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EDUCATION LAW

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WITH each passing year, it seems that school districts are faced with an increasingly complex variety of laws with which to comply, and, along with these laws and rules, are an increasing number of legal actions to defend. This article will survey legal developments affecting Texas school districts, spanning the time from approximately October 2000 to October 2001. This article does not attempt an exhaustive review but merely highlights the significant judicial decisions issued during the relevant time period. Cases are surveyed by subject, beginning with student-related issues, followed by a discussion of cases involving employment, procedure, immunity, open government laws and federal and constitutional matters.

A. STUDENT ISSUES

Events in recent years have raised security concerns for public schools, making the balance between school districts' authority to regulate the environment and student and employee rights a particularly delicate one. The judiciary seems, for the most part, to have expressed support for school districts' efforts to maintain safe, orderly schools, as exemplified in the following case.

1. Student Searches

Shortly after the infamous Columbine shooting, officials at Brazosport ISD found a threatening letter in a high school computer room.[1] Several days later the police frisked and handcuffed fourteen students, who had associated with the suspect, and transported the students in police cars to the municipal court where they were detained for several hours.[2] The police did not incarcerate the students, charge them with a crime, or physically injure them. The principal publicly announced that the targeted students had done nothing wrong and instructed the other stu-

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1. Stockton v. City of Freeport, Tex., 147 F. Supp. 2d 642, 646 (S.D. Tex. 2001).
2. *Id.* at 643.

dents not to retaliate against them. Even so, several students and teachers harassed the targeted students, prompting the targeted students to sue the school district and the police department.[3]

The court found that the students' legitimate and substantial Fourth Amendment protections against unreasonable search and seizure were outweighed by the school's dramatically compelling interests in "maintaining a safe place of learning" and preventing "indiscriminate violence at school."[4] Although the court questioned the school's delay of several days in acting on its concerns, the court allowed the school some latitude in deciding how quickly to act in such a situation. The court emphasized that, even though a less-intrusive means could have been used, the officials' actions had been effective to prevent violence because "[t]he Fourth Amendment does not require that a search or seizure be conducted in the least restrictive means."[5] The court characterized the officials' "extraordinary overreaction" as, "at best, insensitive, heavy-handed actions, and at worst, bumbling hysteria . . . ."[6] Even so, the court dismissed the students' claims, refusing to second-guess the school and law enforcement officials in the aftermath of the Columbine tragedy.[7]

While the *Stockton* case confirms that school districts may have broader authority when responding to threats to student safety, its holding was premised on the close proximity in time of the Columbine events to the threats made at Brazosport High. Given the current climate, however, it seems likely that other courts would apply similar reasoning to authorize school officials to take action—rather than risk danger—when presented with a potential crisis. The *Stockton* case is certainly solid support for school attorneys to cite in defending a civil rights claim.

School officials have long known that they are not subject to the probable cause standard in order to search students; they need only have a reasonable basis for conducting the search.[8] In *Bundick v. Bay City Independent School District*, the Federal District Court for the Southern District of Texas applied the lower "reasonable suspicion" standard and upheld the expulsion of a student from school based on the results of a search of the student's truck.[9]

During a routine search using trained dogs, a dog alerted to David Bundick's truck while it was parked at the school parking lot.[10] A school district patrolman was notified, and Bundick was summoned to the truck. As requested, Bundick opened the cab and the toolbox, where a machete was found. The court found that the search of Bundick's truck was con-

3. *Id.* at 642.
4. *Id.* at 646-47.
5. *Id.* at 647.
6. *Stockton*, 147 F. Supp. 2d at 647.
7. *Id.*
8. *See* Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735, 738 (S.D. Tex. 2001).
9. *Id.* at 738.
10. *Id.*

stitutional.[11] It was justified at its inception, given the dog's alert. The fact that the search uncovered a machete rather than a suspected substance was irrelevant.[12]

Bundick complained that his expulsion deprived him of his liberty and property interests in his education without due process of law, but the court found this claim to be "without foundation."[13] Bundick continued to make progress in his education, earning sufficient credits to graduate and receive his diploma. Therefore, he could not complain of being deprived of an education; rather, he complained that he was being denied participation in extracurricular activities.[14] Citing Fifth Circuit precedent, the court held that the federal constitution does not protect a student's interests in participating in extracurricular activities.[15] For that matter, nothing in Texas law would support such a claim.[16] Moreover, the court found that Bundick received more than adequate procedural due process: he received a conference with the principal three days after the machete was found, and several weeks later an expulsion hearing, at which he was represented by an attorney and was permitted to call and cross examine witnesses.[17] Thereafter, he was provided an opportunity to present his appeal to the board. The court held that Bundick had no basis for challenging the adequacy of the district's procedures.[18]

Finally, Bundick claimed that he did not know the machete was in his truck, and therefore, school officials had not demonstrated the necessary mental state to support his expulsion.[19] Although seemingly tempted by this argument, the court rejected it, holding that "[s]cienter is not a requirement of the school district's policy, and that policy is entitled to deference."[20] Perhaps more significant was the court's statement adding that "[s]cienter 'can be imputed from the fact of possession.'"[21] In so holding, the court noted that the school district's policy and code of conduct, as well as state law, all prohibit possession of an illegal knife.[22] Therefore, the school district's expulsion decision could not be said to be arbitrary, capricious, irrational, or inconsistent with the goals of the school in a manner that would violate substantive due process rights.[23]

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11. *Id.* at 739.
12. *Id.*
13. *Bundick*, 140 F. Supp. 2d at 739.
14. *Id.*
15. *Id.*
16. *Id.* (citing Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 561 (Tex. 1985); Edgewood Indep. Sch. Dist. v. Paiz, 856 S.W.2d 269, 270 (Tex. App.—San Antonio 1993, no writ)).
17. *Id.*
18. *Bundick*, 140 F. Supp. 2d at 740.
19. *Id.*
20. *Id.*
21. *Id.* (quoting Seal v. Morgan, 229 F.3d 567, 585 (6th Cir. 2000)).
22. *Id.* at 741.
23. *Bundick*, 140 F. Supp. 2d at 741.

2. Student Drug Testing

Since the U.S. Supreme Court granted school districts limited authority to drug-test students in *Vernonia School District 47J v. Acton*,[24] school districts have been testing the boundaries of that authority. Two Texas school districts have met challenges to their policies, both of which went far beyond the limits of *Vernonia*.[25] To date, neither case has offered clear guidance for schools wishing to drug test students. The decision of the district court in *Gardner v. Tulia Independent School District* was not reported, but it involved a policy that required all students participating in extracurricular activities to submit to random drug testing as a condition of their participation in these activities.[26] The school district's testing procedures were quite similar to the procedures at issue in the *Vernonia* case. Upon receiving an adverse ruling from the district court, the school district appealed, and the Fifth Circuit heard oral arguments in November 2001.[27] *Gardner* presented the Fifth Circuit with its first opportunity to consider a student drug testing case since the Supreme Court handed down its decision in *Vernonia*.

While the *Gardner* case will hopefully provide school districts with some direction in the near future, another Texas case, *Tannahill v. Lockney Independent School District*, offers little more than an admonition not to try to extend *Vernonia* beyond its specific terms.[28] The Lockney school district began with a voluntary drug-testing program in 1997.[29] In 1999, it made the program mandatory for all students in grades six through twelve. All students and their parents were required to sign a consent form agreeing that the student would submit to an initial test and random testing thereafter. Any refusal by the student and/or parent to sign the consent form would be treated as a positive test and would result in disciplinary action, including possible placement in an alternative school, disqualification from extracurricular activities, and disqualification from receiving honors.[30]

A sixth grade student and his father sued, claiming that the Lockney school district's mandatory drug-testing policy violated the Fourth Amendment.[31] Following guidance from the U.S. Supreme Court and the Fifth Circuit Court of Appeals, the court recognized that the district's drug testing program would be constitutional only if the district could demonstrate a "special need" to test students.[32] The court found that the

24. 515 U.S. 646 (1995).
25. *See* Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001); Gardner v. Tulia Indep. Sch. Dist., 183 F. Supp. 2d 854 (N.D. Tex. 2000), appeal filed, No. 00-11404 (5th Cir. June 25, 2001).
26. Gardner v. Tulia Indep. Sch. Dist., 183 F. Supp. 2d 854 (N.D. Tex. 2000), appeal filed, No. 00-11404 (5th Cir. June 25, 2001).
27. *Id.*
28. 133 F. Supp. 2d 919 (N.D. Tex. 2001).
29. *Id.* at 920.
30. *Id.* at 920-23.
31. *Id.* at 919.
32. *Id.* at 924.

district's drug testing program was not adopted in response to exigent circumstances such as an identified drug crisis or out of concern for student safety.[33] Furthermore, the court determined that the policy was overbroad, because the school district subjected a much larger segment of the student population to testing than the group of student athletes in *Vernonia*.[34] Many of the students who were subjected to testing had higher expectations of privacy than student athletes. In short, the court concluded that the school district had not demonstrated a special need sufficient to outweigh students' Fourth Amendment rights.[35] Quoting Justice Brandeis, the court noted: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[36] Accordingly, the court struck down the district's drug testing program.[37] The district appealed, but the case has since settled.

While courts are generally supportive of school districts' efforts to control the educational environment, this support is not infinite. The courts in the Fifth Circuit are still reluctant to support efforts to expand drug-testing of students beyond the parameters of *Vernonia*.

3. *Sexual Harassment*

Sexual harassment cases brought by students in the past year were resolved as directed by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*.[38] In order to prevail on a claim against a school district under Title IX, plaintiffs must have a very strong case, including evidence that school officials were deliberately indifferent to the acts of alleged sexual harassment.[39]

In *Wilson v. Beaumont Independent School District*, Ken Wilson, a mildly retarded boy, was repeatedly bullied and picked on by another mentally retarded boy, John Doe.[40] As a result, their teacher made sure the two were separated in class and on the school bus. One day, however, the conduct went beyond bullying. After a restroom break, Wilson indicated that John Doe, the alleged harasser, had asked Wilson to perform oral sex on him and forced him to have anal sex.[41] Doe denied this version of the events, and when the teacher reported the incident to the principal, she told him there had been no sexual contact, despite the fact that the evidence on this issue was conflicting.[42] The school did not notify the parents, but made sure the boys were separated.[43] A few days later, Wil-

33. *Tannahill*, 133 F. Supp. 2d at 930.
34. *Id.* at 929.
35. *Id.* at 930.
36. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).
37. *Id.*
38. Davis v. Monroe Co. Bd. of Educ., 526 U.S. 629 (1999).
39. *Id.* at 650.
40. 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001).
41. *Id.*
42. *Id.*
43. *Id.*

son's parents learned about the incident, filed a complaint with Child Protective Services (CPS), and later filed suit.[44]

The *Wilson* court recognized the applicable standard for student-to-student sexual harassment under Title IX as that established by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*.[45] To support their claims, therefore, the plaintiffs had to show (1) that the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive Ken Wilson of the educational opportunities provided by the school; (2) the district had actual knowledge of the sexual harassment; and (3) the district was deliberately indifferent to the harassment.[46] Applying this test, the court found that the plaintiffs failed to show that school officials were deliberately indifferent.[47] The defendants were not required to remedy sexual harassment, the court observed, but had to respond to known peer harassment in a manner that was not unreasonable.[48] The court found that the students' teacher and the principal took steps to remedy the situation once they were aware of it.[49] The principal, for example, interviewed the students, contacted CPS and the police department, interviewed employees and obtained their written statements, met with Wilson and his parents, and had John Doe transferred to another school.[50]

Although the court conceded that, in hindsight, school officials could have taken "swifter and more appropriate action," the court recognized that "there is no legal requirement of perfection."[51] School officials were not, therefore, deliberately indifferent. Nor was the alleged harassment sufficiently severe, pervasive, and objectively offensive to support Title IX liability.[52] The bullying conduct that had occurred throughout the year was not part of the court's analysis; there was no evidence that it was gender-related, and there were no other incidents of gender-related harassment.[53] Although the incident of alleged harassment was "unarguably severe," the court found no *systematic* effect of denying educational opportunities or benefits.[54] Therefore, it granted the defendants' motion for summary judgment on the Title IX claims.[55] In dismissing the federal claims, the court noted that the plaintiffs could bring their state law causes of action for negligence, gross negligence, and respondeat superior in state court.[56] The moral of the story for school officials is: do

44. *Id.*
45. *Wilson*, 144 F. Supp. 2d at 692 (citing Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999)).
46. *Id.*
47. *Id.* at 693.
48. *Id.*
49. *Id.*
50. *Wilson*, 144 F. Supp. 2d at 693.
51. *Id.* at 694.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Wilson*, 144 F. Supp. 2d at 694.
56. *Id.*

something.

4. Student Uniforms

The Fifth Circuit Court heard two appeals in 2001 from students and parents objecting to public schools' use of mandatory uniforms.[57] Both cases upheld the school districts' authority to require uniforms, recognizing that while students may have expression rights in what they wear, school districts have important interests that may be served by requiring student uniforms. The school districts' interests have, in these two cases, outweighed the students' asserted rights. The first case to reach the Fifth Circuit Court of Appeals arose in Louisiana, the second in Texas. Both involved districts that had adopted uniforms pursuant to recently enacted state laws authorizing the practice.[58]

Since 1997, Louisiana school districts have had the discretion to implement mandatory uniforms.[59] The Bossier Parish School Board exercised this option and ordered all of its schools to adopt mandatory uniforms.[60] Several parents filed suit, alleging that the uniform requirement violated their children's rights to free speech, failed to account for religious preferences, and denied their children's liberty interests to wear clothing of their choice. The district court granted summary judgment for the school district, and the parents appealed to the Fifth Circuit Court of Appeals.[61]

A school board's uniform policy will pass constitutional scrutiny if it furthers an important governmental interest—one that is unrelated to the suppression of student expression—and if the incidental restrictions on First Amendment rights are no more than necessary to facilitate that interest.[62] While the court recognized that a person's choice of clothing may be sufficiently expressive to warrant First Amendment protection, educators do have latitude in regulating student conduct.[63] Further, the court found that the school district's uniform policy was viewpoint-neutral on its face and as applied.[64] In denying the free speech claim, the court noted, "it is not the job of the federal courts to determine the most effective way to educate our nation's youth."[65] Here, the school board's interests, were to increase test scores and reduce disciplinary problems, not to suppress student speech.[66] Furthermore, the school board produced evidence that once the uniform policy was implemented, these in-

57. *See* Canady v. Bossier Parish Sch. Dist, 240 F.3d 437 (5th Cir. 2001); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).

58. *See* TEX. EDUC. CODE ANN. § 11.162 (Vernon 1996); LA. REV. CIV. STAT. § 17.416.7 (West 1997).

59. Canady v. Bossier Parish Sch. Dist., 240 F.3d 437, 438 (5th Cir. 2001).

60. *Id.* at 439.

61. *Id.*

62. *Canady*, 240 F.3d at 442.

63. *Id.* at 443

64. *Id.* at 439.

65. *Id.*

66. *Id.* at 444.

terests were in fact achieved.[67] The court rejected the parents' other arguments, finding that they had not demonstrated infringement of a liberty interest, nor had the district court improperly denied them the opportunity to conduct additional discovery.[68]

Not long after the Fifth Circuit decided *Canady*, it heard a second case raising constitutional concerns in connection with student uniforms.[69] In 1995, the Texas Legislature enacted a statute authorizing school boards to adopt rules requiring students at a school in the district to wear school uniforms.[70] Acting pursuant to this authority, and motivated by research indicating the beneficial effects of uniforms on student learning and the school environment, Forney ISD adopted a district-wide mandatory uniform policy.[71] Failure to comply with the uniform requirement would result in disciplinary action, including expulsion. Students with bona fide religious or philosophical objections to wearing a uniform could apply for an exemption from the requirement.[72] In order to receive the exemption, parents were required to complete a questionnaire designed to assess the sincerity of their beliefs. The questionnaire asked, for example, whether the student had ever participated in any activity—such as girl scouts or little league—that might require the student to wear a uniform.[73]

Seventy-two parents sought exemptions from compliance with the uniform policy, but only twelve exemptions were granted by the Forney school district.[74] Most students who had cited philosophical or religious reasons as the basis for their objection were denied exemptions, because they had worn some type of uniform in the past. Several parents and students who were denied the exemptions filed suit.[75] The students alleged violations of their free speech rights, while the parents alleged violations of their fundamental right to control the upbringing and education of their children. In addition, several families alleged violations of their freedom to exercise their religious rights. A federal district court granted the defendants' motion for summary judgment, and the Fifth Circuit Court of Appeals affirmed.[76]

The Fifth Circuit's analysis began with the free speech claim.[77] It assumed, without deciding, that the First Amendment applied to the conduct implicated in the uniform policy but, for several reasons, ultimately found that the uniform policy did not violate the First Amendment. First, the policy was adopted under the authority of state law.[78] Second, it was

67. *Canady*, 240 F.3d at 442.
68. *Id.* at 444-45.
69. Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001).
70. TEX. EDUC. CODE ANN. § 11.162 (Vernon 1996).
71. *Littlefield*, 268 F.3d at 279.
72. *Id.* at 281.
73. *Id.* at 281 n.4.
74. *Id.* at 281.
75. *Id.*
76. *Littlefield*, 268 F.3d at 286.
77. *Id.* at 282-84.
78. *Id.* at 286.

adopted to serve important and substantial interests of the school district and its board.[79] These interests included: improving student performance, instilling self-confidence, fostering self-esteem, increasing attendance, decreasing disciplinary referrals, and lowering drop-out rates.[80] Third, there was no evidence that the policy was enacted to suppress student expression.[81] Finally, the court concluded that the policy was no more than necessary to facilitate the district's interests.[82] The Fifth Circuit therefore affirmed the lower court's decision on the free speech claim.[83]

The court next reviewed the jurisprudence interpreting parents' interests in directing the upbringing and custody of their children.[84] The parents argued that mandatory school uniforms interfered with their parental rights to teach their children to be guided by their own conscience in making decisions, to understand the importance of appropriate grooming and attire, and to understand and respect their own individuality and the individuality of others.[85] The parents also claimed that a "strict scrutiny" analysis should apply.[86] The court of appeals determined, however, that rational basis review was appropriate.[87] Applying this standard, the court concluded that the uniform policy was rationally related to the district's interest in furthering the legitimate goals of school safety, decreasing socio-economic tensions, increasing attendance, and reducing drop-out rates.[88] The court thus determined that there was no violation of the parents' Fourteenth Amendment rights.[89]

The court then examined the parents' religious rights claims under the First Amendment's Free Exercise and Establishment Clauses. Finding the school district's opt-out procedure to be a neutral and rational means of assessing sincerity, the court determined that the process did not interfere with the free exercise of religion.[90] The parents could neither establish a religious purpose behind the opt-out policy, nor prove that any effect of the policy advanced or inhibited a particular religion. In rejecting the final claim, the Fifth Circuit affirmed the judgment in favor of the Forney school district.[91] Judge Barksdale filed a concurring opinion, bemoaning the court's avoidance of the free speech issue.[92] He argued that the court could have directly resolved the issue by holding that the

79. *Id.*
80. *Id.*
81. *Littlefield*, 268 F.3d at 287.
82. *Id.*
83. *Id.*
84. *Id.* at 287-88.
85. *Id.*
86. *Littlefield*, 268 F.3d at 288.
87. *Id.* at 289.
88. *Id.* at 291.
89. *Id.*
90. *Id.* at 292.
91. *Littlefield*, 268 F.3d at 293-95.
92. *Id.* at 295.

wearing of a school uniform is not expressive conduct.[93]

The cases discussed above indicate a judicial tendency to defer to school officials when student conduct, safety, or learning may be at issue.

B. Employment Cases

1. *Sexual Harassment*

Disputes between school districts and school employees continue to provide the courts with a variety of employment-based litigation. Sexual harassment was once again before the U.S. Supreme Court in *Clark County School District v. Breeden*.[94] In *Breeden*, the Supreme Court issued a short and simple reminder to lower courts hearing sexual harassment disputes: the harassment must be severe. This case arose in 1994, when Shirley Breeden's male supervisor met with Breeden and another male employee to review psychological evaluation reports of job applicants.[95] One of the applicants had once said to a co-worker: "I hear making love to you is like making love to the Grand Canyon."[96] The supervisor read the statement aloud, looked at Breeden, and said that he didn't know what that statement meant. The other male employee responded that he would tell the supervisor later, and both men chuckled.[97]

Breeden complained about the comment to the offending employee, two assistant superintendents, and the offending employee's supervisor. She later filed suit, alleging that she was retaliated against for complaining.[98] The Ninth Circuit Court of Appeals ruled in favor of Breeden, but the United States Supreme Court reversed.[99] The Supreme Court stated that "[n]o reasonable person could have believed that the single incident recounted above violated Title VII standards."[100] Her supervisor's comment was at most an isolated incident that would not support a claim for a violation of Title VII.[101] Citing its own precedent requiring sexual harassment to be "extremely serious" in order to satisfy Title VII, the Court determined that summary judgment in favor of the district was appropriate.[102]

2. *Speech*

While school employees have free speech rights, those rights are not without limit. In *Beattie v. Madison County School District*, for example, a middle school secretary openly supported her superintendent's oppo-

93. *Id.* at 295-96.
94. 121 S. Ct. 1508 (2001).
95. *Id.* at 1509.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Breeden*, 121 S. Ct. at 1509.
100. *Id.* at 1510.
101. *Id.*
102. *Id.* at 1510-11.

nent in the election for superintendent of the school district.[103] The superintendent recommended termination of the secretary's employment, and the school board adopted that recommendation. The secretary filed suit, alleging she was terminated in retaliation for her expression of free speech regarding the superintendent election.[104]

All board members testified that they had not been aware of the secretary's political activities.[105] The school board members also stated that they had been neutral in the campaign for superintendent and, even without the recommended action, would have terminated her employment based on complaints about her rudeness to parents and students. Because the board established that it would have voted to terminate Beattie regardless of the superintendent's recommendation to do so, the board was shielded from liability for any retaliation that might have occurred.[106]

The superintendent's motives were not imputed to the board, because the superintendent did not have final policy-making authority.[107] The court noted that "[t]iming alone does not create an inference that the termination is retaliatory."[108] Because the district was able to demonstrate legitimate, non-retaliatory reasons to support Beattie's termination, the court of appeals upheld the board's action.[109]

3. *Leaves*

Temporary disability leave has long been regarded as sacrosanct in Texas; few school districts would dare initiate adverse employment actions against employees who had been placed on temporary disability leave. One district's legal success, however, has demonstrated that temporary disability is not an insurmountable obstacle to termination.[110] In *Nelson v. Weatherwax*, the Fort Worth ISD notified a teacher by letter that it intended to recommend termination of her contract for good cause.[111] On the same day that the letter was mailed, the teacher made a written request for temporary disability leave.[112] The school board adopted the independent hearing examiner's recommendation to terminate the contract effective upon the employee's return from temporary disability leave.[113]

The temporary disability statute, Texas Education Code section 21.409(a), states that "the contract or employment of the educator may not be terminated by the school district while the educator is on a leave

103. 254 F.3d 595 (5th Cir. 2001).
104. *Id.*
105. *Id.* at 603.
106. *Id.*
107. *Id.* at 605.
108. *Beattie*, 254 F.3d at 605.
109. *Id.*
110. *See* Nelson v. Weatherwax, 59 S.W.3d 340 (Tex. App.—Fort Worth 2001, pet. denied).
111. *Id.* at 342.
112. *Id.*
113. *Id.* at 343.

of absence for temporary disability."[114] On appeal, both parties argued that this language supported their interpretation of the law.[115] The district argued that the teacher should not be allowed to use her temporary disability leave offensively to preclude termination.[116] Relying on legislative history and the commissioner's interpretation of the statute, the court upheld the district's decision, stating that the temporary disability statute "prohibits only termination of a contract or of employment during an educator's temporary disability leave. It does not prohibit the continuation of an already-instituted investigation to a procedural conclusion, short of actual termination."[117] The court explicitly declined to hold that the temporary disability law is never violated by a district's decision to pursue termination while an educator is on leave.[118] The court acknowledged that its decision was specific to the facts at issue.[119] Nevertheless, the decision remains helpful support for school districts with employees who would have otherwise faced termination for good cause if not for their temporary disability status.

C. EDUCATOR CONTRACTS

Several questions regarding nonrenewal hearings have been lingering in the backs of school lawyers' minds for many years, such as: what is a school board's standard in making a nonrenewal decision? Recently, a state court of appeals provided some enlightenment in *Whitaker v. Moses*.[120] Willie G. Whitaker, an employee of Marshall ISD, contested the nonrenewal of his contract, complaining that the board inappropriately applied the substantial evidence standard to make the nonrenewal decision.[121] Whitaker appealed to the commissioner, and the commissioner agreed with Whitaker that the board's use of the substantial evidence standard was improper. The commissioner, however, denied the appeal because Whitaker had failed to object prior to the consideration of the evidence by the board.[122] The district court affirmed the commissioner's decision, and Whitaker appealed.[123]

Section 21.301 of the Texas Education Code requires the commissioner to restrict his review to evidence in the local record.[124] The code also states that the district court must affirm the commissioner unless his decision is not supported by substantial evidence or contains erroneous conclusions of law. In his first point of error, Whitaker contended that the

114. TEX. EDUC. CODE ANN. § 21.409(a) (Vernon 1996).
115. *Weatherwax*, 59 S.W.3d at 347.
116. *Id.*
117. *Id.* at 348.
118. *Id.* at 348-49.
119. *Id.* at 349.
120. 40 S.W.3d 176 (Tex. App.—Texarkana 2001, no pet.).
121. *Id.* at 176.
122. *Id.* at 177-78.
123. *Id.* at 178.
124. *Id.* (citing TEX. EDUC. CODE ANN. § 21.301 (Vernon 1996)).

district court erred in concluding that he failed to preserve error.[125] Whitaker argued that only procedural errors – not substantive ones—must be preserved. In essence, he contended that the board's application of an improper evidentiary standard was a substantive error that he was not required to preserve.[126] The court declined to grant this request, however, and held that the commissioner correctly found that Whitaker waived the issue by not raising an objection at the hearing.[127] The court reasoned that to rule otherwise would permit a party to "lay behind the proverbial log at the hearing only to later waylay the board. The better construction would be to require a party to create an issue for the commissioner's review by objecting at the board level."[128] Raising an objection at the hearing is, therefore, necessary to raise that issue before the commissioner.

The court also rejected Whitaker's second point of error: that he suffered a denial of his due process rights when the board applied an incorrect standard of proof to the evidence in his hearing.[129] Noting that section 21.204(e) of the Education Code clearly states that a teacher does not have a property interest in a contract beyond its term, the court ruled that Whitaker was not entitled to constitutional due process in the nonrenewal of his contract.[130]

In another nonrenewal development, a Texas court of appeals has cast doubt on a reason used by many school districts to not renew a term contract employee.[131] The case arose in Peaster ISD and involved two teachers who were accused, by a former student, of having consensual sexual relationships with that student.[132] The superintendent recommended, and the school board agreed, that both teachers' contracts should not be renewed because the former student's allegations had received such widespread publicity that the teachers' effectiveness was irreparably diminished.[133] The commissioner upheld the district's nonrenewal decision, but a state district court reversed in favor of the teachers.

The school district's nonrenewal policy listed, as one of twenty-six reasons for nonrenewal, "any activity, school-connected or otherwise, that, because of the publicity given it, or knowledge of it among students, faculty, and community, impairs or diminishes the employee's effectiveness in the district, could result in a teacher's contract not being re-

125. *Whitaker*, 40 S.W.3d at 178.
126. *Id.*
127. *Id.* at 179.
128. *Id.*
129. *Id.*
130. *Whitaker*, 40 S.W.3d at 179 (citing TEX. EDUC. CODE ANN. § 21.204(e) (Vernon 1996)).
131. *See* Peaster Indep. Sch. Dist. v. Glodfelty, 63 S.W.3d 1 (Tex. App.—Fort Worth 2001, no pet.).
132. *Id.* at 3.
133. *Id.*

newed."[134] The school board and the commissioner based their decisions on an interpretation of the policy that did not require an activity of the teachers but could be an activity of others—including one who made an allegation about the teacher. The court rejected this theory based on its reading of the policy: "The preestablished reason for the nonrenewal given to Appellees was that of engaging in an "activity," not allegations of an activity."[135] The school district produced no evidence of any "activity," but only of allegations, rumors, and gossip, none of which the court considered sufficient to uphold a nonrenewal.[136] Furthermore, "fairness dictates against holding teachers' term contracts at the mercy of nothing more than allegations."[137] Even if allegations against a teacher result in such disruption that the teacher's effectiveness is diminished, according to this court of appeals, a nonrenewal for the reason alleged here would require that the teacher actually have engaged in the activity that provoked the disruption.[138] Any contrary interpretation would render the teacher's ability to try to prove his or her innocence futile.[139] Thus, a school board's belief that a teacher's effectiveness has been diminished is an invalid basis for nonrenewal of a teaching contract unless there is actual proof that the teacher engaged in the activity which allegedly resulted in the teacher's diminished effectiveness.

The developments concerning nonrenewal of educator contracts were minor compared to those involving termination of those contracts. The independent hearing examiner process for conducting educator termination proceedings, initially provided little guidance to school districts. After using the system for five years, school districts now have the benefit of judicial guidance on the intricacies of the process.[140] One of the most frequently debated issues has been whether a school board could add to a hearing examiner's findings of fact. In *Montgomery Independent School District v. Davis*, the Texas Supreme Court considered this matter and confirmed what many school lawyers had come to believe: a school board cannot, as a general rule, add findings of fact to the recommendation of an independent hearing examiner.[141]

Although use of a hearing examiner is required for termination proceedings, it is optional when conducting nonrenewal hearings. *Davis*, however, did involve a nonrenewal. After a five-day hearing, the hearing examiner determined that the teacher did not fail to maintain an effective working relationship or good rapport with parents and the community. Nevertheless, the school board made additional fact findings, based on the record of the hearing, and voted not to renew the teacher's contract.

134. *Id.* at 5.
135. *Id.* at 9.
136. *Peaster*, 63 S.W.3d at 10.
137. *Id.* at 14.
138. *Id.*
139. *Id.* at 14.
140. *See, e.g.*, Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559 (Tex. 2000).
141. *Id.* at 561.

The commissioner of education did not issue a written decision, thereby upholding the district's decision; but the teacher appealed, and the district court ordered that the teacher be reinstated.[142] The court of appeals affirmed.[143]

The Texas Supreme Court reviewed the procedures set forth in the Texas Education Code and determined that, once a school board has chosen to have a hearing examiner serve as factfinder, the board's role is limited.[144] When it chooses to delegate the factfinding role, "a board cannot then ignore those findings with which it disagrees and substitute its own additional findings."[145] A contrary interpretation would render the hearing examiner process meaningless.[146] The Court did allow, however, that while an independent hearing examiner decides the facts, the school board retains the authority to make the ultimate decision of whether the facts demonstrate a violation of board policy. In this case, the board's ultimate determination was based only on its additional fact findings. Because that fact finding was unauthorized, the board's nonrenewal decision could not stand.[147] With *Davis*, the Texas Supreme Court has thus filled a void in the Education Code: school boards may not add fact findings to the recommendations of hearing examiners.

Although school boards may not add to a hearing examiner's recommendations, they may make changes to them, within certain boundaries. Houston ISD accomplished this in *Miller v. Houston Independent School District*.[148] Marsha Miller was employed under a continuing contract by Houston ISD for twenty-eight years.[149] After she was transferred to a different high school, she became dissatisfied with her commute and did not report to work for approximately three months. She eventually reported to work, but shortly thereafter, the board notified Miller that it intended to terminate her contract for her repeated failure to comply with district directives and her neglect of her duties.[150] An independent hearing examiner determined that good cause did not exist to terminate Miller's contract and recommended that she be reinstated without back pay for the three-month absence. The board adopted some of the hearing examiner's findings of fact but made numerous changes to the recommendation and, rather than reinstating her, voted to terminate Miller's contract. The commissioner, the trial court, and the court of appeals upheld the board's decision.[151]

Miller raised several objections, the strongest of which was her argument that the commissioner erred in upholding the board's modification

142. *Davis*, 34 S.W.3d at 561.
143. *Id* at 561-62.
144. *Id.* at 564.
145. *Id.*
146. *Id.*
147. *Davis*, 34 S.W.3d at 568.
148. 51 S.W.3d 676 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).
149. *Id.* at 678.
150. *Id.* at 679.
151. *Id.*

of the hearing examiner's recommendation, because the board had no authority to add a dispositive factfinding.[152] The court held, however, that the board did not add a finding: the hearing examiner had stated in his recommendation that Miller had failed to return to work.[153] Where this statement appeared in the hearing examiner's recommendation was of no consequence, wherever it was placed, it was a factfinding. Further, there was no dispute that Miller did not work for almost three months.[154] Citing the Texas Supreme Court's decision in *Montgomery Independent School District v. Davis*,[155] the court observed that a board may always rely on undisputed evidence.[156] In this case, therefore, the board could rely on this fact to support its conclusion that good cause existed to terminate Miller's contract.[157]

The court's analysis of Miller's arguments regarding the board's modifications of the hearing examiner's recommendation may guide attorneys in litigating similar matters. For example, the board rejected the finding that it is possible for an employee to be assigned to her home during the grievance process as not supported by substantial evidence. Whether it was a finding of fact or a conclusion of law, the finding merely reflected district policy.[158] Miller also complained that the board had redesignated and modified a finding of fact describing the grievance process as a legal conclusion.[159] The court held that any error was harmless, because the finding was one regarding HISD's general policy; it had nothing to do with whether Miller was ever assigned to her home while proceeding with her grievance.[160]

Finally, Miller claimed that the commissioner erred in upholding the board's rejection or modification of two of the hearing examiner's legal conclusions.[161] Each of the hearing examiner's conclusions stated that the district had failed to prove good cause for discharge, but the board changed one conclusion to state that good cause had been proved. The commissioner determined that these conclusions were actually ultimate fact findings that could be rejected because they were not supported by substantial evidence. Miller argued that the commissioner erred in concluding that substantial evidence did not support the ultimate fact findings, but the court determined that the commissioner had not erred since Miller did not report to work for almost three months, despite being instructed to do so.[162] Accordingly, the court of appeals affirmed the trial

152. *Id.* at 682.
153. *Miller*, 51 S.W.3d at 683.
154. *Id.*
155. 34 S.W.3d 559 (Tex. 2000).
156. *Miller*, 51 S.W.3d at 683.
157. *Id.*
158. *Id.* at 684.
159. *Id.*
160. *Id.*
161. *Miller*, 51 S.W.3d at 685.
162. *Id.* at 686.

court's decision in favor of the board.[163]

A third decision involving educator contracts was one of the early appeals to reach the commissioner after the hearing examiner process was added to state law in 1995.[164] The Houston Independent School District proposed to terminate Beverly Goodie's contract for failure to comply with directives and policies regarding punishment, failure to comply with attendance policies, and failure to comply with professional growth requirements.[165] After a four-day hearing, an independent hearing examiner recommended that Goodie not be terminated. The school board rejected the independent hearing examiner's conclusions of law, and instead accepted the administration's proposed findings of fact and conclusions of law in deciding to terminate Goodie's contract.[166] Three days later, the board president sent a letter to Goodie, outlining the results of the board's vote and announcing why the board had changed one of the examiner's findings of fact and rejected another.[167] This letter did not, however, state a reason and legal basis—as required by the Education Code—for any of the board's changes to the hearing examiner's recommendation.[168] After Goodie appealed to the commissioner, the board president sent Goodie a second letter stating that the reasons for the decision were outlined in the hearing transcript.[169]

The commissioner found: (1) that the board had no authority to modify the hearing examiner's findings of fact or to add additional findings of fact; (2) that the conclusions of law were not supported by substantial evidence; and (3) that the board had failed to state a reason for modifying the hearing examiner's findings and conclusions.[170] The trial court reversed the commissioner's ruling,[171] but the court of appeals reversed again in favor of Goodie.[172]

The court of appeals focused on a provision in the Texas Education Code, section 21.259(d), which requires that a school board "state in writing the reason and legal basis for a change or rejection" of a hearing examiner's proposed findings of fact or conclusions of law.[173] Substantial evidence supported the commissioner's conclusion that the two letters sent from the school district to Goodie did not satisfy this condition.[174] The court determined that the first letter did not state a reason or a legal basis for making changes to the hearing examiner's recommendation.

163. *Id.*
164. *See* Goodie v. Houston Indep. Sch. Dist., 57 S.W.3d 646 (Tex. App.—Houston [14th Dist.] 2001, no pet.).
165. *Id.* 647-48.
166. *Id.* at 649.
167. *Id.*
168. *Id.* (citing TEX. EDUC. CODE ANN. § 21.259 (Vernon 1986)).
169. *Goodie*, 57 S.W.3d at 649.
170. *Id.* at 649-50.
171. *Id.* at 650.
172. *Id.* at 647.
173. *Id.* at 651 (citing TEX. EDUC. CODE ANN. § 21.259(d) (Vernon 1986)).
174. *Goodie*, 57 S.W.3d at 651.

The first letter was, therefore, inadequate under Education Code section 21.259(d).[175] Moreover, the second letter was simply a letter from the board president; it was not "sanctioned by the Board."[176] Contrary to the district's assertions, these errors were not merely procedural. Because the school district failed to comply with the statutory requirements, the court of appeals affirmed the commissioner's order that the school district reinstate Goodie and pay her back wages and benefits.[177]

One member of the three-judge panel dissented, noting that the record clearly indicated that, despite directives and warnings, Goodie was tardy 89 times in less than a two-year period.[178] Although the hearing examiner determined that Goodie's repeated tardiness did not constitute good cause for termination, the dissenting judge argued that the school board was not required to accept this conclusion, nor could it have given much more of an explanation than the statement it made: "Ms. Goodie's repeated failure to follow directives regarding attendance is good cause for her termination."[179] The board, the dissent pointed out, retains the authority to determine whether board policy was violated.[180]

D. Procedural Lessons

Courts offered school attorneys some important procedural lessons in areas such as standing, exhaustion of administrative remedies, and jurisdiction of the commissioner of education. The Texas Supreme Court issued a significant decision in *Bland Independent School District v. Blue*.[181] Bland ISD had contracted for the construction of a new high school using a pre-engineered metal building. The total cost of the project was $1,390,000, of which $1,050,000 was financed through a lease-purchase agreement with Citicorp.[182] The new building opened in August 1997, at which time the school district began making payments on the lease-purchase contract from state funds and local tax revenues.

In 1998, two taxpayers sued the district, seeking to enjoin it from making payments to Citicorp under the lease-purchase agreement.[183] They alleged that the contract with Citicorp was illegal because it was made without complying with the Public Property Finance Act in Chapter 271 of the Texas Local Government Code. The school district filed a plea to the jurisdiction, asserting that the Blues did not have standing to sue, as they could not show any particularized injury separate and apart from that of the general public.[184] A state district court ruled that the Blues

175. *Id.*
176. *Id.*
177. *Id.* at 652.
178. *Id.* (J., dissenting).
179. *Goodie*, 57 S.W.3d at 652.
180. *Id.* at 653 (citing Montgomery Indep. Sch. Dist. v. Davis, 34 S.W.3d 559, 565 (Tex. 2000)).
181. 34 S.W.3d 547 (Tex. 2000).
182. *Id.* at 549.
183. *Id.*
184. *Id.* at 550.

had standing to challenge the Citicorp agreement insofar as it provided financing for the building itself and work done on it, and not to financing for furnishings in the building that were clearly personal property.[185] The jurisdictional decision was based on the pleadings, not on any evidence introduced by the school district that revealed the status of the project or the source of the funds used to pay Citicorp.[186] A court of appeals concluded that the trial court had ruled properly on Bland ISD's plea to the jurisdiction, and the school district appealed to the Texas Supreme Court.[187]

The supreme court reviewed its own precedent regarding taxpayer standing, noting that the "jurisprudential justification for taxpayer suits to enjoin performance of illegal agreements is that the interference such suits pose to government activities is slight in comparison to the protection afforded taxpayers from preventing the culmination of illegal agreements made by public officials."[188] But in cases such as this, the court determined, justification is much less compelling. "When all that remains is a school district's repayment of a loan for work completed," it held, "allowance of a taxpayer action to prohibit such repayment threatens a substantial interference with governmental actions."[189] The court observed that if the Blues were to proceed with their suit and actually prevail on their actions, they would disrupt not only the district's already substantial investment in the high school but would also increase the risk to lenders and others that deal with governmental entities.[190] The potential for disruption was too great to allow a taxpayer with no particular interest distinct from the general public's to sue and perhaps prohibit the government from paying for goods and services it has already received and placed in use.[191]

One particularly hot issue of late was the exhaustion of administrative remedies doctrine. Several courts ruled that former employees were not required to exhaust administrative remedies, but not all former employees succeeded without fulfilling the requirement. In *Wilmer-Hutchins Independent School District v. Sullivan*, the Texas Supreme Court found no jurisdiction over an appeal due to the plaintiff's failure to exhaust remedies.[192] As part of a reduction in force, Wilmer-Hutchins ISD terminated the employment of a custodian who had returned to work after a workers' compensation injury.[193] The employee complained to the school district's attorney that the district had retaliated against her because she had filed a workers' compensation claim. The attorney informed the em-

185. *Id.*
186. *Blue*, 34 S.W.3d at 550.
187. *Id.* at 558.
188. *Id.* at 557-58.
189. *Id.* at 558.
190. *Id.*
191. *Blue*, 34 S.W.3d at 558.
192. 51 S.W.3d 293, 293 (Tex. 2001).
193. *Id.*

ployee that she could not advise her.[194] The attorney did not inform the employee of the district's grievance procedures or suggest that the employee seek legal counsel. The employee filed suit without first filing a grievance.[195]

The trial court dismissed the claim based on the employee's failure to exhaust administrative remedies.[196] The court of appeals reversed and remanded, holding that the employee's allegation that she had exhausted her administrative remedies was conclusive because the district had not alleged that the pleading was fraudulent.[197] The Texas Supreme Court again reversed and dismissed the case for lack of jurisdiction.[198]

The employee argued that the district should be estopped from arguing that the court lacks jurisdiction for failure to exhaust administrative remedies, because the district misled her about those remedies.[199] The Texas Supreme Court disagreed, holding that jurisdiction cannot be conferred by a party's conduct if the jurisdiction did not otherwise exist.[200] The undisputed evidence showed that the employee had not exhausted administrative remedies and, therefore, the court had no jurisdiction over the claim.[201]

By contrast, in *Mission Consolidated Independent School District v. Flores*, the plaintiff was not required to exhaust his available remedies.[202] Efren Flores was employed by Mission ISD as a bus driver until he sustained an on-the-job injury to his knee.[203] He received workers' compensation benefits for this injury and returned to work on modified duty for a short time before undergoing knee surgery.[204] Following the surgery, he was again released for modified duty, but the district did not reinstate him because it did not have any available positions. Flores contended that this reason was pretextual and that he was discharged in retaliation for filing a workers' compensation claim.[205] Accordingly, Flores filed suit against the school district.

The trial court rejected Mission ISD's pre-trial plea to the jurisdiction.[206] The court of appeals, agreeing with Flores, found that there was no administrative process under which he could pursue his claims of retaliation and wrongful discharge.[207] Flores could, therefore, go straight to court without having to first file a grievance.[208]

194. *Id.*
195. *Sullivan*, 51 S.W.3d at 293-94.
196. *Id.*
197. *Id.* at 293-94.
198. *Id.* at 294-95.
199. *Id.* at 294.
200. *Sullivan*, 51 S.W.3d at 294.
201. *Id.* at 295.
202. 39 S.W.3d 674 (Tex. App.—Corpus Christi 2001, no pet.).
203. *Id.* at 675.
204. *Id.*
205. *Id.* at 676.
206. *Id.* at 675.
207. *Flores*, 39 S.W.3d at 676.
208. *Id.* at 677-78.

An important decision regarding the handling of grievance appeals was *Grigsby v. Moses*.[209] In this case, a tennis coach at Granbury High School whose coaching duties extended over two semesters believed she was entitled to two stipends for performing these duties.[210] Like most Texas school districts, Granbury ISD requires employees to file a complaint within 15 days of the time he or she knows or should have known of the event or series of events causing the complaint. Pursuant to this policy, the coach filed a grievance with her principal.[211] The principal denied the grievance on the basis that it was not filed in a timely manner under board policy. The superintendent and the school board each denied her appeal on the same grounds.[212] The commissioner of education and a state district court upheld the school district's decision.[213]

On appeal, Grigsby contended that the district court erred, because the school district had waived the fifteen-day requirement by allowing a grievance presentation at the board meeting.[214] Citing its own precedent, the Third Court of Appeals explained that a school district waives its right to assert a time limitation by granting and conducting a hearing on an employee's complaint.[215] Grigsby argued that the school board relinquished its right to insist upon a time limit by merely listening to her complaint. The transcript of the board meeting indicated that the board listened to Grigsby's complaint, accepted documents in support of her argument, but took no action on her complaint, thereby upholding the superintendent's decision to deny the complaint on the basis of untimely filing.[216] This record did not convince the court of appeals that the board had waived the 15-day time limitation; the court upheld the trial court's decision in favor of the school district.[217]

The Third Court of Appeals issued an important decision regarding the jurisdiction of the commissioner of education in *Smith v. Nelson*.[218] The case arose in Zapata County ISD, which employed Pete Smith as Athletic Coordinator/Head Football Coach under a multi-year term contract beginning in 1997.[219] The contract included a reassignment provision pursuant to which the district reassigned Smith, with no change in pay, to the position of elementary school physical education teacher in October 1997. Smith's grievance regarding the reassignment was denied at all levels.[220] Smith then appealed to the commissioner, arguing that his reassignment would cause monetary harm because he would not be able to

209. 31 S.W.3d 747 (Tex. App.—Austin 2000, no pet.).
210. *Id.* at 749.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Grigsby* 31 S.W. 3d at 749.
215. *Id.* (citing Havner v. Meno, 867 S.W.2d 130 (Tex. App.—Austin 1993, no writ); Hernandez v. Meno, 828 S.W.2d 491 (Tex. App.—Austin 1992, writ denied)).
216. *Id.*
217. *Id.*
218. 53 S.W.3d 792 (Tex. App.—Austin 2001, pet. denied).
219. *Id.* at 793.
220. *Id.* at 793-94.

obtain future employment as a football coach or athletic director for a comparable salary.[221]

Section 7.057 of the Texas Education Code gives the commissioner of education jurisdiction to hear an appeal of someone who is aggrieved by: (1) the school laws of this state; (2) actions or decisions of a board of trustees that violate the school laws of the state; or (3) actions or decisions of a board of trustees that violate the provisions of a written employment contract between the district and an employee, if the violation causes or would cause monetary harm to the employee.[222] The only monetary harm Smith alleged was a loss of future earning capacity, which was insufficient to confer jurisdiction on the commissioner. The district court affirmed that decision.[223] The court of appeals initially reversed, but on its own motion, withdrew that opinion, affirming the decisions below.[224]

The court of appeals ultimately concluded that the commissioner had construed section 7.057 of the Texas Education Code correctly.[225] "To appeal to the Commissioner under section 7.057," the court held, "a teacher must allege that he has suffered or will suffer monetary harm in the context of the contract that has been violated, not that he may suffer harm from contracts that he may or may not secure in the future."[226] In so holding, the court noted that in revising section 7.057, the legislature intended to limit the number of grievances the commissioner could hear.[227]

E. IMMUNITY

Several interesting questions concerning both personal and governmental immunity were taken to the courts this past year. Of the cases discussed here, two provide reassurance,[228] while two raise concerns regarding the scope of immunity provided to public schools and their professional employees.[229]

The Fifth Circuit Court of Appeals affirmed its longstanding position on corporal punishment in *Moore v. Willis Independent School District*.[230] In this case, a student's gym teacher ordered him to perform 100 "up-downs" for violating a class rule by talking during roll call.[231] After he did the "up-downs," the student participated in 20-25 minutes of weightlifting. In the following days, he was diagnosed with a degenerative dis-

221. *Id.* at 794.
222. *Id.* (citing TEX. EDUC. CODE ANN. § 7.057 (Vernon 1986)).
223. *Smith*, 53 S.W.3d at 793.
224. *Id.*
225. *Id.* at 795.
226. *Id.*
227. *Id.* at 796.
228. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871 (5th Cir. 2000); Deaver v. Bridges, 47 S.W.3d 549 (Tex. App.—San Antonio 2001, no pet.).
229. *See* Myers v. Doe, 52 S.W.3d 391 (Tex. App.—Fort Worth 2001, pet. filed); Austin Indep. Sch. Dist. v. Gutierrez, 54 S.W.3d 860 (Tex. App.—Austin 2001, pet. filed).
230. 233 F.3d 871 (5th Cir. 2000).
231. *Id.* at 873.

ease of the skeletal muscle and renal failure, for which he was hospitalized and missed three weeks of school. The student's parents filed suit against the district and the teacher, alleging a federal due process violation along with state law claims.[232]

The Fifth Circuit Court of Appeals recognized that inflicting pain through unreasonably excessive exercise violates a student's constitutional right to bodily integrity, but that this right is not implicated in a case involving an allegation of corporal punishment intended as a disciplinary measure.[233] State law, the court explained, provides "adequate traditional common-law remedies for students who have been subjected to disciplinary force," and therefore, the parents could not proceed with their federal due process claims.[234] In so holding, the court noted that this had been its consistent approach since it initially analyzed the Texas corporal punishment system in *Fee v. Herndon*.[235] In a specially concurring opinion, Judge Weiner expressed his concern that the *Fee* court had "placed too much reliance on the mere existence of putative state-law remedies when we answered in the negative the question 'whether the federal Constitution independently shields public school students from excessive discipline.'"[236] Noting that no other circuit court has followed the Fifth Circuit's lead on this determination, Judge Weiner suggested that the court, sitting *en banc*, reconsider its position.[237] Until then, corporal punishment will not support federal due process claims in Texas.

Deaver v. Bridges is an important state case that should provide reassurance to many school employees.[238] Educators are continuously gunshy about providing references with details about former employees' conduct, especially if employees were suspected of, or proven to have engaged in, misconduct. In *Deaver*, the Menard ISD recommended a teacher for termination based on allegations that she made a racially derogatory comment about a public school student.[239] An independent hearing examiner found that the proposed termination was arbitrary, capricious, and not supported by the evidence.[240] The parties then entered into a settlement agreement, which stated that the superintendent would provide only minimal information about the teacher's employment, such as dates of employment, the capacity in which she served, the fact that she resigned, and a copy of an agreed-upon reference letter.[241]

The day after the settlement agreement was signed, the superintendent had a telephone conversation with a newspaper reporter, who subse-

232. *Id.*
233. *Id.* at 875.
234. *Id.* at 875-76.
235. *Moore*, 233 F.3d at 875 (citing Fee v. Herndon, 900 F.2d 804 (5th Cir. 1990), *cert denied*, 498 U.S. 908 (1990)).
236. *Id.* at 879.
237. *Id.* at 880.
238. 47 S.W.3d 549 (Tex. App.—San Antonio 2000, no pet.).
239. *Id.* at 551.
240. *Id.*
241. *Id.* at 551-52.

quently printed an article indicating that the teacher had resigned amidst findings that she had used a racial epithet against a student.[242] The former teacher sued the district and the superintendent for defamation. The superintendent claimed immunity under section 22.051 of the Texas Education Code.[243] The trial court denied him immunity, but the court of appeals reversed.[244]

The Texas Education Code provides immunity to educators who are professional employees, acting within the scope of or incident to duties that involve the exercise of judgment or discretion.[245] In *Deaver*, the teacher argued that making false, defamatory statements to the media was not part of the regular duties of a superintendent and could not be interpreted as advancing the legitimate function of superintendents or their districts.[246] The teacher further claimed that the settlement agreement clearly delineated the superintendent's duties, and therefore, his speaking to the media could not have been a discretionary action that would allow for immunity. The superintendent responded that he understood the settlement agreement to restrict the information that he would provide in response to a prospective employment inquiry—not to other inquiries.[247] Because he was not provided with any guidance on how to interpret the agreement and did not have any prepared statement to use at media interviews, the superintendent argued that he used his discretion and judgment in formulating responses to the reporter's questions.[248]

The court of appeals determined that neither the individual response to the media, nor the interpretation of the agreement should determine whether the superintendent was exercising a discretionary or ministerial function.[249] Instead, the court reviewed the overall responsibilities of a superintendent to determine whether personal deliberation and judgment were exercised. The court found that, like maintaining discipline, interpreting contracts and communicating with the media required the exercise of judgment and personal deliberation.[250] Consequently, it granted the superintendent immunity from the teacher's defamation claim.[251]

In *Myers v. Doe*, the Forth Worth court of appeals hinted that the existence of specific procedures could preclude a finding of immunity by removing any discretionary duties from educators.[252] In *Myers*, a 17-year-old special education student with the IQ of a six to eight year-old child was involved in a sexual encounter with another special education stu-

242. *Id.* at 552.
243. *Deaver*, 47 S.W.3d at 552 (citing TEX. EDUC. CODE ANN. § 22.051 (Vernon 1996)).
244. *Id.* at 550.
245. TEX. EDUC. CODE ANN. § 22.051 (Vernon 1996).
246. *Deaver*, 47 S.W.3d at 554.
247. *Id.*
248. *Id.*
249. *Id.* at 556.
250. *Id.*
251. *Deaver*, 47 S.W.3d at 556.
252. 52 S.W.3d 391 (Tex. App.—Fort Worth 2001, pet. filed).

dent named "Mad Dog."[253] The diagnostician in charge of disciplining special education students discussed the issue with the girl and determined that the sex had been consensual.[254] Both students were then disciplined with a reprimand. The next day, the female student told one of her teachers that the sex was *not* consensual, and the teacher wrote a memo advising the diagnostician, vice-principal, principal, and the superintendent of this finding.[255] In response, the school officials decided to adopt some new procedures, such as not allowing the two students to be left alone together and to have them accompanied and watched by an escort. However, these procedures were never implemented, and the girl was assaulted in the elevator twice more. The girl's parents then filed suit, alleging that the school officials' failure to perform ministerial acts and failure to properly discipline "Mad Dog" led to their daughter's injuries.[256]

The officials sought immunity under the Education Code.[257] The court focused on whether the officials' actions involved the exercise of judgment or discretion, explaining that the determination depended upon the ability of the actor to exercise discretion when performing the act. "If a policy prescribes the duties to be performed with such precision and certainty so as to leave nothing to the exercise of the actor's judgment," the court stated, "then the act is ministerial."[258] Here, the officials drafted specific policies and procedures regarding the two students involved in the incident.[259] The proposed policies defined the employees' duties with such precision that there was no room for discretion, but the policies were never implemented. Although the court seemed inclined to conclude that the duties involved were ministerial, it declined to make a final determination without a trial.[260]

The motor vehicle exception to the Texas Tort Claims Act came under scrutiny in *Austin Independent School District v. Gutierrez*.[261] The case arose when a young girl in the Austin ISD got off her school bus one day, crossed the street, and was killed when a drunk driver hit her.[262] Her parents sued the district, alleging that the Austin ISD bus driver had honked the bus horn as a signal to the disembarked children that it was safe to cross the street. Under the Texas Tort Claims Act, a school district can be liable only for claims arising from the "use or operation" of a motor vehicle.[263] The district filed a plea to the jurisdiction, claiming that

253. *Id.* at 393.
254. *Id.*
255. *Id.* at 394.
256. *Id.*
257. *Deaver*, 47 S.W.3d at 394 (citing TEX. EDUC. CODE ANN. § 22.051(a) (Vernon 1996)).
258. *Id.* at 396.
259. *Id.*
260. *Id.* at 397-98.
261. 54 S.W.3d 860 (Tex. App.—Austin 2001, pet. filed).
262. *Id.* at 861.
263. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(a) (Vernon 1997).

it was immune from suit and that the bus driver's actions had not waived that immunity.[264] The district court denied the plea to the jurisdiction, and the Austin ISD filed an interlocutory appeal. The school district was unable, however, to meet the burden of showing that the factual allegations in the petition did not, as a matter of law, constitute the use or operation of a motor vehicle.[265] In distinguishing the cases cited by the district, the court emphasized that the school bus was present at the scene of the accident and the bus driver took the affirmative action of honking the horn.[266] The final resolution of this case will be an important one.

F. GOVERNANCE—THE TPIA AND TOMA

Most of the guidance regarding the open government laws[267] is provided by the Texas attorney general, but in the past year, the courts have had the opportunity to address these laws. Three different courts of appeals were presented with Open Meetings Act challenges, all involving the notice requirements of the act.[268]

In *Hill v. Palestine Independent School District*, a former teacher alleged that his nonrenewal hearing was invalid and void under the Open Meetings Act because the hearing had not been placed on the agenda for the meeting.[269] Both the teacher and his attorney appeared for the hearing, but the school board took no action on the night of the hearing. Two weeks later, the board held another meeting, at which it voted to terminate the teacher's employment with the district.[270]

The court of appeals noted that the Open Meetings Act distinguishes between meetings at which deliberation occurs and meetings at which action is taken.[271] It also noted that its precedent had held that action taken at a meeting for which insufficient notice is given is voidable, but the meeting itself is not voidable.[272] Although the district did not give proper public notice of the teacher's nonrenewal hearing, it did provide proper notice prior to the meeting at which it voted to terminate the teacher's employment.[273] The court rejected the employee's argument that his contract automatically renewed the day after his nonrenewal hearing was held, based on its conclusion that the meeting at which the hearing occurred was not invalid.[274] The school district gave proper no-

264. *Id.* at 861-62.
265. *Id.* at 866.
266. *Gutierrez*, 54 S.W.3d at 866-67.
267. *See* TEX. GOV'T CODE ANN. §§ 551 (TOMA), 552 (TPIA) (Vernon 1994).
268. *See* Hill v. Palestine Indep. Sch. Dist., No. 12-00-00101-CV, 2000 WL 1737531, at *1 (Tex. App.—Tyler Nov. 22, 2000, pet. denied); Hays County Water Planning P'ship v. Hays County, 41 S.W.3d 174 (Tex. App.—Austin 2001, pet. denied); Salazar v. Gallardo, 57 S.W.3d 629 (Tex. App.—Corpus Christi 2001, no pet.).
269. No. 12-00-00101-CV, 2000 WL 1737531, at *1 (Tex. App.—Tyler 2000, pet. denied) (unpublished opinion).
270. *Id.*
271. *Id.* at *2.
272. *Id.*
273. *Id.* at *3.
274. *Hill*, 2000 WL 1737531, at *3.

tice of its intention to consider the nonrenewal of the teacher and voted in open session on that issue. Therefore, it was not "the type of governmental action that is subject to judicial invalidation."[275]

The second case involved the notice required when a governmental entity has knowledge of the topic on which someone will be making public comments.[276] In *Hays County Water Planning Partnership v. Hays County*, the agenda for the Hays County Commissioner's Court meeting held on October 26, 1999 listed a discussion item as "Presentation by Commissioner Russ Molenaar."[277] At the meeting, Molenaar made some of his suggestions for road development, water service, and county employment matters. No questions were asked of Molenaar, and no action was taken regarding the issues he raised.[278] A group of Hays County residents sued the county for violations of the Open Meetings Act. The residents appealed a ruling in favor of the county.[279]

As an initial matter, the court of appeals found that the residents had standing to bring this action under the standard for associational standing set forth in *Texas Association of Business v. Texas Air Control Board*.[280] The court next addressed the Open Meetings Act issues, paying particular attention to the notice requirements.[281] The court found "Presentation" to be a vague description. There was nothing in the posting that would give a resident of Hays County any idea of the *substance* of Molenaar's proposed presentation.[282] The court accorded particular weight to a 2000 opinion of the attorney general, in which the attorney general advised that "public comment" would not be sufficient notice if the governmental body was aware or reasonably should have known of the subjects to be mentioned.[283] As the commissioner's court was "surely aware" of the contents of Molenaar's presentation before the meeting agenda was prepared, the court held that the notice the county provided was insufficient.[284]

The county argued unsuccessfully that Molenaar's presentation was exempt from the Open Meeting Act's notice requirements by section 551.042 of the Texas Government Code, which allows a governmental body to make a very limited response to a public comment.[285] But because Molenaar was not responding to an inquiry by a member of the court or the public, the exception of section 551.042 did not apply.[286]

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275. *Id.*
276. *See* Hays County Water Planning P'ship v. Hays County, 41 S.W.3d 174 (Tex. App.—Austin, 2001, pet. denied).
277. *Id.* at 176.
278. *Id.* at 179.
279. *Id.*
280. *Id.* at 178 (citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 447 (Tex. 1993)).
281. *Hays County*, 47 S.W.3d at 179.
282. *Id.*
283. *Id.* (citing Op. Tex. Att'y Gen. No. JC-0169 (2000)).
284. *Id.* at 181.
285. *Id.*
286. *Hays County*, 41 S.W.3d at 181.

Finally, the court rejected the county's argument that Molenaar's right to free speech could not be abridged by state law.[287] "The problem with Molenaar's remarks," the court stated, "is not that he could not make them at all, but rather the location and timing of his comments was limited."[288] The court held that requiring compliance with the Open Meetings Act does not violate the First Amendment.[289]

The third case included under this heading is *Salazar v. Gallardo*.[290] *Salazar* involved the notice of a meeting at which a school board voted to accept the superintendent's resignation and pay her severance of $500,000.[291] Two taxpayers filed suit to void the transaction, alleging that the agenda posted for the meeting was inadequate to inform the public of the issue to be voted on by the school board. A trial court signed a temporary injunction ordering the former superintendent to deposit the money she had thus far received with the court, and enjoined the district from making additional payments to her.[292] The court based this action on its determination that the meeting at issue probably violated the Texas Open Meetings Act. The superintendent and the school district filed an interlocutory appeal.[293]

The court of appeals reviewed the temporary injunction for an abuse of discretion.[294] The agenda for the meeting had stated that the board would discuss "the superintendent's performance, job duties, evaluation and contract."[295] The superintendent and the president of the school board testified that they would discuss the superintendent's problems in performing her duties, and four trustees testified that they did not anticipate that a buy-out of the superintendent's contract would result.[296]

The superintendent argued that the notice need not list all possible consequences or outcomes of topics listed on the agenda, but the court of appeals concluded that the plaintiffs had a probable right of recovery.[297] Furthermore, the court determined that the injunction ordering the superintendent to deposit the money she had received from the school district preserved the status quo, *i.e.*, the status quo that preceded the controversy.[298]

Although the individual trustees had not been named as defendants, the court of appeals found this omission inconsequential, since, in naming the school district as a party, the board had been effectively included in

287. *Id.* at 181-82.
288. *Id.* at 182.
289. *Id.*
290. 57 S.W.3d 629 (Tex. App.—Corpus Christi 2001, no pet.).
291. *Id.* at 631.
292. *Id.* at 632.
293. *Id.* at 631.
294. *Id.* at 632.
295. *Salazar*, 57 S.W.3d at 633.
296. *Id.*
297. *Id.* at 634.
298. *Id.*

the proceedings.[299] Similarly, the court rejected Salazar's claim that she could not be subject to the injunction, since she was not a member of the board.[300] The Texas Open Meetings Act gives authority to enjoin actions of the board; as an agent of the board, she could properly be subject to the injunction.[301]

With regard to the Texas Public Information Act, perhaps the most important decision was handed down by the Texas Supreme Court in *In re the City of Georgetown*.[302] In this case, the trial court's decision virtually eviscerated the attorney-client privilege of governmental entities. Fortunately, the supreme court restored the integrity of this exception. The case involved the City of Georgetown, which had hired an engineer as a consulting expert to prepare a report assessing one of the city's wastewater treatment plants for use in pending and anticipated litigation concerning the plant.[303] The report was, in fact, used in connection with the litigation. The city manager also attached a copy of the consulting expert's report to the manager's self-evaluation, which he provided to city council members.[304] While litigation about the wastewater treatment plant was proceeding, a newspaper requested that the city release the evaluation and attached documentation. The city, believing the report to be exempt from disclosure as information related to litigation under the Texas Government Code section 552.103(a), sought a ruling from the Attorney General.[305] The Attorney General agreed that the report was prepared in anticipation of litigation. Nevertheless, he concluded that the report had to be released because it was a completed report—one of the items expressly made public by the definition of public information in section 552.022—and it was not expressly made confidential by "other law," as required by statute.[306]

The city sought a declaratory judgment that it was not required to disclose the report.[307] Seeking to compel disclosure, the newspaper intervened in the suit and the trial court ordered the city to disclose the report.[308] The city appealed, and after the court of appeals denied its petition for a writ of mandamus, the city petitioned the Texas Supreme Court to issue a writ of mandamus directing the trial court to vacate its order.[309]

The newspaper argued that the city's report was a completed report and had to be disclosed because no other law expressly made a consulting

299. *Id.* at 635.
300. *Salazar*, 57 S.W.3d at 635.
301. *Id.* at 635-36.
302. 53 S.W.3d 328 (Tex. 2001).
303. *Id.* at 329.
304. *Id.*
305. *Id.* (citing TEX. GOV'T CODE ANN. § 552.103(a) (Vernon 1994)).
306. *Id.* at 329-30 (citing TEX. GOV'T CODE ANN. 552.022 (Vernon 1994)).
307. *Georgetown*, 53 S.W.3d at 330.
308. *Id.*
309. *Id.*

expert's report confidential.[310] The city contended that the Texas Rules of Civil Procedure were "other law" that made consulting expert reports confidential.[311] The Texas Supreme Court considered the term "other law" and determined that its meaning was not limited to statutes.[312] Noting that attorney work product and attorney-client privileges have long been a part of the common law and that the legislature was fully aware of these privileges when it amended the statute in 1999, the court held that the Texas Rules of Civil Procedure were "other law," and consulting-expert reports were within a category of information that was expressly confidential under those rules.[313]

The court also observed that the interpretation of section 552.022 advocated by the newspaper would have "a profound impact" on the ability of governmental bodies to seek legal advice.[314] Recognizing that this interpretation would mean that written legal advice and strategy provided to governmental bodies would have to be disclosed upon request to opposing parties, the court observed that taxpayers would bear increased costs due to the resulting disadvantages to governmental bodies engaged in litigation.[315] The court conditionally issued a writ of mandamus directing the trial court to vacate the order in which it required the city to produce records to the newspaper.[316]

In the past year, two Texas courts of appeals have issued TPIA rulings specific to school districts. The first case involved employee surveys.[317] As part of its site-based decision-making process, Arlington ISD annually surveyed the professional and paraprofessional staff at each campus for their opinions on the learning environment and student performance.[318] The superintendent assured the survey respondents that their answers would remain anonymous. In 1998 and 1999, a local newspaper sent Arlington ISD public information requests for the survey results, including all written comments garnered from the survey.[319] The school district, in turn, requested open records decisions from the attorney general, asserting that the requested information fell within the "agency memoranda" exception to the Public Information Act. The attorney general advised the district that it could withhold narrative comments but that the compiled results—bar graphs and aggregate percentages of responses for each answer—had to be disclosed.[320] The school district filed suit after both rulings, seeking declaratory judgments that the survey results need

310. *Id.*
311. *Id.* at 331.
312. *Georgetown*, 53 S.W.3d at 332.
313. *Id.* at 332-33.
314. *Id.* at 333 (citing TEX. GOV'T CODE ANN. § 552.002 (Vernon 1994)).
315. *Id.*
316. *Id.* at 337.
317. Arlington Indep. Sch. Dist. v. Tex. Att'y Gen., 37 S.W.3d 152, 155-56 (Tex. App.—Austin 2001, no pet.).
318. *Id.* at 155.
319. *Id.* at 156.
320. *Id.*

not be disclosed.[321] The lawsuits were consolidated, and both parties filed motions for summary judgment. The district court granted the attorney general's motion, and the school district appealed to the Third Court of Appeals.[322]

The attorney general contended that the survey results represented factual material that was not deliberative and did not fall within the agency memoranda exception to the Public Information Act.[323] The court of appeals agreed with the attorney general's position, finding that it struck "the proper balance between the public's right to governmental information and the entity's ability to conduct its affairs."[324] In reaching this conclusion, the court reasoned that the survey results were the "raw data upon which decisions can be made" but were "not themselves a part of the decisional process."[325] The surveys did not relate to the making of new policy. Instead, they allowed the district to measure its performance under existing policy.[326] Thus, the court concluded that the survey results were not predecisional, intra-agency memoranda related to policymaking.[327] It held that the agency memoranda exception to the Public Information Act did not encompass the survey results.[328] The court affirmed the judgment in favor of the attorney general, requiring the district to make public the survey results.[329]

Fish v. Dallas Independent School District, yet another TPIA decision, involved the disclosure of student information.[330] Student information is, of course, protected by federal law to a certain extent, but summaries and statistical information about students are often subject to disclosure under the Texas Public Information Act (TPIA).[331] In this case, Russell Fish and the Dallas NAACP sought a writ of mandamus against the Dallas ISD to obtain standardized testing results under the Public Information Act.[332] Specifically, they sought certain information from the Iowa Test of Basic Skills for the 1986-1997 school years, including: student number; student sex, age, and ethnicity; special education and LEP flags; campus name; grade; and reading and math grade equivalents. They also requested that a "unique number be placed in the field for student and teacher names and that the number be consistent from year to year."[333] Dallas ISD moved for summary judgment, arguing that it was not required to disclose confidential information or personally identifiable information contained in education records, nor was it required to create

321. *Id.*
322. *Arlington*, 37 S.W.3d at 156.
323. *Id.* at 157.
324. *Id.*
325. *Id.* at 161.
326. *Id.* at 160-61.
327. *Arlington*, 37 S.W.3d at 161.
328. *Id.*
329. *Id.* at 163.
330. 31 S.W.3d 678 (Tex. App.—Eastland 2000, no pet.).
331. *See* TEX. GOV'T CODE ANN. § 552.001 et seq. (Vernon 1994 & Supp. 2000).
332. *Fish*, 31 S.W.3d at 679.
333. *Id.*

new information, such as identification numbers, in response to requests for public information. The trial court denied the plaintiffs' motion for summary judgment and entered a take-nothing summary judgment in favor of the school district.[334]

The court of appeals reviewed both reasons asserted by Dallas ISD for withholding the information. It noted that the Family Education Rights and Privacy Act (FERPA) protects, with certain exceptions, the confidentiality of student education records.[335] None of the exceptions applied here, but the court of appeals nonetheless determined that the information requested was not made confidential by FERPA.[336] The district provided no evidence to support its argument that it could not maintain the integrity of the statistical information released, and state law authorizes release of aggregated student data that does not contain the names of individual teachers or students.[337]

Dallas ISD also asserted that assigning a unique and confidential numerical code to each student and teacher would require the district to create new information, which is not required by the TPIA.[338] The plaintiffs argued that their request merely required a manipulation or programming of data. The court of appeals agreed with the plaintiffs, finding that, "[a]ccording to the plaintiffs' summary judgment evidence, substituting each child's name with a unique, confidential number would have required a mere manipulation of the existing data by adding only one line of programming code."[339] The court of appeals thus held that the request required the manipulation of data, not the creation of new information.[340]

The plaintiffs requested that the court order the immediate production of the requested information.[341] The court refused to do so because of confidentiality concerns.[342] In the court's opinion, the plaintiffs failed to conclusively show that the student's confidentiality would not be compromised by the disclosure of the information as requested. Consequently, the court ruled that the trial court properly denied the plaintiffs' motion for summary judgment.[343] Summary judgment in favor of the district was, however, improper, and therefore, the court reversed and remanded the case for further proceedings.[344]

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334. *Id.*

335. *Id.* at 680-81 (citing Federal Education Rights and Privacy Act (FERPA) of 1974 §§ 552.026, 552.114, 20 U.S.C.A. § 1232g(b) (West 2000)).

336. *Id.* at 681.

337. *Fish*, 31 S.W.3d at 681.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at 682.

342. *Fish*, 31 S.W.3d at 682.

343. *Id.* at 683.

344. *Id.*

G. Constitutional and Federal Law Issues

On the constitutional front, the most important developments involved facilities use policies, particularly in light of the Supreme Court's decision in *Good News Club v. Milford Central School*.[345] This case involved a very common scenario, since many school districts open their facilities for use by outside groups and have fairly liberal access policies. Various circuit courts of appeals had issued different interpretations of school districts' ability to limit the types of groups that might use their facilities, and in *Good News*, the Supreme Court finally weighed in. The challenge was brought by a religious club—the Good News Club—after its request to use the school's facilities was denied.

The Good News Club is a private Christian organization for children ages 6 to 12.[346] It meets weekly after school and conducts activities such as reading Bible verses, singing songs, and praying.[347] The Good News Club asked to use the school facilities on a weekly basis so that it could engage children in those activities. The superintendent and the school attorney reviewed the Club's materials, determined that its activities were the equivalent of religious instruction, and denied the Club's request.[348] The Club then filed suit in federal court and was granted a preliminary injunction, which allowed it to use the school facilities for its meetings for approximately one year.[349] Thereafter, the court vacated the injunction and granted the school's motion for summary judgment. The Club appealed, but the Second Circuit Court of Appeals upheld the school's policy, finding that the policy differentiated groups seeking access to its facilities on the basis of subject matter but did not engage in unconstitutional viewpoint discrimination.[350] The Club then sought and received relief from the U.S. Supreme Court.[351]

The parties agreed that the school had established a limited public forum.[352] When a school establishes a limited public forum, the Court noted, it cannot discriminate against speech on the basis of viewpoint. Central to the Supreme Court's analysis was the school's policy, which allowed outside groups to use the school for "instruction in any branch of education, learning, or the arts."[353] In addition, the official written policy made the school available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses [are] nonexclusive and [are] opened to the general public."[354] The policy contained a prohibition against use

345. 121 S. Ct. 2093 (2001).
346. *Id.* at 2098.
347. *Id.*
348. *Id.*
349. *Id.* at 2099.
350. *Good News*, 121 S. Ct. at 2099.
351. *Id.*
352. *Id.*
353. *Id.* at 2098.
354. *Id.*

"by any individual or organization for religious purposes."[355]

The Court found that Milford's policy allowed any group that promotes the moral and character development of children to use the school building.[356] The Good News Club teaches morals and character development, but because Milford found the Club's activities to be religious in nature—"the equivalent of religious instruction itself"—it excluded the Club from the use of its facilities.[357] The Court found that this constituted the type of viewpoint discrimination forbidden by the First Amendment.[358]

Significantly, the Court rejected the school district's argument that, even if its restriction on religious instruction constituted viewpoint discrimination, excluding the Good News Club was necessary to avoid an Establishment Clause violation.[359] Although the Court conceded that avoiding an Establishment Clause violation may be a compelling state interest that could justify a content-based distinction, it was not convinced that a state's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination.[360] The Court reached this conclusion based on its finding that the meetings were held after school hours, not sponsored by the school, and were open to any student who obtained parental consent.[361] Furthermore, the Court discounted the idea that the Club's activities would have a coercive effect on elementary school children.[362] Although the Court's own precedent indicates that younger students would be more impressionable than adults, the Court has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where elementary school children may be present."[363] In fact, the Court determined, allowing the Club to use the school facilities would ensure neutrality. The Court also reasoned that the danger that children would misperceive the endorsement of religion was not any greater than the danger that they would perceive a hostility towards religion if the Club were excluded from using the school.[364]

The Court also rejected the notion that the community would feel coercive pressure to engage in the Club's activities.[365] Interestingly, the Court identified the relevant community as the parents, not the elementary school children.[366] The Court based this conclusion on the fact that parents must consent to their children's participation in the Club, and therefore, the students could not be coerced into engaging in the Good

355. *Good News*, 121 S. Ct. at 2098.
356. *Id.* at 2101.
357. *Id.*
358. *Id.*
359. *Id.* at 2103.
360. *Good News*, 121 S. Ct. at 2103.
361. *Id.*
362. *Id.* at 2103-04.
363. *Id.* at 2104.
364. *Id.* at 2106.
365. *Good News*, 121 S. Ct. at 2104.
366. *Id.*

News Club's religious activities.[367] The Court was not persuaded that parents of elementary school children would believe that the school was endorsing religion by allowing the Good News Club to meet in the school cafeteria after school.[368]

The Supreme Court's ruling will likely have a significant, practical impact on the way many school districts handle requests for use of facilities. Moreover, it will have a direct impact on *Campbell v. Saint Tammany's School Board*, a recent Fifth Circuit Court of Appeals Case.[369] In *St. Tammany's*, the Fifth Circuit upheld a school district's policy that prohibited non-students from using school facilities for religious worship or instruction.[370] Although the Fifth Circuit noted that St. Tammany's policy "skate[d] close to establishing a designated public forum," it ultimately concluded that the policy's restrictions were sufficient to maintain the non-public forum status of the school buildings.[371] From the Fifth Circuit's perspective, the policy did not forbid speakers on general topics with a religious perspective and was, therefore, neutral and constitutional. After the *en banc* court refused to rehear the decision, the Supreme Court granted certiorari, vacated the Fifth Circuit's decision, and ordered it to reconsider its panel decision in light of *Good News Club v. Milford Central School*.[372]

Chiu v. Plano Independent School District, another Fifth Circuit decision, also tackled the facilities use issue.[373] In this case, two parents attempted to criticize the new math curriculum at "Math Night" meetings held at several schools, but were instructed by the district not to distribute leaflets or articles, collect signatures on a petition, or display signs with a hotline number on school premises.[374] The district also refused to allow another parent to use the school mail delivery system to distribute flyers and petitions that were critical of the program. The parents sued the school district and its administrators under 42 U.S.C. section 1983, claiming violations of their free speech rights.[375] The district court denied the administrators' motions for summary judgment, ruling that they had all failed to establish qualified immunity.[376] All but one of the administrators failed to obtain relief on appeal.[377]

Because the record contained conflicting evidence regarding the extent of the use granted by Plano ISD for the Math Night events, the Fifth Circuit determined that it did not have appellate jurisdiction over the de-

367. *Id.*
368. *Id.*
369. 206 F.3d 482 (5th Cir. 2000), *cert. granted and judgment vacated,* 121 S. Ct. 2518 (2000).
370. *St. Tammany's*, 206 F.3d at 484.
371. *Id.* at 486-487.
372. *See* Campbell v. St. Tammany's Sch. Bd., 121 S. Ct. 2518 (2001).
373. 260 F.3d 330 (5th Cir. 2001).
374. *Id.* at 337-39.
375. *Id.* at 339-40.
376. *Id.* at 340 n.5.
377. *Id.* at 340.

fendants' claims related to Math Night.[378]

On the school mail claim, however, the record revealed that the district had not intended to open its school mail system to the general public to facilitate debate on issues of public concern; the mail system was, therefore, a limited or nonpublic forum.[379] Moreover, the school district had not previously allowed any other organization to use the school mail system to distribute politically-oriented flyers to parents. The court reaffirmed that "[i]dentity-based and subject matter distinctions in a nonpublic forum are perfectly permissible so long as they are not a covert attempt to suppress a particular viewpoint and are reasonable in light of the purpose of the forum."[380] The administrator who denied the parents' use of the school mail system did not, therefore, engage in viewpoint discrimination and was entitled to qualified immunity.[381]

In other developments, school districts learned whether they may be held liable under the False Claims Act.[382] The *Garibaldi* case arose when a school district's internal auditor, Carlos Samuel, alleged that the school board was exceptionally high rates for its unemployment and workers' compensation insurance to district programs that were financed by the federal government.[383] The auditor and his supervisor prepared a report contending that the board violated federal accounting principles and the False Claims Act by submitting false claims to the federal government.[384] The superintendent hired two accounting firms to review the accounting decisions. Both firms found that the board had violated neither federal accounting principles, nor the False Claims Act.[385] The school board subsequently fired the auditors.[386]

Garibaldi and Samuel filed a qui tam suit against the school board, alleging, on behalf of the United States, that the board had submitted numerous false claims to the United States over a period of eleven years.[387] The plaintiffs further alleged that they had been retaliated against in violation of the protections the False Claims Act provides to whistleblowers. A jury found that the school board had submitted over 1500 false claims to the federal government and that Samuel and Garibaldi had suffered illegal retaliation.[388] The district court ordered the board to pay treble damages in the amount of $22.8 million and a civil penalty of $7.85 million. "As their bounty" for their actions, Garibaldi and Samuel were awarded damages for pain and suffering and back pay,

378. *Chiu*, 260 F.3d at 355.
379. *Id.* at 350.
380. *Id.*
381. *Id.*
382. *See* United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486 (5th Cir. 2001) (citing False Claims Act, 31 U.S.C. § 3730 (1999)).
383. *Id.* at 487.
384. *Id.* at 487-88.
385. *Id.*
386. *Id.*
387. *Garibaldi*, 244 F.3d at 488.
388. *Id.*

as well as 25 percent of the damages and civil penalty awards granted to the United States.[389] They were also awarded attorney's fees, expenses, and costs.[390]

The school board appealed, arguing that, as a local government, it could not be held liable under the False Claims Act.[391] "The False Claims Act makes any 'person' who knowingly presents a false claim to the federal government for payment liable for treble damages and a civil penalty."[392] The school board argued that a local government is not a "person" under the Act.[393] The issue was one of first impression for the Fifth Circuit Court of Appeals.[394]

The court acknowledged that while a recent Supreme Court decision, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[395] did not decide the issue, it provided guidance.[396] The Fifth Circuit Court found particularly persuasive the Supreme Court's reasoning that the False Claims Act's treble damages were punitive in nature and as such contrary to the long-standing presumption that local governments are not subject to punitive damages. "Imposing punitive damages on a local government in favor of the federal government is especially problematic," the court noted.[397] Requiring such payments, the court reasoned, would "reflect a judgment by Congress that denying the schoolchildren of Orleans Parish needed services, or requiring the taxpayers . . . to pay higher taxes, is justified in light of the relatively minor benefit to the federal treasury."[398] In the absence of clear language in the False Claims Act indicating an intent to impose punitive damages on a local government under the Act, the Fifth Circuit declined to impute such intent to Congress.[399]

The Fifth Circuit Court of Appeals also held that the term "person" in the liability provisions of the False Claims Act does not include local governments such as school boards.[400] The court could find no statutory support for such a reading of the statute, nor could it identify any legislative intent or purpose that would undermine that conclusion.[401] Therefore, it vacated the judgment below and rendered judgment in favor of the Orleans Parish School Board.[402]

Of all the cases from the past year, *Falvo v. Owasso Independent School District* may have the most profound effect on educational activi-

389. *Id.*
390. *Id.*
391. *Id.* at 483.
392. *Garibaldi*, 244 F.3d at 483.
393. *Id.*
394. *Id.* at 489-90.
395. 529 U.S. 765 (2000).
396. *Garibaldi*, 244 F.3d at 490.
397. *Id.* at 492.
398. *Id.*
399. *Id.*
400. *Id.* at 495.
401. *Garibaldi*, 244 F.3d at 493.
402. *Id.* at 495.

ties through its interpretation of the Family Education Rights and Privacy Act (FERPA).[403] Although FERPA has been in place for almost 30 years, the United States Supreme Court had never considered a FERPA dispute prior to 2001. On June 25, 2001, the Court agreed to hear a case from the Tenth Circuit Court of Appeals, when it granted *certiorari* in *Owasso Independent School District v. Falvo*.[404] The case below involved a common school district practice: a teacher would have students grade one another's papers and call out their grades when they got them back.[405] A parent complained about this practice, claiming that it "severely embarrassed" her children, but the school district refused to prohibit the practice. A federal district court granted the school district's motion for summary judgment based on its conclusion that the grades did not constitute "education records" as defined by FERPA.

Falvo argued that the court should have granted judgment in favor of her son, a special education student, because he had an expectation of privacy in his grades under the Individuals with Disabilities Education Act (IDEA).[406] The district court denied that motion, concluding that Falvo could not premise a Fourteenth Amendment privacy claim on the IDEA since she could not make a distinct claim under the IDEA.[407]

On appeal, the parent raised two issues. First, she argued that the right to privacy under the Fourteenth Amendment prohibited disclosure of the students' grades.[408] The Tenth Circuit Court of Appeals concluded that in order to warrant constitutional protection, a party's expectation of privacy in the information must be "highly personal or intimate."[409] Although the court recognized that school work and test grades could be somewhat personal or intimate, it refused to conclude that these grades were so highly personal or intimate as to merit constitutional protection.[410] The court further determined that neither FERPA nor the IDEA created a constitutional privacy right.[411]

The parties did not raise the issue of whether a violation of FERPA could be the basis for a lawsuit under Section 1983, but the court assumed that subject matter jurisdiction was "implicated," and that the remedial scheme within FERPA itself did not foreclose a Section 1983 remedy.[412]

The parent's second claim was that the school district's practice violated FERPA.[413] The court of appeals first decided that the district court inappropriately deferred to a letter from the director of the FPCO, be-

403. 233 F.3d 1203 (10th Cir. 2000) (interpreting Family Education Rights and Privacy Act (FERPA)).
404. 121 S. Ct. 2547 (2001).
405. *Falvo*, 233 F.3d at 1207.
406. *Id.* at 1208 (citing Individuals with Disabilities Education Act (IDEA)).
407. *Id.*
408. *Id.*
409. *Id.* at 1209.
410. *Falvo*, 233 F.3d at 1209.
411. *Id.* at 1210.
412. *Id.*
413. *Id.* at 1213.

cause it was "bereft of any reasoning underlying the rather conclusory opinion," and because its statutory interpretation ignored the broader language of FERPA that states that an "education record" includes records maintained by a person acting for the educational institution.[414] Disregarding the FPCO's interpretation, the court made its own assessment of the statute. First, it determined that the grades students record on one another's papers and report to the teacher constitute "education records" under FERPA, because the grades contain information directly related to a student.[415] Next, because at least some of the grades are ultimately recorded in the teacher's grade book, they are "maintained by an educational institution," and are therefore "education records" protected by FERPA.[416] Although the court recognized that a teacher's grade book could be excluded from the statutory definition of "education record," under the "sole possession of the maker" exception, this exception applies only when the grade books are not disclosed to others (except for substitutes).[417] Finally, the court considered whether the grades are also protected by FERPA at the "more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers."[418] By assisting the teacher, the court found, the students are acting for the district, and when the student places a grade on the paper, the grade is "maintained," because the student is preserving the grade until the time it is reported to the teacher for further use.[419] In reaching this conclusion, the court of appeals noted that it would be inconsistent with Congressional intent to allow a teacher to disclose students' grades to other students immediately before recording them, but to prohibit a teacher from revealing to one student the grades of another when writing the grades in a grade book.[420]

Unlike the trial court below, the court of appeals granted the individual defendants qualified immunity.[421] While the court found the statute unambiguous, it found no authority indicating that the school district's practice violated FERPA.[422] Despite its disregard of and disagreement with the FPCO's interpretation, the existence of that letter led the court to conclude that the right it identified was not clearly established at the time the case arose. Therefore, qualified immunity was appropriate.[423]

As of this writing, the Supreme Court had not issued a decision in the appeal of this case. Its decision is expected in late Spring of 2002. However the case is decided, it will be an important one for school districts. Having the Supreme Court's view of FERPA will be of valuable guidance

414. *Id.* at 1214.
415. *Falvo*, 233 F.3d at 1214.
416. *Id.*
417. *Id.*
418. *Id.* at 1216.
419. *Id.*
420. *Falvo*, 233 F.3d at 1216.
421. *Id.* at 1219.
422. *Id.*
423. *Id.*

and may initiate a change in how the Department of Education reads the law.

H. RELIGION

The basic premises concerning religion in public schools have long been known, but new practices, such as one initiated by Beaumont Independent School District, still make their way to the courts. At issue in *Doe v. Beaumont Independent School District* was the school district's initiation of a "Clergy in the Schools Program" that asked volunteers from local clergy to counsel groups of students about secular issues, including race, divorce, discipline, and drug use.[424] Before the district began the program, a parent read about it in the newspaper and requested the inclusion of professionals from secular counseling professions in the program.[425] When the district turned down her request, the parent, along with other plaintiffs, brought suit to enjoin the program. The plaintiffs claimed the program violated the Establishment Clause of the First Amendment and the Texas Constitution.[426] A federal district court granted summary judgment in favor of the school district, but the Fifth Circuit Court of Appeals reversed the district court in a panel decision.[427] Beaumont ISD sought, and was granted, review by the *en banc* court.[428]

The *en banc* court of appeals agreed that the plaintiffs had demonstrated standing sufficient to withstand summary judgment.[429] If proven at trial, the court reasoned, the students could be deprived of their right to participate in the school's program without taking part in an unconstitutional practice.[430] In considering the merits of the claim, the court framed the ultimate question in the case as one of equal treatment: whether the school board preferred religion to non-religion in its program.[431]

The court analyzed the plaintiffs' claims according to Supreme Court precedent. Although the test set forth in *Lemon v. Kurtzman*,[432] has fallen into disfavor by many courts, the Fifth Circuit applied its three-prong test here.[433] First, the court concluded that it could not find as a matter of law that the stated purpose of the program was not secular.[434] This issue would, therefore, have to be resolved at trial.[435] The court then considered the second prong of the *Lemon* test: whether the pro-

424. 240 F.3d 462, 465 (5th Cir. 2001).
425. *Id.* at 466.
426. *Id.*
427. *Id.*
428. *Id.*
429. *Beaumont*, 240 F.3d at 468.
430. *Id.*
431. *Id.* at 464.
432. 403 U.S. 602 (1971).
433. *Beaumont*, 240 F.3d at 468.
434. *Id.*
435. *Id.* at 469.

gram has the primary effect of advancing or inhibiting religion.[436] It determined that the key question in assessing the program's neutrality toward or endorsement of religion is the context in which the program is presented.[437] Crucial to this determination was the review of all volunteer programs operated by the school district, not just the Clergy in Schools program.[438] In remanding the case, therefore, the Fifth Circuit instructed the district court to consider the entire set of volunteer programs when determining whether the district favored religion over nonreligion.[439]

The third prong of the *Lemon* test bars excessive entanglement.[440] The court found no excessive entanglement because the district monitors all of its volunteer programs; this one does not require the district to take on additional, unique burdens.[441]

In conclusion, the court stressed that the case would have to be sent back for trial, primarily because "the record evidence leaves . . . a blurred picture of the District's volunteer program as a whole."[442] The court declared that if the program is viewed on a fully-developed record as part of a larger scheme of secular mentoring programs, it has not violated the Establishment Clause.[443] And, the court explained, the reasons for the district's refusal to add non-clergy counselors to the program must be settled by a factfinder.[444] It therefore reversed the grant of summary judgment and remanded to the district court for further proceedings, including trial if necessary.[445]

Judge Jolly, joined by four other judges (Jones, Barksdale, Garza, Smith, DeMoss) dissented on the standing issue.[446] Judge Jolly criticized the majority for creating an injury where the plaintiffs had failed to allege one.[447] Meanwhile, Judge Jones, joined by four judges (Smith, Barksdale, Garza, and DeMoss), dissented from the decision to remand the case for further proceedings.[448] "Eight of us say that the clergy in schools (CIS) program is or may be constitutional, six say it can never be so, and one abstains on the merits for jurisprudential reasons," Judge Jones wrote.[449] She went on to question the value of remand, pointing out that the *en banc* court had provided no clear direction to the district court or the parties.[450] She found it quite obvious that the CISD program did "not

436. *Id.*
437. *Id.* at 470-71.
438. *Beaumont*, 240 F.3d at 471.
439. *Id.* at 471.
440. *Id.*
441. *Id.* at 472.
442. *Id.*
443. *Beaumont*, 240 F.3d at 472.
444. *Id.*
445. *Id.* at 473.
446. *Id.*
447. *Id.* at 477-78.
448. *Beaumont*, 240 F.3d at 479.
449. *Id.*
450. *Id.*

inculcate religious beliefs or practices," and that "any benefit to religion [was] too attenuated to violate the Establishment Clause."[451] The dissenters would, therefore, decline to remand the case and affirm the district court's original ruling that the program is constitutional as a matter of law.[452]

Judge Weiner, joined by Judges Politz, Benavides, Stewart, Parker, and Dennis dissented to express their belief that the summary judgment evidence was sufficient to resolve this matter.[453] Judge Weiner emphasized that the program symbolically endorses religion, striking at the "core concern of the Establishment Clause: the protection of citizens from the specter of government interference and favoritism in the inextricably intertwined domains of conscience, religion, and morality."[454] Furthermore, he stated, the district overtly advanced religion by granting preferential status to the clergy in this program.[455] The district's only conceivable purpose in excluding all other vocations and professions from the program, he argued, would be to ensure that students "would receive a perspective on morality grounded in religion."[456] To drive the point home, Judge Weiner applied all of the Supreme Court's tests to determine the validity of the program under the Establishment Clause and found the program to be "indisputably unconstitutional."[457]

Although the Clergy in Schools program passed muster, it did so with only the weakest support of the court of appeals. It is the unenviable task of the district court to interpret the strong difference of opinions regarding the resolution of this matter.

I. CONCLUSION

As has become the norm, school districts faced a variety of legal challenges in 2000-2001. While courts understand schools' need to maintain a safe learning environment, the cases reviewed here do not reflect judicial hesitation to intervene if the court identifies a legal violation. The laws as applied to schools are continually being refined, providing guidance for those that have been fortunate enough to avoid liability, and correction to those that have erred.

451. *Id.* at 480-81.
452. *Id.* at 482.
453. *Beaumont*, 240 F.3d at 482-83.
454. *Id.* at 486.
455. *Id.* at 488.
456. *Id.* at 492.
457. *Id.* at 499.