

FLYING IN NO-MAN'S LAND: THE USE OF DRONES AT SCHOOLS

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Unmanned aircraft systems, more commonly known as drones, seem to be everywhere these days. These devices have surged in popularity as smaller, more affordable recreational models have come on the market. According to the Consumer Electronics Association, consumers were expected to spend more than \$100 million on drones in 2015, up from \$69 million in 2014, and the Federal Aviation Administration (FAA), which regulates the use of drones, estimated that more than 1 million drones, both for hobby-related and commercial purposes, would be sold through the holiday season.

With this boom in sales come concerns about responsible, correct and safe usage, and school districts and charters can expect to increasingly face these questions as teachers, coaches, parents or even students acquire drones for potential use at schools and school-related functions.

It's no wonder the room was full for attorney Debbie Esterak's talk on drones at the TASBO Operations and Texas Facility Masters Conference in San Marcos on Nov. 11. A partner in the Austin office of Rogers Morris & Grover, Esterak has practiced school law her entire legal career including a stint at the Texas Association of School Boards. Drones came on her radar, so to speak, in September while she was at an away game for her son's football team. In passing through the athletic director's office,

she noticed a small drone sitting on his desk.

"As a school attorney, I started thinking 'What are the liability issues?' because while school districts are immune from most forms of liability, they can be held liable for certain things, such as damage resulting from use or operation of a motor-driven vehicle," Esterak said. "So the question in my mind was 'Is this a vehicle?'. I would say no but it got my cogs turning."

Current Regulations

In reviewing the regulatory landscape for these small unmanned aircraft systems, she found that under current FAA regulations, school districts and charters and school-related activities fall into a kind of no-man's land.

"The overarching issue is how school districts can use drones without running afoul of FAA regulations," Esterak said, "and also without putting themselves at risk for liability concerns."

The problem for school districts and charters is that they don't fit comfortably in the FAA's definitions of public use or civil use, but may fit in certain ways under the recreational and hobby use exemption. Public use, as defined by the FAA, is for a governmental entity or operations, primarily for law enforcement purposes, firefighting or emergency/disaster relief situations; civil use is for private sector or commercial purposes. Educational use, with a very

narrow exception for aeronautical research, is not included under the public use definition.

Operators of drones for public or civil uses must acquire approval from the FAA in the form of either an experimental airworthiness certificate or a Certificate of Waiver or Authorization.

That leaves the recreational use exemption, which allows for use of small unmanned aircraft purely for personal and hobby purposes. Depending on how a school district might want to use a drone, the usage might not fit squarely under that exemption.

"What I'm trying to determine right now is how the FAA is really enforcing the hobby/recreation exemption," Esterak said. "Must the use truly be solely for a hobby or recreational purpose, or does the exemption cover any use that is not for a commercial purpose? It's a very fine line with that distinction."

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For school districts, extracurricular activities would, according to Esterak, come closer to being a recreational use but classroom purposes might be a trickier fit.

A proposed FAA rule for the operation of small drones would address some of the uncertainty surrounding various uses, such as educational and academic ones, that fall in between those that are purely commercial and purely recreational. The proposed rule is expected to be finalized later in 2016. Another FAA rule requiring online registration of small drones is currently being drafted and is expected to be effective in the near future.

Safety and Privacy Concerns

With most drones coming equipped with cameras or other imaging devices, another primary concern for school districts is the safety and privacy of students, teachers and staff. Eanes ISD Director of Safety & Risk Management Laura Ferry, who attended Esterak's talk at the conference, expressed concerns about student confidentiality, particularly for students on no-photography lists. She started thinking about drones and their consequences after seeing a student's parent using a drone at a homecoming pep rally last fall. "That parent does photography, but he doesn't know who is on our [no-photography] list," she said, adding that she's been talking with other risk managers about their concerns and the need for district policies.

Leander ISD decided to establish its own guidelines after questions arose from coaches looking for direction on the use of drones. While the district does not have any drones at this time, "we wanted to get out in front of this," said Darla Humes, director of risk management. Those wanting to use a drone for school-related purposes must first request permission through the district's support services. In drafting the guidelines, "we went through the FAA regulations but also used common sense to figure out what we wanted to do and how to address it," she said.

Leander ISD is allowing construction crews to use their own drones to monitor the construction phases of the new Tom Glenn High School for safety purposes. "But there are no students or staff on that campus at this time," Humes pointed out.

In addition to the FAA regulations, Texas school districts can, under UIL rules, film sports practices but cannot film games or events in accordance with FAA rules prohibiting flight over large crowds. In fact, the FAA provides "no drone zone" signage examples for posting at stadiums.

But, what about a drone being flown outside a school window or near but not over a playground?

Scenarios like these fall into a gray

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FAA Guidelines for Drone Use



Under the hobby/recreation exemption, operators must follow certain FAA safety guidelines, including:

- Device must be 55 pounds or less.
- Must fly no higher than 400 feet.
- Must be operated within the operator's personal line of sight.
- Must follow a community-based set of safety guidelines (such as a local model aircraft club's guidelines).
- Must not fly recklessly or under the influence of drugs or alcohol.
- Cannot fly over unprotected persons or vehicles or fly near sensitive infrastructure, such as water treatment plants, correctional facilities, power stations, etc.
- Must contact the airport if flying within five miles of an airport.

area within the Texas Privacy Act, which is "pretty much it right now as far as Texas law concerning drones goes," Esterak said. The law, enacted just in 2013, makes it unlawful to use a drone to take an image of an individual or privately owned real property with the intent to conduct surveillance on the individual or property. There are a number of exceptions contained in the law, however, including allowing for the capture of an image of "public real property or a person on it." Public property is not defined in the Act, but would presumably include schools.

Because so much is happening in this area of the law, Esterak suggested that school districts designate a person to keep apprised of the changes, as well as notify all teachers, coaches, staff and even booster and parent groups about the appropriate usage of drones.

Esterak said that school districts could argue that a drone outside a classroom window constitutes a classroom disruption under the Texas Education Code, while a drone over a playground most likely would violate FAA regulations, but that "there is a lot of uncharted territory right now." For now, should a drone appear over school property that is operating in an unsafe or reckless manner, districts can contact the local law enforcement agencies, which are tasked by the FAA to help deter, detect, investigate and pursue enforcement actions to stop unauthorized or unsafe drone operations. Additionally, districts could consider enacting a policy prohibiting all drone flights over school property unless approved in advance by the superintendent or a designated district employee.

Because so much is happening in this area of the law, Esterak suggested that school districts designate a person to keep apprised of the changes, as well as notify all teachers,

coaches, staff and even booster and parent groups about the appropriate usage of drones. Until the small drone regulations are released by the FAA, districts should take a more conservative approach to using them to avoid sanctions for unauthorized use.

"Luckily, the FAA's enforcement strategy is not to fine people right away for infractions, unless the operation is something really egregious," Esterak added. "Right now, the FAA is taking an educational role and position. They want to get the word out about safety and security."

"It's important to be aware, however, that drone use is a federally regulated area and the laws are changing rapidly. Schools and school employees need to be aware that if they venture down the drone path, they do so with their eyes open and knowing the rules of the road."

Want to learn more about this topic at the Annual Conference?

Drones: Look Before You Launch
Session E, Thursday 10:15-11:15 am
Presenter(s): **Debra Esterak**, Rogers, Morris & Grover LLP

As drones become cheaper, easier to operate and more widely available, their uses are exploding. Yet these are not just toys for anyone to fly. State and federal laws, as well as city ordinances and UIL rules, govern drone use. This session is essential for anyone considering purchasing or currently owning a drone in order to learn the laws regarding how, where, when and by whom a drone may be operated.



Resources

FAA Fact Sheet: Unmanned Aircraft Systems
www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153

Proposed FAA Rule for Operation and Certification of Small Unmanned Aircraft Systems
www.regulations.gov/#!document-Detail;D=FAA-2015-0150-0017

Know Before You Fly
www.knowbeforeyoufly.org

No Drone Zone
www.faa.gov/uas/no_drone_zone

Dos and Don'ts of Flying Unmanned Aircraft Systems
www.faa.gov/uas/publications/media/27231_FAA_KBYF_lores.pdf

Texas Privacy Act, Chapter 423. Use of Unmanned Aircraft
<http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.423.htm>