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ABSTRACT

This booklet examines the liability of school board members in light of the United States Supreme Court ruling in Wood v. Strickland and the provisions of Title VII of the 1964 Civil Rights Act. It was prepared specifically to inform Texas school board members of their legal rights and responsibilities; however, since Texas government officials are liable only under provisions of federal law, most of the discussion will be useful to school officials in other states as well. Different sections of the booklet examine the potential liability of board members, suggest how a school board should operate to avoid liability problems, discuss possible steps a school district can take to protect its board members from personal financial loss, and consider the pros and cons of purchasing liability insurance coverage for school board members.

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SCHOOL BOARD MEMBER LIABILITY

Who is liable?

Who is not liable?

What can be done about it?

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EA 007 760

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BOARD MEMBER LIABILITY

The Potential of Liability

In recent months a great deal of concern has been voiced over the potential effect on Texas school board members of the U.S. Supreme Court ruling in the *Wood v. Strickland*¹ case on board member liability. In *Wood* the Supreme Court ruled that in the specific context of student discipline school board members could be held personally liable under 42 U.S.C.A., Section 1983² (the 1871 Civil Rights Act) where they were found to have acted maliciously towards a student or where they have knowingly or unknowingly violated the settled, and indisputable constitutional rights of a student.³

The court's decision focuses the attention of the educational community on the serious issue of the overall liability to which school districts and their boards of trustees are potentially exposed. Of primary concern to school trustees is their exposure to personal financial loss due to both the cost of defending themselves against suits arising from actions taken in their capacity as trustees, and monetary judgments against them as a result of such suits.

Before one can speak to the protection of school trustees from liability, the limits of their potential exposure must be defined. In Texas a school district is not liable to suit in state court; and while exercising governmental functions, neither it nor its trustees, agents, or employees are liable for damages.⁴ Only through the Texas Torts Claim Act,⁵ has the legislature waived governmental immunity as applied to school districts and then only as to damages occurring through the negligent operation of motor-driven vehicles.⁶ As a result of the continued existence of governmental immunity in Texas, the liability to

which school districts and their trustees are exposed is effectively limited to that which arises under federal law and in federal courts. To date the majority of the cases wherein school districts or their trustees have been held liable for monetary damages have arisen under the various federal civil rights laws.⁷ For example, the 1972 amendments to Title VII of the 1964 Civil Rights Act include school districts within the definitions of "employer" and "person" as those terms appear within that Act.⁸ As a result, school districts are now subjected to suit in federal court for the full scope of actions and remedies which apply to private employers. Title VII prohibits employment practices which discriminate on the basis of an employee's race, color, religion, sex, or national origin.⁹ A school district or school board may be sued in federal court under Title VII by the Equal Employment Opportunity Commission (EEOC) or by a private plaintiff.¹⁰ If a federal district court finds unlawful employment discrimination, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, **but is not limited to** reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court deems appropriate."¹¹

Absent a finding that the Eleventh Amendment protects school districts from awards of monetary damages it appears that the full range of relief awards provided by Title VII can be obtained from a Texas school district. Whether or not members of a board of trustees may be held personally liable to suit under Title VII for actions taken in their official capacity is yet unclear. One recent decision held that since the school board is an employer under Title VII, the board members themselves are employers and are subject to personal liability.¹² The court in that case did, however, rule that the doctrine of official immunity (discussed below) would be followed in such cases.¹³

The only cases to date in which damages have actually been awarded against school trustees individually have arisen under the provisions of 42 U.S.C.A. § 1983 (the 1871 Civil Rights Act). Suits brought under either the 1866 or the 1871 Civil Rights Acts (42 U.S.C.A. §§ 1981-1986)¹⁴ are unique in that they cannot be brought against the school district itself, but rather, have to be brought against the school trustees or school employees. This is true because the federal courts have held that the district itself does not fit under the definition of "person" as it appears in those acts.¹⁵

School trustees, however, do fit the definition of "person" and as a result are not immune to suit.¹⁶ In the Texas case of *Sterzing v. Fort Bend ISD*, the court stated, "Of course the ap-

appropriate named school officials are 'persons' within 1983 and there are no jurisdictional problems...."¹⁷ As a result, the school trustee is exposed to suits brought against him individually or jointly with other trustees and school officials. Such suits are, as a rule, brought against the trustees in their "official and individual capacities."

Since it is established that school trustees are liable to suit in their official and individual capacities, the important issue to confront is the extent of their personal liability in a situation where damages are awarded. It must be noted that the great majority of the cases, in which damages were awarded under the civil rights acts, were brought by former school employees seeking reinstatement and back pay. In these cases, damages were awarded against trustees in their **official capacity**. Since the courts draw no real distinction between the actions of the school district itself and the actions of school trustees in their official capacities, such awards are uniformly paid out of school district funds and not out of the personal funds of the trustees. However, in situations where compensatory awards are sought from school trustees in their **individual capacities**, there is a potential of awards being made against them personally. Since 1967,¹⁸ the doctrine of official immunity has protected (to a degree) public officials, including school trustees, from personal liability. The importance of the recent U.S. Supreme Court ruling in the *Wood v. Strickland* case is that it defines the extent to which school trustees are protected by this doctrine.

The Court's closing remarks on liability, set forth the standard by which future cases will be tried. In its last sentence on the subject of liability, the Court said: "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."¹⁹ The court made this ruling only after a lengthy discussion about the values of lay leadership in education and the great need for qualified school board members who can fulfill their duties without fear of reprisal for the actions they take while running the schools. However, the Court stated, in essence, that the rights of individuals carried greater weight than the need of school boards to retain unquestionable authority in the conduct of the schools.

The Court modified the effect of its ruling somewhat by stating that school boards were not to be held responsible for knowing the future course of constitutional law. This modification appears to limit potential liability to situations where a school board has acted with malice or in a way which deprives an individual of a right which has already been defined by the

U.S. Supreme Court, or one which is fundamental under the U.S. Constitution. For example, the Court ruled in the *Tinker*²⁰ case that students cannot be deprived of their basic constitutional right to freedom of speech or expression. As a result it is apparent that any school board which attempts to discipline students who take part in some nondisruptive form of self-expression (such as wearing black armbands) will be opening itself to liability. This will be true because students' rights in this area have already been defined and are not open for debate. On the other hand, it appears clear that where the school board disciplines students for violating hair or dress codes no personal liability can result. This appears to be a safe assumption because the lower courts are seriously split as to whether or not a pupil has a protected constitutional right to control his appearance, and since the U.S. Supreme Court has repeatedly refused to hear such a case there is no "settled and indisputable" constitutional right which the school board can violate.

Avoiding Liability

With the preceding statements in mind, the question which must be answered is how heavy a burden has this ruling placed on school boards.

In order to answer this question, it is necessary to determine how a board must now operate if it is to avoid liability for its actions. In answer it must be stated that to avoid the first prong of potential liability (that which arises where a school board member has acted with impermissible motivation) a board must never be motivated in its actions by malice toward the individual. In reality, this is not a new restriction placed on school board members but is a basic premise upon which good boardmanship is always based. Taking action against an individual because of personal distaste toward him, or as a means of seeking revenge for something he has done, or because of clash between personalities, is never a proper course for a school board to follow. Common sense dictates that school boards act with reason and not in anger. To meet this requirement, a school board should never take action against an individual unless such action is necessary to maintain an efficient and effective educational program.

In order to avoid the second prong of liability (that which arises where a school board member has acted in a way which

violates an individual's "settled and indisputable" constitutional rights) a school board must do several things. First, it should maintain sources of information which will keep it informed of changes in the law which affect the operation of the schools. This can be done in several ways. Subscribing to educational publications such as the American School Board Journal, the Texas School Board Journal, Texas School Law News, NOLPE Notes, and the Journal of Law & Education, will often provide valuable information as to recent actions by the state and federal courts, the state and national legislative bodies, and the state and federal administrative agencies.

Second, a school board should continually review school policies to ensure their compliance with recent developments in the law. In this review procedure the school board should be assisted, at least initially, by someone with a strong knowledge of both the past and present course of law. Many school districts (especially the larger ones which have a great many potential plaintiffs) have found it very advantageous to retain attorneys for this purpose. While this may appear at first glance to be a very expensive undertaking, in truth it is possibly the best investment a school district can make. What is truly costly to a district is continued operation under questionable policies, because the result might be very expensive law suits against the district and the school board.

Third, a school board should take steps to ensure that its policies are applied fairly and uniformly. If a school board has sufficient interest in a given matter to pass a policy which deals with that matter, it should take care to see that the policy is applied as written; and that the application is uniform from campus to campus.

Fourth, when disciplinary action is taken against an individual, it must be accompanied by adequate due process. The due process requirements will vary according to the action being considered. The harsher the proposed punishment is, the more elaborate and complete the due process should be. Some forms of discipline (such as long-term expulsion of a student) should be applied only after proper notice to the interested parties and a full hearing. The hearing should ensure an opportunity for the development of a complete record which reflects the infraction which occurred, the evidence brought forth to support or oppose the proposed punishment, the school policy upon which the district is basing its action, the actual or potential effect which the violation of that policy will have upon the district, a list of the school's witnesses with a description of their testimony, and any other relevant material such as a student's past record with the district.

If the school board has met these basic requirements, it is

extremely difficult to conceive of a situation in which a board member could possibly be subjected to personal liability. The burden imposed upon school board members by the Wood case cannot be considered overbearing. To the contrary, it can be better classified as establishing a judicial doctrine which encourages the use of reason and fairness in the operation of the public schools. It is probably safe to say that at least 80% of the school boards in Texas already operate in a manner which meets or exceeds the level of performance required by this decision. The remaining 20% do not face an overly difficult task in measuring up. In most cases, their most important responsibility is simply the updating and revision of school policies to assure their compliance with the law.

Protection From Liability

Even though a school board can minimize potential liability with very little effort, there always remains a possibility that some action which it has taken could result in personal liability. As small as this risk might be, in reality it still is capable of creating doubt and worry in the mind of a school board member. Since serving on a school board entails a great deal of work without monetary compensation, it is only reasonable that a board member would desire to be protected from a personal financial loss resulting from his efforts to serve the community. This fact in mind, the question which must be answered is what can be done to provide such protection.

To answer that question, one must first recognize one basic premise upon which the whole issue of personal liability pivots. That premise is that the best interests of a school district may not always coincide with the best interests of an individual trustee or even of a majority of the trustees. To take an extreme example, suppose a majority of a school board votes for a motion to pay themselves a monthly salary for their board service. Suppose they then proceed to issue themselves pay checks which they promptly cash and spend. By doing so, they have very obviously engaged in a criminal act for which they could be punished under present Texas law. If they are brought to trial, should they be able to pay for their defense with school district funds? The answer is, of course, a very definite **no**.

The fact that a trustee's interest and that of the school district might not coincide has been recognized by the Attorney General of Texas. In Opinion H-70 (July 1973) Attorney General Hill

addressed the question of whether or not school districts' funds could be spent to purchase insurance coverage: "(a) to protect its trustees from costs of defending litigation brought against them individually for acts or omissions committed in the good faith discharge of their official duties; and/or (b) to protect school board members from liability, if any, imposed on them for damages resulting from an action, affirmative or omission, occasioned while in the performance of duties or responsibility as a school trustee?"²¹

In answer to that question, it was said, "... it is our opinion that a school district may purchase insurance to protect itself (and its trustees) from the cost and expense of defending litigation brought against them individually for acts or omissions committed by them in good faith discharge of their official duties but not insofar as the litigation is directed against the trustees for acts personal to them in which the school district has no interest or in which the school district may have an adverse interest." The opinion stated further, "... that the school district may purchase insurance to indemnify its trustees from awards of damages only where the district itself was or might have been held liable for the same damages."²²

The essence of Opinion H-70 appears to be that school board members can use school district funds to protect themselves so long as the best interests of the district itself are being served. With this in mind, what protection may be extended to school board members? To answer this, it must be recognized that the total costs resulting from a legal action can be broken into two distinct parts. First are the actual damages which might be awarded to a successful plaintiff, while second are the actual costs of the litigation process itself (such as legal fees). Setting aside the issue of insurance protection but following the reasoning of Attorney General Opinion H-70 (supra), it appears clear that school district funds may be used to defend litigation brought against the district's board members whenever the district itself has a valid interest to protect by doing so.

One of the most obvious needs of any school district is having a school board which can act decisively when action is necessary. To quote the decision in the *Wood* case, it was therein stated that, "school board members function at different times in the nature of legislators and adjudicators in the school disciplinary process. Each of these functions necessarily involves the exercise of discretion, the weighing of many factors, and the formulation of long-term policy."²³ To maintain an atmosphere in which these and other functions can be performed effectively, school board members must be protected from the potential litigation expenses which might arise from actions taken in the discharge of their official duties.

In determining whether public funds should be used to defend litigation brought against school trustees, the issue should not be whether their actions were right or wrong, but rather whether it was within their legal authority to exercise their discretion on the matter in question. In an old Texas case concerning the payment of legal fees out of county funds, the court stated: "The validity of their acts was not affected by the fact that they were mistaken, or that there was an adverse decision of the question. It has been frequently held that the power cannot be measured by such a rule."²¹ It is apparent that a showing that there existed a power, duty, or responsibility to act is crucial to a determination of whether school district funds can be used to defend the actions.

Since cases arising under the various federal civil rights laws will generally be brought by either employees (prospective, present, or former) or students, it is important to define the discretionary authority of school trustees with relation to these groups. In general, school trustees are granted the "exclusive power to manage and govern the public free schools of the district."²² In order to accomplish this task, they are given the power to "adopt such rules, regulations, and bylaws as they may deem proper."²³ As representatives of the public which elected them trustees have as their primary responsibility the maintenance of an efficient and effective educational system. The courts have held repeatedly that school trustees may adopt and enforce rules and policies which regulate the conduct of students and the performance of employees.²⁷ The first responsibility of the trustees is to formulate the school policies which they determine to be necessary for the proper functioning of the school district. Having exercised their legislative function in establishing policies, school trustees then become responsible for taking on the role of adjudicators in the enforcement of those policies. The final authority in student suspensions or employee terminations lies with the school trustees. The trustees cannot, for example, delegate to the superintendent the power to dismiss teachers. The power to hire and fire employees lies solely with the trustees, and though they may rely heavily on the recommendations made by the superintendent, the final authority is in their hands.

If the trustees are to meet the duties of their office, it is apparent that they must fulfill the obligations of preparing and adopting policies. In fact, if they fail to adopt and maintain written policies, their district will lose its state accreditation and, as a result, its state financial support.²⁹ So what appears in statute to be a permissive authorization to "adopt such rules, regulations, and bylaws as they may deem proper" is in reality a legal obligation to adopt school policies.

Having established that the school trustees are obligated to adopt policies to promote the efficient and effective operation of their school district, it is also important to understand the manner in which such policies are adopted. In Texas, as in other states, individual school trustees have no more authority over the operation of the school district than any other citizen. Except for a few statutes which assign certain duties to the president of the school board, the Texas Education Code makes no mention of authority granted to individual trustees.²⁰ All powers granted under the laws of Texas are granted to the trustees as a group, not as individuals.²¹ In fact, no official action can be taken unless a quorum comprising a majority of the board is present at a legally called meeting.²¹

It becomes apparent that any attempt to require trustees to stand alone and individually pay to defend actions which they were obligated to take is not only against the best interests of the district itself but is also adverse to the obvious intention of Texas law. The costs of litigation should be paid out of district funds whenever the trustees are being sued for actions taken in the discharge of their official duties. This protection obviously should not extend to actions of a criminal nature or those which can be classified as official misconduct, but it should encompass all actions in which it is their responsibility to exercise their discretion. With this in mind, it is only reasonable that the policies of the school district protect the members of the school board from being forced to pay for defending their actions. If such a policy does not presently exist, it should be adopted immediately. The policy should be worded in a way that provides for the payment from school district funds of all costs of litigation arising from action taken in the discharge of their official duties during an official board meeting. (See sample policy.)

Such a policy will protect school board members from the possibility of having to pay the costs of litigation and in turn will promote the best interest of the district by freeing the board members to perform their functions effectively and without hesitancy.

Once the school board member is protected from the potential expenses of the litigation, his exposure to personal financial loss is limited to the actual damages which might be awarded against him. In reality, actual damage awards have been very low in the few cases where they have been awarded against school board members in their individual capacity.²² There is, however, no guarantee that damage awards will be consistently low. As a result, school board members also desire protection from this aspect of their potential liability. With respect to the payment of damage awards, however, Attorney General

Opinion H-70 (supra) does not leave much flexibility. Once again setting aside the issue of insurance protection, the Attorney General has ruled, in essence, that school district funds may be used to protect trustees against damage awards "only where the district itself was or might have been held liable for the same damages."³³

This language raises unique problems when considered in the light of suits brought against school board members under the Civil Rights Acts of 1866 and 1871 (42 U.S.C.A. §§ 1981-1986). As previously discussed, actions under those federal statutes cannot be brought against the school district itself, but they can be brought against the officers and employees of the district. Since the district itself is not a party to such suits, it would seem at first glance that it could not be liable for any damages awarded. In reality, however, this is not the case. Many suits have been brought under § 1983 by former school employees seeking reinstatement and back pay; and, when they have been awarded, such damages have been paid from district funds.

This has been true because the law suits were brought against the school board members for actions taken in their official capacity, and the courts have made no real distinction between a school board acting in such a capacity and the school district itself. As a result, the district is indirectly liable for damages, and under the language of Attorney General Opinion H-70 can protect itself and its trustees where the suit is brought for damages against the trustees in their **official capacity**.

The question which remains to be answered is what protection can be afforded to trustees for damages awarded against them in their **individual capacity**. Once again, it is important to note that under the Wood decision, school trustees are protected from awards of such damages unless they have acted with malice or have violated the settled and indisputable constitutional rights of the individual who has brought the suit. It is clear that school trustees who act with malice cannot and should not be afforded the protection of indemnification from school district funds.

However, where school trustees have acted in the discharge of their legal responsibilities but have unknowingly violated an individual's settled and indisputable constitutional rights and as a result are subjected to individual liability, a different situation arises. Technically speaking, the school district can be neither directly nor indirectly subjected to such liability, and under the ruling in Attorney General Opinion H-70 (supra) the school district's funds could not be used to protect its trustees from such liability.

To follow this reasoning, however, creates a purely fictional distinction between individual members of the board of trustees and the school district itself: a distinction which is not supported by reality or Texas law. It is clear that no individual trustee can create official school policy nor may any individual trustee enforce official school policy, nor do the official policies of a school district become invalid because of a change in the individual makeup of a school board. In truth and in fact, all school boards operate through many policies which were adopted by previous school boards made up of entirely different individuals. It is readily apparent that the individual trustee has no role in school governance in any capacity other than as a member of the board of trustees as a whole. To isolate the individual trustee for the purpose of paying damages resulting from the discharge of his official duties is to assign him an individual capacity which he does not have.

Even the cases cited by Attorney General Hill in Opinion H-70 do not support the conclusion that a school district may indemnify its trustees "only where the district itself was or might have been held liable for the same damages." For example, the opinion cites the case of *Corsicana v. Babb*,³⁴ A close reading of that case shows that the liability of the city involved had no bearing on the court's decision. The court in that case stated, "Aside from any considerations purely personal to the officer, it is for the public good that these officers, as instruments through which the city performs its functions, shall be shielded from the personal hazards which attend the discharge of their official duties."³⁵ The court went on to say, "Indemnification of a city officer against liability incurred by reason of an act done by him in the bona fide performance of his official duties is a municipal function."³⁶ While it is clear that later cases have modified the doctrine set forth in *Babb*, they have done so only to the extent necessary to protect the political subdivision from being forced to defend or indemnify officers who have acted in bad faith or in a criminal manner.³⁷

A comprehensive understanding of the legal structure underlying school governance and the legal precedents existing in Texas makes it clear that the test for determining whether school district funds can be used to protect school trustees from the costs of litigation and awards of damages does not hinge on the issue of the school district's liability. The test is, in fact, whether or not the school trustee was acting in the discharge of his official duties. **It is appropriate for school district funds to be used to pay all costs of litigation and all damage awards arising from actions taken by the board of trustees in the discharge of their official duties.**

Once again, it is imperative that the official school policies reflect the protection to which the school trustees are entitled. (See sample policy below.)

SAMPLE POLICY

Litigation Expenses: It is the policy of this school district that local school funds be used to pay all costs of litigation and to indemnify school trustees for all awards of damages in any legal action which has arisen as a result of the discharge by the school trustees of their official duties; however, local funds shall not be used for such purposes where school trustees have engaged in acts of official misconduct or have acted with provable malice toward any individual.

Insurance Protection

On the issue of purchasing insurance coverage, it is important to note that once a clearly established risk to the school district or the trustees in their official capacity has been defined, it is completely permissible for the board of trustees to order the payment of insurance premiums out of the district's local funds.³⁸ However, the primary responsibility for protecting trustees from personal liability is the responsibility of the district itself. Once this is done, by the adoption of appropriate school policies, insurance coverage may be considered basically as back-up protection for the district itself.

Simply stating that the payment of premiums on a liability policy as a legitimate expenditure does not address the real issue in question. Just because a policy is entitled "Board Member Liability Insurance" does not mean that it provides the protection needed by the school district and its officers. In determining the value of any particular policy, it is important to review its costs, the coverage actually provided, and the technical aspects of the policy itself. After a review of the policies presently being offered in Texas, one finds several problems which are common to all of them.

In purchasing coverage, there are several practical problems which must be recognized. One major problem with all board member liability policies is that they give the insurance company great authority to control the defense against legal actions and to agree to settlements without concurrence by the board of trustees. There is serious doubt that the board of trustees of any school district has the legal right to enter into any

contract which delegates its authority to settle lawsuits to any third party (in this case, the insurance company). Whether such a delegation of authority is legal or not, it is definitely not good policy to allow such an important decision as the settlement of a lawsuit against the school district or its trustees to be made by anyone other than the trustees. Take, for example, a situation where the school board is sued by a student who has received corporal punishment under the official school policies. If the insurance company decides that it would be more economical to make a settlement with the student than to pay the expenses entailed in a lengthy legal battle, it would have the power to do so. The result of such a settlement would be to invalidate effectively the school district's policy on corporal punishment even though the district would probably have won the suit had it been carried as far as necessary. If the school board had refused to allow the insurance company to settle, the protection offered by the policy would have been withdrawn. If an insurance policy is to fit the real needs of a school district, the control of the final settlement should be left in the hands of the board of trustees of the district.

Another problem common to all policies is that they offer coverage for more than just the school district and the members of the board of trustees. Since many of the lawsuits brought against school districts and their trustees are brought by employees (former or present) of the district, a possible conflict of interest could arise if the insurance policy covers both the plaintiff and the defendants in the same suit. If coverage is to be provided for the district and its trustees, the policy should include no other parties. If the school trustees desire to provide coverage for district employees, such coverage should be provided in the nature of a fringe benefit and through a separate policy.

While several policies presently being offered in Texas appear to provide coverage which is very comprehensive, it is imperative that before a policy is purchased it should be carefully inspected to insure complete protection. The coverage clause should be carefully reviewed to make sure it covers any actions arising from the discharge by the school trustees of their official duties. The exclusion provisions should be closely studied for any clauses which weaken the coverage clause. In brief, the protection afforded by the policy should be clearly defined before it is purchased. If the meaning of the coverage clause and exclusion provisions is difficult to understand, it may be even more difficult to get protection when it is needed.

One of the primary problems inherent in the purchase of such coverage is the inability of many agents to explain fully the coverage provided by the policy they are offering and the

corresponding inability of many school trustees and superintendents to decipher the complex and sometimes contradictory language appearing in the coverage and exclusion provisions of any policy.

The policies presently available in Texas seem to have two distinct approaches to providing coverage. Many are overly-broad, providing coverage for a wide range of exposure which does not even exist. For example, many policies offer protection from claims of personal injury to which school districts and their trustees are immune. The policies, in essence, offer protection which is not needed. In fact some policies are so broad that they would appear to provide coverage even in situations where trustees have engaged in acts of official misconduct. On the other hand, some policies contain such all-inclusive exclusion provisions that no protection is provided.

Answering the question of what coverage a specific policy provides is not an easy task. This appears once again to be an area where the investment entailed in having a knowledgeable attorney review the policy could save the district a great deal of money.

Aside from the technical problems inherent in securing valuable insurance coverage there are also very important, long-range considerations which must be addressed. Primary among these is the effect which the widespread purchase of liability coverage could have on the continued existence of governmental immunity. To explain the potential effect of widespread liability coverage it is necessary to examine the history of charitable immunity in Texas. Prior to 1966 all charitable institutions (churches, private colleges, orphanages, etc.) enjoyed immunities very much like those presently enjoyed by school districts. However, so many of these charitable institutions bought liability policies that the Texas Supreme Court abolished the doctrine of charitable immunity.³⁹ One of the important considerations which was before the Court was that it appeared to be a violation of public policy to permit an insurance company to sell liability insurance to churches and other institutions and then to allow the insurance company to hide behind the charitable immunity doctrine.⁴⁰ The Court apparently felt that the insurance companies should not be allowed to charge premiums to protect against a nonexistent risk. To cure this situation the Court did away with charitable immunity and provided charitable institutions with a real exposure to liability for which they could then buy legitimate insurance coverage.

The doctrine of governmental immunity could very easily follow a similar course. If a large percentage of Texas school districts start buying overly-broad coverage against liability which doesn't exist, the need for schools to be protected by govern-

mental immunity will decrease. The results will be an increasing likelihood that governmental immunity will be abolished as a protection for school districts.

In summary, while insurance protection against board member liability is a legitimate proposition, those policies presently available have serious drawbacks which probably outweigh their advantages.

SUMMARY

The recent decision of the United States Supreme Court in the *Wood* case has clarified to a degree the issue of the individual liability to which a school trustee is exposed. In Texas and other states where the doctrine of governmental immunity is still honored, trustees are exposed to individual liability only in situations where they have acted with impermissible motivations (malice) or where they have violated the settled and indisputable constitutional rights of an individual.

In order to avoid this potential liability, school trustees must make every effort to maintain school policies which reflect current law. More important, they must make every effort to apply these policies in a fair and reasonable manner. Though every school trustee is exposed to potential liability, this potential can be minimized by any board which is willing to make a sincere effort to remain informed and to base its decisions on the actual needs of the school district.

In determining whether or not school district funds can be used to indemnify school trustees for the expenses of litigation or for awards of damages, the key question to answer is whether or not the trustees were exercising the discharge of the discretionary authority delegated to them under law. If in fact the trustees have acted with malice or have engaged in actions outside their discretion, then the funds of the district cannot and should not be used to protect them. If, on the other hand, the litigation has arisen out of discretionary actions which the school board had a responsibility to take, district funds can and should be used for their protection. Whether the school trustees made the right decision or the wrong decision is not crucial. What is crucial is that the decision was theirs to make in the first place. If the trustees were empowered to take action or make a decision and did so, they are entitled to all the protection which the school district can provide.

While the primary responsibility for protecting school trustees

lies with the district itself, an acceptable avenue for meeting this responsibility is through insurance coverage. However, the policies presently being offered in Texas either fail to offer the necessary protection or are written in such a way that they infringe upon the discretionary authority of the school trustees.

REFERENCES

1. *Wood, et al. v. Strickland, et al.*, 95-5.Ct. 992 (1975).
2. 42 U.S.C. § 1983—Civil Action for Deprivation of Rights
"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
3. *Wood*, pp 1000, 1091, see note 1.
4. *Coleman v. Beaumont Independent School District*, 496 S.W. 2d 245, (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); *Braun v. Trustees of Victoria Independent School District*, 114 S.W. 2d 947 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.).
5. Tex. Rev. Civ. Stat. Ann. Art. 6252-19.
6. *Torres v State*, 476 S.W. 2d 846 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).
7. 42 U.S.C. § 1981—Equal Rights Under the Law—
"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, sue, be partys, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, payings, penalties, taxes, licenses, and exactions of every kind, and to no other."
42 U.S.C. § 1982—Property Rights of Citizens—
"All citizens of the United States shall have the same right, in every State and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."
42 U.S.C. § 1983, see note 2.
42 U.S.C. § 1985—Conspiracy to Interfere with Civil Rights—Preventing officer from Performing Duties (1)
"If two or more persons in any State or territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding

any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him and his personal property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede in the discharge of his official duties."

42 U.S.C. § 1986—Action for Neglect to Prevent—

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this Title, are about to be committed and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding \$5,000 damage therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained under which has not commenced within one year after the cause of action has accrued."

42 U.S.C. § 2000e—Civil Rights Act of 1964, Title VII—Definitions—

"For the purposes of this Chapter—(a) the term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers. (b) The term "employee" means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service, or (2) a bona fide private membership club which is exempt from taxation under Section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five (25) employees (and their agents) shall not be considered employers."

42. U.S.C. Section 2000e-2—Unlawful Employment Practices—Employer Practices—

"(a) It shall be an unlawful practice for an employer—1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, or respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

8. 42 U.S.C. § 2000e; see note 7.

9. 42 U.S.C. § 2000e-3

10. 42 U.S.C. § 2000e-6.

11. 42 U.S.C. § 2000-6(g).
12. *Hutchinson v. Lake Oswego School District*, 374 F. Supp. 1056 (D. Ore. 1974).
13. *Ibid*, p. 1059.
14. See note 7.
15. *City of Kenosha v. Bruno*, 93 S. Ct. 2222 (1973).
16. *Sterzing v. Fort Bend Independent School District*, 496 F2d 92 (5th Cir. 1974).
17. *Ibid*, p. 93.
18. *Pierson v. Ray*, 87 S. Ct 1213 (1967).
19. *Wood*, p. 1001; see note 1.
20. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
21. Attorney General Opinion H-70 (July 1973), p. 300.
22. *Ibid*, p. 305.
23. *Wood*, p. 999, see note 1.
24. *City National Bank of Austin v. Presidio County*, 26 S.W. 775 (Tex. Civ. App., 1894, no writ) at p. 777.
25. Texas Education Code, Section 23.26(b).
26. Texas Education Code, Section 23.26(d).
27. 68 Am Jur 2d 494, 588.
28. Texas Education Code, Section 11.26(a)(5): Texas Education Agency Bulletin 560—*Principles and Standards for Accrediting Elementary and Secondary Schools* (Oct. 1974); Principle III, Standard I—"The Board of Trustees has developed, codified, duplicated, and made available to all school employees and to the public the policies that cover the operation of the school."
29. Texas Education Code, Section 23.41.
30. Texas Education Code, Sections 17.21 et seq.; 22.08, 22.10; 23.26 et seq.; and 25.03, 25.06.
31. V.T.C.S. Article 6252-17.
32. *Lucia v. Duggan*, 303 F. Supp 112 (1969).
33. See note 22.
34. *City of Corsicana v. Babb*, 290 S.W. 736 (Tex. Comm., 1927).
35. *Ibid*, p. 737.
36. *Ibid*.
37. *City of Del Rio v. Lowe*, 111 S.W. 2d 1208, (Tex. Civ. App., 1937, reversed on procedural point, 122 S.W. 2d 191).
38. Texas Education Code, Section 20.48(c).
39. *Watkins v. Southcrest Baptist Church*, 399 S.W. 2d 530 (1966).
40. *Ibid*, also see—*Cox v. Dejarnette*, 123 S.E. 2d 16.