not carry the handgun, but must keep it in a locked and secure safe "within the marshal's immediate reach when conducting the marshal's primary duty."[107] The identity of a school marshal is confidential and not subject to the Public Information Act, though it must be disclosed to the Department of Public Safety, the employing school and other law enforcement personnel as specified in the statute. [108] The law does not address the practical matter of how a school district is to keep the identity of the marshal confidential when he or she is standing right next to a locked safe. (Locked safes in every classroom?)

In requiring the marshal to be an existing school employee, the law implies that districts may not employ an individual solely to act as the marshal. The law does not address whether a district should pay additional compensation to the employee; this is a local decision that would need to be addressed with the confidentiality concerns in mind.

Comment: *HB 1009 does not change existing law permitting a school district to allow individuals to carry concealed handguns on campus. Following the tragic deaths of students in Newtown, Connecticut, some Texas districts adopted policies for this purpose. HB 1009 does not invalidate this decision but provides an additional option for districts with safety concerns. The training and psychological exam required to license a school marshal may address some of the liability issues with regard to guns on campus. Whether to arm employees is a local decision that should be made in consultation with an attorney.*

Viii. PRoCUReMenT And ConsTRUCTion

COOPERATIVE PURCHASING AND CONSTRUCTION (HB 1050)

School district purchasing gurus may recall that the 82nd Legislature in 2011 amended Chapter 44 of the Education Code, moving most of the construction procurement methods to Government Code chapter 2267. Two methods of procurement, interlocal agreements and energy savings performance contracts, remained in Chapter 44.[109] For the last two years, it has been unclear whether districts may use an interlocal agreement with a purchasing cooperative as a method of construction delivery.

HB 1050 clarifies that school districts may not procure construction-related goods and services in an amount greater than $50,000 through a purchasing cooperative unless a person designated by the district certifies in writing that: (1) the project does not require the preparation of plans and specifications by an architect or engineer under the Texas Engineering Practice Act or the Texas Board of Architectural Examiners; or (2) the plans and specifications have been prepared as required.[110] This law does not apply to the purchase of construction goods and services through a different method of procurement, nor does it change the legal standards that apply to determine whether an architect or engineer is required.

Comment: *The new law does not address who a district should designate to make the required certification. While it can be anticipated that vendors may be willing to provide the certification, districts should bear in mind that it is not the vendor but the district, including its employees and officers, that may be subject to liability for failure to follow procurement laws.*

iX. MisCeLLAneoUs

HOUSE BILL 308: HAPPY FESTIVUS!

Thanks to the 83rd Texas Legislature for clarifying that it is OK to say "Merry Christmas" in public schools. HB 308 amends the Education Code to provide that schools may teach about the history of traditional winter celebrations. Schools may also allow students and staff to offer greetings such as: Merry Christmas, Happy Hanukkah and Happy Holidays. [111] A display relating to a traditional winter celebration may not include a message that encourages adherence to a particular religious belief, but it may consist of scenes or symbols associated with traditional winter celebrations including a menorah, nativity scene or Christmas tree as long as the display: 1) includes symbols of more than one religion; or 2) includes symbols of one religion along with a secular scene or symbol.[112]

Comment: *This state law will not protect schools from lawsuits based on the Establishment Clause of the U.S. Constitution. HB 308 could be construed as permitting a school to display the following combinations of "secular" and "religious" symbols:*

Christmas tree + nativity scene
Dreidel + menorah

Under federal law, it is not hard to imagine that these same displays could be interpreted as an endorsement of a particular religion. If a lawsuit is filed against a school district alleging the violation of the Establishment Clause, the court will look at federal law to determine liability. As such, school districts should be wary of overly relying on the new statute.

SEPTEMBER 11, 2001: HOUSE BILL 1501

If September 11th falls on a school day, each school must observe one minute of silence at the beginning of the first class period. The class instructor must first make a statement of reference to the memory of those who died that day. This observance "may be held in conjunction with" the minute of silence already required by law.[113] As this bill became effective immediately, schools must begin to observe the moment of silence on Wednesday, September 11, 2013.

ConCLUsion

We hope we have provided you with a good summary of the major legal developments affecting public education in the 83rd Legislative Session. If you would like to learn more about the new laws that will impact your schools in the year ahead, please consider attending our annual Back to School Workshops, coming to an Education Service Center near you! This year's BTS program will feature a review of the practical implications of these new laws, along with our annual case law update, and a focus on serving the disruptive or violent student in a safe, legal, and appropriate manner. It will be comprehensive, practical, and interactive with plenty of time for Q&A. Sign up by using the enclosed registration form or at www.legaldigestevents.com.

endnoTes

1. Tex. Educ. Code § 25.083(b)
2. Tex. Educ. Code § 28.0217
3. Tex. Educ. Code § 29.081
4. Tex. Educ. Code § 29.081
5. Tex. Educ. Code § 39.054(a)
6. Tex. Educ. Code § 39.0545
7. Tex. Educ. Code § 39.0545
8. Tex. Educ. Code § 39.0232
9. Tex. Educ. Code § 39.0232
10. Tex. Educ. Code § 39.0238
11. Tex. Educ. Code § 39.023
12. Tex. Educ. Code § 39.0263
13. Tex. Educ. Code § 39.0263
14. Tex. Educ. Code § 39.0301
15. Tex. Educ. Code § 28.02121
16. Tex. Educ. Code § 33.007
17. The basic foundation program includes 22 credits: four credits in English language arts; three credits in math; three credits in science; three credits in social studies; two credits in the same foreign language, unless an exception applies; one credit in fine arts; one credit in physical education, unless an exception applies; and five electives. Tex. Educ. Code § 28.025.
18. Tex. Educ. Code § 28.025
19. Tex. Educ. Code § 51.803
20. Tex. Educ. Code § 28.025
21. Tex. Educ. Code § 28.025
22. Tex. Educ. Code § 28.025
23. Tex. Educ. Code § 28.02121
24. Tex. Educ. Code § 39.057
25. Tex. Educ. Code § 28.02121
26. Tex. Educ. Code § 31.02015
27. Tex. Educ. Code § 39.023
28. Forty-five states, the District of Columbia, four territories and the Department of Defense Education Activity have adopted the CCSSI. Texas, Virginia, Alaska and Nebraska have not joined the initiative; and Minnesota has adopted the English Language Arts but not the Math standards. See http://www.corestandards.org/in-the-states (last visited July 14, 2013).
29. "Policy Ending Criticized Lesson Plans Leaves Schools in a Bind." *New York Times,* (June 1, 2013).
30. Tex. Educ. Code § 8.0531
31. Tex. Educ. Code § 28.002(g)
32. Tex. Educ. Code § 39.0545
33. Tex. Educ. Code § 38.013(a)
34. Tex. Educ. Code §28.0023
35. Tex. Educ. Code § 552.127 (current)
36. Tex. Gov't Code § 552.127
37. Tex. Gov't Code § 552.127
38. The bills add Tex. Gov't Code § 551.006 to TOMA.
39. Tex. Gov't Code § 551.006(3)(b)
40. Tex. Gov't Code § 551.006(3)(c)
41. Tex. Gov't Code § 551.006(3)(e)
42. Tex. Gov't Code § 552.002.
43. Tex. Gov't Code § 552.002(a)
44. Tex. Gov't Code § 552.002(a)
45. Tex. Gov't Code § 552.003(2-a)
46. Tex. Educ. Code § 11.1512 (c)-(f)
47. 20 U.S.C. § 1232g
48. Tex. Elec. Code § 85.036(b), (f)
49. Tex. Elec. Code § 85.036(f)(2)
50. Tex. Elec. Code § 85.036(b)
51. Tex. Educ. Code § 37.141
52. Tex. Educ. Code § 37.141
53. Tex. Educ. Code § 37.144
54. Tex. Educ. Code § 37.145
55. Tex. Educ. Code § 37.146
56. Tex. Code of Civ. Proc. 45.058(i)
57. Tex. Code of Civ. Proc. 45.058(j)
58. Tex. Educ. Code § 37.0022
59. Tex. Educ. Code § 25.0915(c)
60. Tex. Educ. Code § 28.025(i)
61. Tex. Educ. Code § 25.007
62. Tex. Educ. Code § 25.008
63. Tex. Educ. Code § 25.087(b-1)
64. Tex. Educ. Code § 25.087(b)
65. Tex. Educ. Code § 25.087(b-4)
66. Tex. Educ. Code § 25.087
67. Tex. Educ. Code § 33.901
68. Tex. Educ. Code § 29.004
69. Tex. Educ. Code § 29.004(a)
70. Tex. Educ. Code § 29.019-.020
71. Tex. Educ. Code § 29.0162
72. Tex. Educ. Code §§ 29.011, -.0112
73. Tex. Health & Safety Code § 437.023(c)
74. Tex. Hum. Res. Code § 121.002(4)(G)
75. Tex. Educ. Code § 39.023(b)
76. Tex. Educ. Code § 42.006

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77. Tex. Educ. Code § 21.044(e).
78. Tex. Educ. Code § TEC 21.0441.
79. Tex. Educ. Code § TEC 21.352.
80. Tex. Educ. Code § 21.352(e); note that this bill overturns the Commissioner's ruling that a Board of Trustees was not required to consider prior evaluations to support the nonrenewal of a teacher in *Hudson v. Pasadena Ind. Sch. Dist.,* Comm'r of Educ. Dkt. No. 107-R1-0712 (2012).
81. Tex. Educ. Code § 7.038
82. Tex. Educ. Code § 7.064
83. Tex. Educ. Code § 21.458.
84. Local Gov't Code § 180.007
85. Tex. Educ. Code § 11.171(c)
86. Tex. Educ. Code § 11.1514
87. Tex. Gov't Code § 552.147 (current)
88. Tex. Gov't Code § 552.024(a-1)
89. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1897 (1974)
90. Tex. Educ. Code § 37.0181
91. Tex. Educ. Code § 21.054(d)-(f)
92. Tex. Educ. Code § 21.044(c-1)-(c-2)
93. Tex. Health & Safety Code § 161.325
94. Tex. Educ. Code § 38.0041(c)
95. Tex. Educ. Code § 12.101(b-1)
96. Tex. Educ. Code §12.110(e)
97. Tex. Educ. Code § 12.052.
98. Tex. Educ. Code § 12.120(a) (current)
99. Tex. Educ. Code § 12.120(a-1)
100. Tex. Educ. Code § 25.082(d)
101. Tex. Educ. Code § 25.082(b)
102. Tex. Educ. Code § 37.0811(a)
103. Tex. Educ. Code § 37.0811(b)
104. Tex. Educ. Code § 37.0811(b)
105. Tex. Educ. Code § 37.0811(c)
106. Tex. Educ. Code § 37.0811(e)
107. Tex. Educ. Code § 37.0811(d)
108. Tex. Educ. Code § 37.0811(j)
109. Tex. Educ. Code §§ 44.031(a)(4); 44.901.
110. Tex. Gov't Code 791.001(j)
111. We are just kidding about Festivus; HB 308 would not apply to this holiday developed by a writer for the hit television comedy, "Seinfeld," as it is probably not considered a "traditional" winter holiday.
112. Tex. Educ. Code § 29.920.
113. House Bill 1501; Tex. Educ. Code § 25.0821.