State Bar
Section Report
School Law

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Greetings to all members of the School Law Section.

I would first like to wish all of you a joyous holiday season from the entire Executive Committee.

Because of feedback received at this year's retreat, suggestions by members, and requests, we have contracted with the La Cantera Resort for the 2001 School Law Retreat. The dates are July 13th and 14th. This is a wonderful facility. It is located on a hill overlooking San Antonio and is contiguous to Fiesta Texas. The resort has numerous pools, a pool slide and waterfall, an exercise facility and numerous other amenities. We were able to negotiate a reduced rate of $160 a night. Please mark your calendar and plan to attend.

In conjunction with the retreat, I would like to thank Andy Ramzel and Kevin Lungwitz who have agreed to serve as co-chairs for the CLE for the retreat. Please give them assistance if they ask. They have already roughed out an excellent program and will be asking for help speaking. Thanks also to Bill Armstrong who has agreed to coordinate the golf.

For your calendars, you may want to note that the UT School Law Conference is scheduled for March 1st and 2nd. It will be held at the Hyatt Regency on Town Lake in Austin.

The State Bar has asked all attorneys to be sure to turn in your estimated pro-bono hours to them. If we don't do this, it is more likely that the Bar would propose mandatory pro-bono.

As a final word, I would again like to thank the members of the Section Newsletter Committee and those who have contributed articles. This newsletter is really high quality and is a wonderful benefit to Section members. Thanks to all of you.

Season's greetings and best wishes for an excellent New Year.

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Re: School Law Newsletter

Dear Members:

On behalf of the Editorial Board of the School Law Newsletter, I would like to offer the opportunity to our school law section colleagues to be a contributing editor to the School Law Newsletter. The newsletter, which is published three times a year, is always soliciting papers on topics that will be of interest to our membership.

When preparing your articles, please adhere to the following guidelines:

FONT: Times New Roman, 12 point

TITLE AND AUTHOR NOTE: Center titles in Times New Roman 16 point, bold. Below that in italicized Times New Roman 12 point should be author's name, next line should be author's firm and below that can be, if desired, author's city and state. Below that, if desired, can be author's e-mail address.

SECTION TITLES: Bold, upper and lower cases, flush left to the margin. Do not number sections or put paper in outline form.

FOOTNOTES / ENDNOTES: Endnotes should be used in lieu of footnotes. Endnotes should be arabic numbered and double spaced. Case cites should be italicized

LENGTH: A suggested length is 3,750 words to 6,000 words, not including title and endnotes (approximately 4-6 pages in the Newsletter). Draft articles being submitted to editors can be double spaced, but the final version should be single spaced.

SUBMISSION: Authors should submit both a hard copy and floppy disk in either Word or Word-compatible format to the editor. The edited disk should be submitted with the final hard copy for publishing.

If you wish to submit a paper for possible publication, please direct it either to my attention or to my Co-Editor, Ms. Debbie Esterak.

Very truly yours,

Karen L. Johnson, Co-Chair
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A SCHOOL DISTRICT PEACE OFFICER PRIMER

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In 1973, the Texas Legislature enacted a statute authorizing school boards to employ campus security personnel and peace officers.[1] Former section 21.483 of the Texas Education Code, entitled "Campus Security Personnel, "is the predecessor of the current statute, Texas Education Code § 37.081, "School District Peace Officers and Security Personnel."

Approximately ten percent of Texas school districts have exercised their authority to commission peace officers.[2] As of May 2000, 113 Texas school districts currently have 1272 active commissioned peace officers. Thus, each Texas school district police department currently employs an average of 11.2 officers.

Jurisdiction

Article 2.12 of the Texas Code of Criminal Procedure outlines who is a "peace officer" for purposes of the criminal justice system in Texas. Included in the laundry list of peace officers are "officers commissioned under Section 37.081, Education Code."[3] Thus, commissioned school district police officers hold the same "peace officer" status as sheriff's deputies, constable's deputies, municipal police officers, and state troopers.[4] [5]

Although school district police officers are equal to other law enforcement officials as peace officers, their jurisdiction may be limited. A police officer's jurisdiction is both the geographic boundary in which she can lawfully perform her peace officer duties and the day-to-day duties she is authorized to perform. Peace officers should have clearly defined jurisdictions because acts performed outside an officer's jurisdiction may be subject to challenge, typically through motions to suppress evidence obtained as a result of an officer's conduct.[6]

In the original 1973 statute, the scope of school district peace officers' jurisdiction was quite limited. School district "campus security personnel" were "vested with all the powers, privileges, and immunities of peace officers" so long as they were "on the property under the control and jurisdiction of the district or otherwise in the performance of [their] duties."[7] The statute clearly vested officers with broad peace officer jurisdiction while on school property. On the other hand, the "otherwise in the performance of his duties" jurisdiction was quite vague.

Since 1973, the jurisdictional aspects of the school district peace officers' statute have been amended twice. In 1993, the Texas Legislature amended the jurisdictional statute, expanding school district peace officers' potential jurisdiction as that jurisdiction "determined by the board of trustees" and may include "all territory in the boundaries of the school district and all property, real and personal, outside the boundaries of the district that is owned, leased, or rented by or otherwise under the control of the school district and the board of trustees that employ the peace officer."[8] In 1995, the Texas Legislature required school district boards of trustees to determine both the jurisdiction of peace officers and security personnel.[9] That jurisdiction "may include all territory in the boundaries of the school district and all property outside the boundaries of the district that is owned, leased, or rented by or otherwise under the control of the school district and the board of trustees that employ the peace officer or security personnel."[10]

Every school board that employs peace officers should adopt a policy clearly defining the jurisdiction of its officers because the scope of a school district peace officer's jurisdiction is not automatic. "The jurisdiction of a peace officer or security personnel under this section shall be determined by the board of trustees Ö ." Without board determination, no jurisdiction may exist. The geographic jurisdiction usually will follow the statutory-maximum jurisdiction permitted under the Education Code: "The jurisdiction of peace officers is all territory within the boundaries of the District and all property, real and personal, outside the boundaries of the District that is owned, leased, or rented by or otherwise under the District's control."[11]

Law Enforcement and Administrative Duties

In addition to defining geographic jurisdiction, school boards should address through policy the duties assigned to its officers. The Education Code specifically anticipates that school district officers will accomplish both law enforcement and administrative tasks. "A school district peace officer shall perform administrative and law enforcement duties for the school district as determined by the board of trustees of the school district. Those duties must include protecting (1) the safety and welfare of any person in the jurisdiction of the peace officer; and (2) the property of the school district."[12]

Law enforcement authority regularly delegated to school district peace officers include the following:

(1) Enforce all applicable sections of the Texas Education Code.
(2) Prevent and investigate violations of law, ordinances, or District policy that occur on District property, at school zones and bus stops, or at District functions; that involve District vehicles or buses; or that involve offenses against the District or against District employees or Board members in their capacity as District employees or Board members.
(3) Serve search warrants in connection with District-related investigations and arrest warrants in compliance with the Texas Code of Criminal Procedures.
(4) Take juveniles into custody as provided by the Texas Family Code.
(5) Arrest suspects consistent with state and federal statutory and constitutional standards governing arrests, including arrests without warrant for offenses that occur in the officer's presence or under the other rules set out in the Texas Code of Criminal Procedures.
(6) Patrol streets in connection with the performance of

duties provided by this policy, and engage in traffic enforcement activities on streets, highways, and roadways within the jurisdiction set out by this policy.
(7) Engage in activities and programs approved by the Superintendent or designee designed to prevent or deter crimes against District property or District employees, students, and visitors.
(8) Carry weapons as directed by the chief of police and approved by the Superintendent or designee.
(9) Assist in providing traffic and parking control at athletic events, at school closings or openings, or at any other time deemed necessary by the Superintendent or designee to ensure the safety and welfare of students, staff, and District patrons.
(10) Enforce laws relating to the safe operation of school buses.
(11) Enforce all laws, including municipal ordinances, county ordinances, and state laws within another law enforcement agency's jurisdiction while temporarily assigned to that agency.
(12) Where appropriate, coordinate and cooperate with commissioned officers of all other law enforcement agencies in law enforcement matters consistent with the Board's policy.
(13) Participate in judicial proceedings.

Administrative Duties

School boards should also consider what administrative duties its peace officers should perform. Some school district police officers perform specialized or long term investigations. Some conduct sexual harassment investigations for human resources departments. School district police departments may be asked to perform administrative (*i.e.*, non-law enforcement) investigations because of their officers' training and experience in investigative techniques; the apparent control, authority, and seriousness they bring to a situation; and their immediate availability to conduct the investigation.

School districts are divided on their approaches to administrative duties. Some local board policies do not appear to make an express determination of what administrative duties their officers can perform. Other districts' policies grant peace officers "authority to investigate violations of District rules and regulations as requested by the District administration and participate in administrative hearings concerning the alleged violations."[13] Because the Education Code suggests that administrative duties will be "determined by the board of trustees of the school district," the adoption of a policy specifically authorizing peace officers to perform administrative tasks is advisable.

Public Information Requests

School districts receive numerous requests for public information each year. Certain requests may seek, either intentionally or unintentionally, information held by the school district police department. Certain law enforcement information held by a law enforcement agency is exempt from public disclosure if:

(1) it deals with the "detection, investigation, or prosecution of crime" and the release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it deals with the "detection, investigation, or prosecution of crime" and the investigation did not result in conviction or deferred adjudication; or

(3) it is information that (a) is prepared by an attorney representing the state in anticipation of or in preparation for criminal litigation; or (b) reflects the mental impressions or legal reasoning of an attorney representing the state.[14]

In addition, an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from public disclosure if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) the internal record or notation (a) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (b) reflects the mental impressions or legal reasoning of an attorney representing the state.[15]

The law enforcement record exception is permissive. It may be waived by a school district if it so chooses. However, the school district police department may share law enforcement records with school district administrative personnel for use in administrative actions without waiving the law enforcement exception to public disclosure. As a general rule, "the transfer of information within a governmental body or between governmental bodies is not necessarily a release to the public for purposes of the Public Information Act."[16] This may be an additional reason for the school board to explicitly adopt a policy authorizing peace officers to perform and assist in administrative duties.

Confidential Information: Juvenile Records

Some information held by the school district police department may be confidential by law and cannot be released to the public. For example, juvenile law enforcement records that are maintained by a law enforcement agency may be confidential by statute depending on the date the juvenile conduct occurred. Three time periods are critical in determining whether juvenile law enforcement records are confidential: conduct that occurred before January 1, 1996; conduct occurring between January 1, 1996 and August 31, 1997; and conduct occurring after August 31, 1997.

Juvenile law enforcement records concerning conduct that occurred before January 1, 1996 are confidential under former section 51.14(d) of the Texas Family Code.[17]

In 1995, the Legislature replaced section 51.14 of the Family Code with section 58.007 and omitted the language in

former section 51.14(d) that made juvenile law enforcement records confidential.[18] Following the Legislature's statutory change, the Attorney General held that section 58.007 of the Family Code does not make confidential juvenile law enforcement records concerning juvenile conduct occurring on or after January 1, 1996.[19]

In 1997, the Legislature amended the Family Code, superseding in part Open Records Decision No. 644 (1996) and making juvenile law enforcement records expressly confidential under section 58.007(c) of the Family Code: "[L]aw enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public . . . ."[20]

Section 58.007(c) only applies to juvenile law enforcement records concerning conduct that occurred on or after September 1, 1997. In summary, juvenile law enforcement records maintained by a law enforcement agency are confidential by statute except for conduct occurring between January 1, 1996 and August 31, 1997.[21]

Confidential Information: Sexual Harassment Investigations

In addition to juvenile records, the names of the witnesses and their detailed statements provided as a result of a sexual harassment investigation are confidential by law.22 In Morales v. Ellen, the court recognized the difficulty in getting adults to come forward with complaints of sexual harassment.[23] For this reason, the court emphasized public policy "dictates that we treat sexual harassment investigations, victims and witnesses so as to promote full disclosure of improper conduct and prompt resolution of valid complaints."[24] *Ellen* holds that witness names and statements contained in a police department sexual harassment investigation file are not subject to public disclosure under the Public Information Act pursuant to the Act's confidentiality exception.[25]

Confidential Information: Child Abuse Investigations

Local law enforcement officers, including school district police officers, may be involved in the detection and investigation of child abuse. School district police are a "local law enforcement agency" for purposes of receiving required reports of child abuse.[26] If a school district police department receives a report that "a person responsible for the a child's care, custody or welfare," which includes any school personnel or volunteer at the school,[27] may have been the person who abused or neglected the child, then that report must be referred immediately to the Texas Department of Protective and Regulatory Services.[28]

Local law enforcement agencies, like school district police departments, can assist with and, at times, may take the lead in conducting child abuse investigations.[29] The information obtained in an investigation of alleged or suspected child abuse, however, is confidential. Any report that alleged or suspected abuse or neglect of a child has occurred or may occur is, by statute, confidential.[30] Likewise, the identity of the person making the report is confidential.[31] Finally, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation are confidential.[32] School district peace officers must be sensitive to their dual duties to maintain the confidentiality of information obtained in a child abuse investigation while simultaneously fulfilling their role of keeping appropriate school district personnel updated on the status of an investigation and the possible need for administrative action–suspension or termination–against the employee.[33]

Outside Employment

School districts must approve any off-duty law enforcement activities of its peace officers.[34] The district's board of trustees must determine the scope of both on-duty and off-duty law enforcement activities of a school district peace officer.[35] In addition, school districts "must authorize in writing any off-duty law enforcement activities performed by a school district peace officer."[36] Typical policies do not allow district officers to provide law enforcement or security services for an outside employer without prior written approval from the chief of police and Superintendent or designee.[37]

Memorandum of Understanding and Assisting Other Jurisdictions.

School district police departments and law enforcement agencies with overlapping jurisdiction must have in place communication and coordination agreements. Under Section 37.081(g), a school district police department must enter a "memorandum of understanding" with the law enforcement agencies with which it has overlapping jurisdiction that outlines reasonable communication and coordination efforts between the department and the agencies.[38]

The Education Code also encourages assistance between a school district, its peace officers, and other law enforcement agencies. School districts may contract with other political subdivisions to allow school district peace officers to assist other law enforcement agencies.[39] In a contract, a school district and another political subdivision can enlarge school district peace officers' jurisdiction to include all territory in the jurisdiction of the political subdivision.[40]

Chief of Police

In 1995, the Texas Legislature added requirements concerning the school district chief of police. By statute, the chief of police reports to the superintendent or the superintendent's designee and is accountable to the superintendent.[41] The chief of police or the chief's designee supervises school district police officers, who must be licensed by the Commission on Law Enforcement Officer Standards and Education.[42]

Texas Occupations Code

The licensing requirements for peace officers and other laws pertaining to peace officers were formerly located in Chapter 415 of the Texas Government Code. The 1999 Legislature recodified different statutes applicable to various professions to the newly-enacted Texas Occupations Code. Chapter 1701 of the Texas Occupations Code pertains to all law enforcement officers, including school district peace officers. Included under this chapter are various statutes relating to the

Commission on Law Enforcement Officer Standards and Education; training programs and schools; license requirements, disqualifications, and exemptions, continuing education and yearly weapons proficiency; employment records; and disciplinary procedures.[43]

ENDNOTES

1. Act of May 28, 1973, 63rd Leg., R.S., ch. 596, § 1, 1973 TEX. GEN. LAWS 1637, 1638.

2. Information provided by Mary Kay Bolton, Texas Commission on Law Enforcement Officer Standards and Education. Her assistance is greatly appreciated.

3. TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon Supp. 2000).

4. Like other law enforcement officers, "a school district peace officer commissioned under Section 37.081, Education Code" is specifically authorized to take a child into custody under certain circumstances. TEX. FAM. CODE ANN. § 52.01(a) (Vernon Supp. 2000).

5. Thus, the phrases "peace officers" and "police officers" are used interchangeably throughout this article.

6. *See, e.g., State v. Elliott*, 879 S.W.2d 381, 382 (Tex. App.—Waco 1994, pet. ref'd) (DWI defendant seeking to suppress evidence obtained in traffic stop by arguing that Houston Metropolitan Transit Authority police officer lacked jurisdiction to make stop); *Vickio v. State*, 902 S.W.2d 523, 524 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (same).

7. Act of May 28, 1973, 63rd Leg., R.S., ch. 596, § 1, 1973 TEX. GEN. LAWS 1637, 1638.

8. Act of April 30, 1993, 73rd Leg., R.S., ch. 115, § 1, 1993 TEX. GEN. LAWS 263, 264.

9. TEX. EDUC. CODE ANN. § 37.081(a) (Vernon 1996).

10. *Id.*

11. *See, e.g.*, Northside ISD Board Policy CKE (Local).

12. TEX. EDUC. CODE ANN. 37.081(d) (Vernon 1996).

13. *See, e.g.*, Conroe ISD Board Policy CKE (Local); Katy ISD Board Policy CKE (Local).

14. TEX. GOV'T CODE ANN. § 552.108(a) (Vernon Supp. 2000); *see also Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996).

15. TEX. GOV'T CODE ANN. § 552.108(b) (Vernon Supp. 2000).

16. Office of the Attorney General, 2000 TEXAS PUBLIC INFORMATION HANDBOOK 31; *see* Tex. Att'y Gen. ORD-661 (1999).

17. Act of May 22, 1993, 73rd Leg., R.S., ch. 461, § 3, 1993 TEX. GEN. LAWS 1850, 1852 (former TEX. FAM. CODE ANN. § 51.14(d) (Vernon 1994)).

18. Act of May 27, 1995, 74th Leg., R.S., ch. 262, § 106, 1995 TEX. GEN. LAWS 2517, 2591. Section 58.007 of the Family Code was applicable only to conduct occurring on or after January 1, 1996.

19. Tex. Att'y Gen. ORD-644 (1996).

20. A child is a person who is at least ten and under seventeen years old or seventeen who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming seventeen years of age. TEX. FAM. CODE ANN. § 51.02(2) (Vernon Supp. 2000).

21. Other statutory provisions and exceptions to disclosure may apply to juvenile law enforcement records falling in this period.

22. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied).

23. *Id.* at 523.

24. *Id.* at 525.

25. *See* TEX. GOV'T CODE ANN. § 552.101 (Vernon 1994) (confidential information exception to required public disclosure).

26. *See* TEX. FAM. CODE ANN. § 261.103(a)(1) (Vernon Supp. 2000).

27. TEX. FAM. CODE ANN. § 261.001(5)(D) (Vernon Supp. 2000).

28. TEX. FAM. CODE ANN. § 261.105(a) (Vernon Supp. 2000).

29. TEX. FAM. CODE ANN. §§ 261.301 (Vernon Supp. 2000); *id*. § 261.406(c).

30. TEX. FAM. CODE ANN. § 261.201(a)(1) (Vernon Supp. 2000).

31. *Id.*

32. TEX. FAM. CODE ANN. § 261.201(a)(2) (Vernon Supp. 2000).

33. Child abuse investigations may create conflict for school district police officers because their law enforcement duty to keep child abuse investigation information confidential may compete with their administrative duty to keep the administration appropriately informed. The potential for conflict derives from the highly confidential nature of child abuse investigation information. The Family Code creates a system whereby child abuse investigation information may only be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law"; "under rules adopted by investigating agency"; or pursuant to a court order. *Id.* § 261.201.

    As described above, the transfer of information within a governmental body or between governmental bodies is not necessarily a release to the public for purposes of the Public Information Act. *See* note 16 and accompanying text. Governmental bodies should be able to share information internally "in the interest of the efficient and economical administration of statutory duties. Tex. Att'y Gen. ORD-661 (1999). In furthering this interest, the Attorney General has "acknowledged that [confidential] information may be transferred between governmental bodies without violating its confidential character on the basis of a recognized need to maintain an unrestricted flow of information between governmental bodies." *Id.*

    There are no Attorney General opinions, Commissioner's decisions, or court decisions that consider or determine whether school district administrators can obtain and use child abuse investigation information from their own police department. In at least one case involving the termination of teacher's contract, the hearing examiner ruled that the teacher could not obtain child abuse investigation information through discovery from the school district or student witnesses. *See* Order on Respondent's Motion to Compel, *Spring Branch Independent School District v. Charles Trammell*, TEA Docket No. 024-LH-1199. Likewise, the hearing examiner denied the school district administration the ability to use the police department's child abuse investigation information to prepare for or use during the hearing. *Id.*

34. TEX. EDUC. CODE ANN. § 37.081(e) (Vernon 1996).

35. *Id.*

36. *Id.*

37. *See, e.g.*, Spring Branch ISD Board Policy CKE (Local); Alief ISD Board Policy CKE (Local).

38. TEX. EDUC. CODE ANN. § 37.081(g) (Vernon 1996).

39. TEX. EDUC. CODE ANN. § 37.081(c) (Vernon 1996).

40. *Id.*

41. TEX. EDUC. CODE ANN. § 37.081(g) (Vernon 1996).

42. *Id.*

43. *See* TEX. OCC. CODE ANN. §§ 1701.001 through 1701.965 (Vernon 2000).

Two-part article

Beyond Four Corners?

Employment contracts do not stand alone in Texas. Extracontractual sources such as district policies, board actions, and even administrative decisions can affect the contractual rights and duties of districts and employees. Of the several issues attorneys face in construing employment contracts, two significant ones are discussed in this two-part article. The first part of the article examines the Commissioner's jurisdiction under Texas Education Code, section 7.057 and the impact of recent decisions on the appeal of con involving employment contracts and school district policies. The second part of the article examines the interplay of contracts and policies on supplemental duties, specifically at what point the protections of an employment contract extend to protect a property interest in an assigned supplemental duty.

Contract Policy Incorporation

Author: Michael J. Currie

Each and every year, thousands of teachers in Texas sign a new contract; however, the vast majority of them probably never read the contract or understand its implications. With the exception of a decreasing number of teachers on continuing contracts, most teachers sign a contract every year or so. Typically, these contracts contain a clause that requires each employee to "comply with, and be subject to, state and federal law and District policies, rules, regulations, and administrative directives as they exist or may hereafter be amended." As the reader will see, the Commissioner of Education has confused a relatively clear area of the law through his recent decisions.

Historically, the preeminent case cited often as the general rule is *Arlington ISD v. Weekley*, et vir., 313 S.W.2d 929 (Tex. App.—Fort Worth, 1958, r.n.r.e.) [*Weekley*]. The general rule, as written in that case, is that "regulations adopted by a school board prior to the making of a contract with a teacher, which are known or ought to have been known to the teacher when he enters into the contract, form part of the contract and the teacher's employment is subject thereto." *Id at 930*. Ironically, the policy in question in this case is one that no district would adopt today. This policy required a teacher to quit her teaching position if she became pregnant during her contract term. *Id at 930*. Despite the questionable policy at issue, the rule that derived from Weekley was based on pure contractual analysis. The contract stated that the teacher would abide by the rules and regulations adopted by the Board of Trustees. *See Id at 929-930*. The Board had adopted the regulation at issue in this case prior to the contract formation. *Id at 929*. Therefore, the teacher was required to abide by this regulation. From this bright line beginning, an erosion of the incorporated policies rule has occurred over the years. But, as is often the case, the erosion has not been consistent across the board.

In the past few years, numerous Commissioner of Education decisions have addressed this reoccurring question of what policies, if any, are incorporated into a written contract. In *Robinson v. Houston ISD*, the Commissioner held that violations of local school district policies do not provide the Commissioner of Education with jurisdiction under either §7.057 (a)(2)(A) or §7.057 (a)(2)(B) of the Texas Education Code. Dkt. No. 143-R3-696 (Comm'r Educ., April, 2000) [*Robinson*]. This particular case involved a coaching contract and the corresponding supplemental coaching duties. The district initially hired the Petitioner to be the head football coach; however, he received a teacher contract only and was assigned the supplemental duties of head football coach. *Id at 4*. The Houston ISD policy on supplemental duties indicated that "supplemental compensation shall be paid to an employee who is assigned certain extra duties and responsibilities. Such assignments will be made by the principal and are subject to cancellation at any time." *Id at 4*. The Commissioner of Education discussed the provisions of the written contract at length and decided supplemental duties were not part of the coach's written contract. *Id at 4*. This determination resulted in a lack of jurisdiction for a §7.057 (a)(2)(B) appeal. *Id at 4*. Additionally, the Commissioner decided that a "local board policy is not a 'law' for purposes of appeal under the Texas Education Code section 7.057 (a)(2)(A) and therefore, the Commissioner does not have jurisdiction over Petitioner's grievance concerning the alleged violation of district policies." *Id at 3*.

In *Robinson*, the Commissioner did not appear to consider the guidelines raised by *Salinas v. Roma ISD*. Dkt. No. 058-R3-1196 (Comm'r Educ., 1997) [*Salinas*]. In *Salinas*, Petitioner, like Robinson, had supplemental duties as an assistant band director. The district policy, in *Salinas*, on supplemental duties stated that "such assignments may be terminated for any reason or no reason, at the sole discretion of the district." Id at 3-4. The Commissioner found an ambiguity and a conflict between this policy and Petitioner's term contract. *Id at 4*. Respondent in *Salinas* had the sole ability to terminate the supplemental duties at-will by policy. By the contract terms, supplemental duty requirements were not a part of the contract. *Id at 4*. In contrast to the district, the Petitioner did not have the ability to terminate the supplemental duties. *Id at 4*. Under the rule of law that contract terms are construed against the drafter when an ambiguity exists, the Commissioner decided that supplemental duties were part of the term contract. *Id at 4*. Therefore, any attempt to terminate these supplemental duties would necessarily invoke the protections of Chapter 21, subchapter E, of the Texas Education Code. *See Id at 4*.

Based on the *Salinas* rule, the Commissioner in *Robinson* should have reached a different result. The policy provisions in the two decisions are similar with regard to supplemental duties and the sole ability to terminate such an arrangement. Despite this similarity, the Commissioner in *Robinson* dismissed the contract argument by simply stating that the supplemental duties were not created in a written contract. *Robinson at 4*. This dismissal arguably negates the rule stated in Salinas that you cannot terminate a portion of a term contract. *Salinas at 4*. The Houston ISD in *Robinson* should have been required to go through the termination/non-renewal process in Chapter 21, subchapter E, of the Texas Education Code before removing Petitioner's supplemental duties as football coach.

It should be noted that the *Robinson* decision would likely have been the correct decision if this case had arisen from a district with policies that are based on the TASB-model. Houston ISD utilizes policies that are not based upon the

TASB-model. If the case had come from a TASB-model district, the local policies at issue would likely have been district policy DK (local) and DEA (local). A typical DK (local) policy reads as follows:

> "Supplemental Duties: Noncontractual supplemental duties for which supplemental pay is received may be discontinued by either party at any time. An employee who wishes to relinquish a paid supplemental duty may do so by notifying the Superintendent or designee in writing. Paid supplemental duties are not part of the District's contractual obligation to the employee, and an employee shall hold no expectation of continuing assignment to any paid supplemental duty." *Round Rock ISD on-line policy DK (local).*

A typical DEA (local) policy reads as follows:

> "Supplemental Duties: The Superintendent or designee may assign noncontractual supplemental duties to personnel exempt under the Fair Labor Standards Act, as needed. The employee shall be compensated for these assignments according to the supplemental duty pay schedule established by the Board. These assignments may be discontinued at any time for any reason or no reason, by either party. The assignment of these duties shall not create any expectation of continued assignment to that same duty or any other duty." *Round Rock ISD online policy DEA (local).*

Since these policies mention that both parties have the ability to terminate the supplemental duties arrangement, the *Salinas* factor is removed from the equation. If other factors were equal, then the *Robinson* decision would have been correct and consistent with previous Commissioner's decisions if TASB-model policies were used. But, as it stands, the decision in *Robinson* conflicts with the *Salinas* decision.

When analyzed in more detail, the results in *Robinson* are quite disconcerting with respect to what policies are actually incorporated into a contract and what violations of policies provide TEA with jurisdiction *Robinson* is a double-edged sword that can be used by both teachers and districts alike. Violations of local board policies generally do not provide TEA with jurisdiction. But violations of the written contract do. This position greatly deteriorates the viability of a §7.057 appeal.

The Commissioner's position in *Robinson* presents a conundrum for attorneys and teachers to decipher. If the TEA only acquires jurisdiction over what is delineated in a written contract, and violations of district policies are generally not actionable at the TEA, then should a teacher be held accountable for violation of district policies? Put in a different context: Is violation of a district policy that is not incorporated into a written contract supportive of a decision to terminate or non-renew a teacher?

The case of *Ceynowa v. Brady ISD* further illustrates the problems raised by the Commissioner's position with regard to contract policy incorporation. *Ceynowa* appears to severely restrict the court's holding in *Weekly*, which established the general rule. Specifically, the Commissioner stated that "[n]ot every board policy in existence at the time an employee enters into a contract becomes a part of the employee's contract." Dkt. No. 010-R10-999 (Comm'r Educ. September, 2000), p. 5 [Ceynowa]. Rather, the Commissioner limits the incorporated policies to those that are "closely linked with the employment relationship" such as those that relate to compensation, which is an important aspect of the employment relationship. *See Id at 3, 6*. In holding this way, the Commissioner is trying to establish a bright line rule as to what policies are incorporated into an employment contract.

Since the Commissioner is attempting to establish a contract policy incorporation rule under §7.057, the statutory language should be examined in more detail. The decision in Ceynowa arguably legislates a requirement that was not intended by the Texas Legislature. Specifically, the Commissioner is limiting the right to appeal under §7.057 (a)(2)(B). The statutory language of §7.057 (a)(2)(B) is as follows: . . . (a) a person may appeal in writing to the commissioner if the person is aggrieved by: (2) actions or decisions of any school district board of trustees that violate (B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee. Tex. Educ. Code §7.057 (a)(2)(B). Under statutory interpretation rules, the first consideration is whether a violation of the contract, and the incorporated policies, has occurred. Only after determining that there has been a violation of a written contract does the question of monetary harm arise.

But in *Ceynowa*, the first question is whether the incorporated policy at issue deals with compensation, or is otherwise closely linked to the employment relationship. This process inherently excludes all policies that are not related to compensation, and only then considers the question of monetary harm. This process will exclude the vast majority of policies in every school district. The process instead should require incorporation of all policies, and then ascertain whether monetary harm has occurred as a result of the incorporated policy.

This question might seem like a futile exercise because regardless of what analysis you utilize, the end result would likely remain the same. In other words, the Commissioner does not have jurisdiction under §7.057 unless the incorporated district policies deal with compensation, and there is monetary harm. This position presupposes that there is not a need to know for certain which policies are incorporated into a contract. Although the end result would likely remain the same for a §7.057 appeal, the different avenues to get there would affect other disputes at the TEA. When you juxtapose the Commissioner's position with the typical contract language quoted above, the result is that the vast majority of district policies would not be incorporated into a typical teacher's contract. If the district policies are not incorporated into the contract, a teacher could not be held accountable for failure to abide by the district's policies because they would not be a part of contract. More importantly, it would be difficult, at best, to non-renew or terminate a teacher based a violation of these unincorporated district policies.

In contrast, the strict statutory analysis would incorporate all policies automatically into the contract. Then, for purposes of a §7.057 appeal, the Petitioner would have to show monetary harm in order to recover. Under that approach, the district

could still hold teachers accountable for violations of district policies because they would be incorporated into the contract. With the current precedents, a strong argument could be made that since these policies are not incorporated into the contract for a §7.057 appeal, then the district should not be able to hold teachers accountable for violations of district policies in the context of a non-renewal or termination. There should not be two different rationales governing when policies are incorporated into a contract. They either are incorporated or they are not incorporated. Clearly, there is a need for the Commissioner to reexamine his position.

The contractual interpretation position reached by the Commissioner differs substantially from his position with regard to federal and state law. The typical contract language illustrated above also incorporates by reference state and federal law. The case of *Barborak v. Oakwood ISD* typifies the Commissioner's position with regard to incorporating state and federal law. Dkt. No. 224-R3-797 (Comm'r Educ. August, 1999) [*Barborak*]. That decision, which quoted from the Texas Supreme Court, held that "[l]aws which subsist at the time and place of making a contract. . .enter into and form part of it, as if it were expressly referred to or incorporated in its terms." *Id at 3 (Citing Central Educ. Agency v. George West ISD*, 200 783 S.W.2d 200, 201 (Tex. 1990)). Additionally, the Commissioner's decision went on to say that "[t]he contract itself makes federal and state law applicable." *Barborak at 4*.

The Commissioner's remark in *Barborak* stands in sharp contrast to the analysis and rules he has established with regard to contract policy incorporation. It appears that the rule with regard to federal and state law is that the laws in existence at the time of contract formation enter into and become part of the contract. This occurs, in part, because of the explicit contractual language. Obviously, the Commissioner's position in *Barborak* is quite different from his position in *Robinson*. If the Commissioner applied his strict construction analysis in *Barborak* to the policy incorporation issue in *Robinson*, then all district policies existing at the time of contract formation attach to and become incorporated into the contract.

The other possibility is to make the federal and state law incorporation standard consistent with the one established with regards to policy incorporation. The result would be that the Commissioner would limit the incorporated laws to those that are "closely linked with the employment relationship" such as those that relate to compensation, which is an important aspect of the employment relationship. *See Ceynowa at 3, 6*. The result of this would be that the vast majority of federal and state law would not be a part incorporated into the contract. Therefore, the employee could not be held accountable under the contract for blatant violations of state and federal law. Intuitively, it would seem that this is not the precedent that the Commissioner would want to establish; however, one of these conflicting precedent paths needs to be corrected in order to have consistency with regards to the contractual interpretation.

Even the TEA is not entirely clear about this bright line rule. In the case of *Smith, et al., v. Amarillo ISD*, the Commissioner states that "the regulations and operational policies adopted by a school board before making a contract of employment with a teacher form part of a teacher's contract... " Dkt. No. 184-R10-799 (Comm'r Educ. 2000), p 4. This particular case bolsters the *Weekley* rule more than other recent decisions. It does not provide the limitations that the *Ceynowa* and *Robinson* decisions did; however, its discussion was not as extensive as in the other two decisions. Perhaps it is this lack of detailed analysis that results in a more pure contractual analysis of the contract incorporation point at issue. After all, the particular language at issue is not ambiguous. Because of this lack of ambiguity, the instant reaction is to adopt a pure contractual analysis. Based on this decision, every district policy would be incorporated into the typical teacher contract, as first illustrated by *Weekley*.

The general rule established by *Weekley* is far more defensible in its equal application and effect. The express contractual language in almost every teacher contract incorporates district policies. To proclaim what specific policies are incorporated into the term "district policies" is an attempt to construe the contract language when the language itself is clear. Undoubtedly, the recent decisions of the Commissioner should be reexamined. Perhaps, after all, there is a need to return to the clarity and simplicity of the *Weekley* rule.

Supplemental Duty Contracts

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Definition of Supplemental Duty; Supplemental Duty Schedule

The Commissioner defines supplemental duty quite simply. In *Salinas v. Roma Independent School District*[1], the duty of "assistant band director" did not appear on the supplemental duty schedule. Noting that the District listed only some of the supplemental duties on its schedule, the Commissioner concluded:

> [B]eing an assistant band director includes duties over and above those of a teacher who is not an assistant band director. For example, the district pays assistant band directors more money. The assignment as assistant band director is a supplemental duty.

If a supplemental duty does not appear on the duty schedule, a directive to perform a supplemental duty might not bind the teacher. In 1995-1996 Susan Cates's contract said that "supplemental duties may from time-to-time be assigned and paid according to the District's supplemental duty schedule."[2] Her principal assigned her to serve as junior class sponsor, but she resigned on January 29. The Board voted to nonrenew her contract asserting, *inter alia*, that she had acted "contrary to [her] contractual obligation to perform supplemental duties as assigned." The Commissioner noted that the supplemental duty schedule did not list "junior class sponsor" and concluded:

> Respondent did not have a contractual right to assign Petitioner the supplemental duty of junior class sponsor. Petitioner did not breach her contract by informing her principal that she was resigning from the position of junior class sponsor. *Id.*, Conclusions of Law No. 3 and 4.

Supplemental Duty and Chapter 21 Contracts

Some employees have asserted that a supplemental contract must be a term contract.[3] The Commissioner rejected that argument in *Carroll* on the following grounds. Initially Tex. Educ. Code, §§21.101 and 21.151 would appear to require Chapter 21 contracts for supplemental duties. Section 21.101 defines "teacher" to include a principal, supervisor, classroom teacher, counselor, or "other full-time professional employee," a phrase describing those who have "direct and regular contact with students", their supervisors, or those with "control over student curriculum."[4] Section 21.002 requires a district to employ "teachers" under a Chapter 21 contract. Given this language, coaches would have term contracts. However, §21.002(b) provides that a district need not hire anyone other than the employees listed in §21.101 under a probationary, continuing, or term contract. The Commissioner concluded, apparently on the basis that the employee did not perform the supplemental duties full-time and the term "coach" does not appear in the list of employees, that districts can, but need not, use Chapter 21 contracts to hire employees to perform supplemental duties.

Supplemental Duty As Property Right

Nature abhors a vacuum, and contracts abhor ambiguity, which brings us back to *Salinas v. Roma Independent School District*. Salinas served for two years as assistant high school band director, a supplemental duty that added approximately 37 days to his contract. Then on August 12, 1996, the first day of school, a principal informed him that he had been reassigned to the middle school campus. Salinas subsequently learned that the district had also terminated his extra days. Salinas asserted that although the supplemental duty and corresponding additional days did not appear in his teacher employment contract, he had a contractual right to the assignment and the days, and that the District had breached its binding contract by not acting until he had already started to perform his contract. The District argued that Salinas served at-will and had no contractual right to the extra days.

Salinas's teaching contract included the following provision, which is the key to the case.

> This contract does not cover any payments for supplemental duties. Any such payments are not part of the contractual salary. Supplemental duties may from time-to-time be assigned for some of which stipends are paid according to the District's supplement salary schedule. No property right of continued employment exists in such supplemental duties, and such assignments may be terminated for any reason or no reason, at the sole discretion of the district.

The Commissioner found the provision rife with ambiguity. Pursuant to this contract term, the District purported to make supplemental duties separate from the contract, while reserving the right to assign duties, terminate them at will, and pay or decline to pay additional compensation. Additionally, a teacher has no choice but to perform additional duties when assigned and accept whatever payment the District deems appropriate. Resolving the contract ambiguities against the District because it drafted the contract, the Commissioner said that if duties are required under the contract, the contract also provides for the payment. Despite the District's claim that the supplemental duties existed apart from the written contract, the Commissioner concluded that the supplemental duty was part of Salinas's written contract,[5] and the District could not unilaterally change the material term of the contract after Salinas's resignation deadline had passed.

In replying to Exceptions, the Commissioner cited another provision of the contract as further evidence of the existence of a unitary contract.

> In the event Employee serves in more than one position, employment is conditioned on the satisfactory performance in each position, and unsatisfactory performance in either position constitutes grounds for dismissal or nonrenewal of this contract.

The Commissioner determined that Salinas had a contractual right to the additional days for the coming three-year term of his term contract. Salinas also had a contractual right to employment in the "same professional capacity" as teacher/assistant band director.[6]

Three years after deciding *Salinas*, the Commissioner decided *Dibble v. Keller Independent School District*,[7] a case similar to *Salinas*, but involving a continuing contract and a supplemental coaching contract. The Commissioner again found that a district had created a unified contract despite its claim to have lawfully terminated at-will supplemental duties. This case involved several contract provisions and local policies.

According to Dibble's continuing contract the District could terminate the continuing contract, release the employee from the contract at the end of the year, or return the employee to probationary status if the employee failed to satisfactorily perform duties assigned in addition to classroom duties. According to the continuing contract, an employee could not resign from coaching or from a duty paying a stipend without resigning from the District.

Dibble's supplemental coaching contract plainly stated in its title that it was an "addition" to the continuing contract. Like the teacher's continuing contract, it stated that failure to adequately perform additional duties might be grounds for termination or nonrenewal, and that employees could not be relieved of supplemental duties without resigning from the District. Finally, the District reserved in the supplemental contract the right to modify or terminate the duties at any time.

The Commissioner pointed to a number of "incongruent elements to this contractual arrangement." The provisions that suggest that separate contracts exist include two statements in the second document, the supplemental contract: it provides no right for continued employment as a coach, and the district retains the right to reduce compensation or terminate the duty. Reasons for concluding that a unified contract existed include the title of the second document describing it as an addition to the teaching contract, and the fact that the second document met the requirements to amend the continuing contract. In addition, the documents provided for the termination of the teaching contract for poor coaching performance, and precluded the employee from resigning from coaching unless the employee resigned from the teaching contract. The

Commissioner, following *Salinas*, said:

> The contractual arrangement in some ways treats the coaching duties as part of a continuing contract and in some ways treats the coaching duties as separate from the continuing contract. The contractual documents are ambiguous as to the issue of whether there is a unified contract or two separate contracts. Since contracts are construed against the drafter, it is concluded that Petitioner has one unified contract.

In its Exceptions, the District pointed out two policies it said made supplemental contracts terminable at-will. Policy DEA (Local) gave the superintendent the right to assign supplemental duties and reserved to the district in its sole discretion the right to modify or terminate the supplemental duties. The policy stated that the employee could not expect to continue in the assignment. The policy also stated that the employee would be compensated according to the supplemental duty schedule. Policy DK (Local) also reserved to the District the right to modify or terminate the supplemental duties. It stated that the employee could not resign without the consent of the Superintendent. Finally, it stated that "[p]aid supplemental duties are not part of the District's contractual obligation to the employee."

The Commissioner said that these two policies apply only to other supplemental duties and could not apply to the coaching duties unified with the teacher continuing contract. The Commissioner cited a conflict between the contract and Policy DK (Local) as evidence supporting that position. The contracts reserved to the board the authority to modify the contracts, but Policy DK (Local) appears to allow the superintendent to modify the assignment.

Salinas and Dibble mean, stating it simply, that a District cannot purport to create a supplemental duty that it can terminate at will while (1) making the failure to adequately perform the supplemental duty a reason for termination of the teaching contract, and (2) prohibiting the employee from resigning at-will. If a district sufficiently entangles a teaching contract with a supplemental contract, the supplemental contract "unifies" with the teaching contract, and the district must follow the Chapter 21 procedures to terminate the assignment.

At-Will Supplemental Duty Agreement

Districts that want to truly separate teaching and supplemental duties should follow the lead of Wichita Falls Independent School District. Carroll held a continuing contract as a teacher and a supplemental coaching contract. The District terminated the coaching contract. Carroll claimed that the coaching contract was a term contract and the District had not followed Chapter 21 nonrenewal procedures.

The Commissioner agreed with the District that it had created an at-will supplemental coaching contract. (Carroll did not make his continuing contract a part of the record.) Carroll's coaching contract provided: (1) the Board would pay a stipend so long as the employee remained in the position, (2) the employee had the right to resign from coaching simply by delivering written notice of resignation to the Superintendent, (3) the District could terminate the duties at any time for any reason, and (4) neither the contract nor District policy created any expectation of continued employment to perform supplemental duties. The supplemental contract also contained a provision stating that it was "expressly conditioned upon the continued employment of the Employee in the capacity of teacher with the District." The Commissioner said that the provision does not unify the contracts because it simply implements the District's right to terminate the contract at-will, and that the contract standing alone created true at-will employment status existing separate and apart from the teaching contract.

The Commissioner rejected for two reasons the claim that the coaching contract was a term contract. First, the Commissioner noted that the law does not require districts to use Chapter 21 contracts to hire employees to perform supplemental duties. Second, the supplemental agreement on its face shows itself to be terminable at the will of either party.

Miscellaneous

Settlement Agreement

In *Skinner v. Weslaco Independent School District*[8], Skinner asserted that a settlement agreement covering the 1994-1995 and 1995-1996 school years required the District to hire him as a coach in 1996-1997. The Commissioner disposed of the argument by noting that the settlement agreement expired by its own terms.

The issue was resolved because the Settlement Agreement had expired by its own terms. But the Commissioner added that Skinner could not satisfy the jurisdictional mandates of Tex. Educ. Code §7.057(a)(2)(B) because the "settlement agreement did not create an employment contract governed by the Education Code." Section 7.057(a)(2)(B) does not predicate jurisdiction on only Chapter 21 employment contracts, the language simply does not say that. Moreover, the Commissioner has made it clear that districts can employ teachers to perform supplemental duties with contracts that do not meet the terms of continuing, term, or probationary contracts. Whether a financially harmful breach of a settlement agreement that contains a commitment by a district to employ a teacher satisfies the minimal terms of the Commissioner's jurisdictional statute should remain an open question.

Conflicts Between Teaching and Supplemental Contracts

In *Dibble*, for reasons not discussed in this article, a controversy existed over whether the Superintendent had the right to reassign Dibble or whether only the Board had that right. The Commissioner took the position that the Superintendent's right to reassign employees pursuant to the teacher contract had been superseded by the subsequently signed contract which assigned that right solely to the District.

Employee Resignations

In Hester v. Canadian Independent School District9, the Commissioner made it clear that districts that create supplemental agreements allowing the district to terminate the duty at-will also give the employee the same right.

It appears from the fact that in *Cates* the teacher orally

resigned, that a teacher need not in all cases submit a written resignation to terminate a supplemental duty assignment. Note though that in *Carroll*, the supplemental duty agreement required a written resignation.

District Election of Remedies for Nonperformance

A district that elects to make supplemental duties truly at-will has given up the right to use performance deficiencies in the supplemental duty as evidence supporting action against the teaching contract. In Salinas, on page 8, the Commissioner spoke to the reasons why a district would choose a unified contract:

> In such a case, the district can take employment action against a teacher's contract for unacceptable performance as either a classroom teacher or a band director. This arrangement allows a district to remove a teacher who is not a competent band director. By making a unified contract, a board can terminate the contract for errors as a teacher or for failings in a supplemental duty, but…only…by following the provisions of the Education Code.

And speaking then to the impact of separate contracts the Commissioner said:

> This type of contract allows the district to easily terminate a band director contract but does not allow a district to take action against the teaching contract if the band director does not live up to the band director contract.

In *Dibble*, the Commissioner includes a well-taken footnote that modifies the foregoing principles and acknowledges that an employee can do something so heinous, such as having sex with a minor, as to give the District the right to terminate a teaching contract.

Summary

School districts expect to exercise discretion in assigning and reassigning teachers to curricular and extracurricular duties, and to determine the parameters of those duties. Employees expect that commitments districts make in contracts and in their contracting actions will bind the district to compensate employees. The contractual mechanisms by which to accomplish these respective goals should be clear after *Salinas* and *Dibble*.

ENDNOTES:

1. Dkt. No. 058-R3-1196 (Comm'r Educ., 1997)
2. *Cates v. Blue Ridge Independent School District*, Dkt. No. 111-R1-596 (Comm'r Educ., 1996)
3. *Carroll v. Wichita Falls Independent School District*, Dkt. No. 196-R10-899 (Comm'r Educ., 2000)
4. *Hightower v. State Comm'r of Education*, 778 S.W.2d 595, 598 (Tex. 1989).
5. See also *Barborak v. Oakwood Independent School District*, Dkt. No. 224-R3-797 (Comm'r Educ., 1999)(the same contract provision that appears in the *Salinas* contract incorporated supplemental duty for purposes of jurisdiction).
6. The Commissioner also discussed the District's violation of Chapter 21 of the Education Code. The District, having unified the supplemental duties with the term contract, violated the nonrenewal and termination provisions of Subchapter E, because the District did not propose to nonrenew or terminate the term contract. Having failed to propose nonrenewal pursuant to §21.206, the District had to employ Salinas in the same professional capacity.
7. Dkt. No. 148-R10-798 (Comm'r Educ., 2000)
8. Dkt. No. 016-R2-996 (Comm'r Educ., 1997); see also *Carroll* and *Dibble*
9. Dkt. No. 106-R1-585 (Comm'r Educ. 1985)

SELECTED ISSUES IN EXCLUSIVE SCHOOL VENDING AGREEMENTS

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Introduction:

It seems like only been a few years since the typical agreement between a school district and a soft drink manufacturer involved the donation of a scoreboard -- with a prominent corporate logo, of course -- in exchange for the exclusive right to sell sodas at the concession stand. These agreements did not usually involve much, if any, cash consideration, and were typically for a term of five years or less. Many of these agreements consisted of only one or two pages.

Times have definitely changed. Corporate sponsors -- most notably the national soft drink manufacturers -- are now willing to provide significant cash payments to school districts in return for exclusive advertising and distribution rights. Of course they also demand more from the schools. For example, schools may be required to take affirmative measures if competitors attempt to market their products to students. Proposed contract terms of ten or fifteen years are not uncommon. Vendors have also become more precise in their marketing analysis, and may reserve the right to amend the deal if attendance figures drop.

The abbreviated agreements which were once common are no longer sufficient to protect the interests of either side in these transactions, and school districts now typically seek legal counsel when considering negotiation agreements. This article will discuss a few of the more significant recurring issues arising with "sponsorship" agreements between school districts and soft drink manufacturers.[1]

Advertising in Schools:

A school district contemplating a corporate sponsorship agreement must first determine as a policy matter whether the presence of corporate advertising in the schools is acceptable.

Districts should be aware that corporate sponsors are as interested in building brand loyalty among future consumers as they are in selling products today. As an example, when faced with early termination of its contract, one of the major national manufacturers sought damages for sales lost after the end of the original contract term based on "conditioning" of students to purchase their product.

Many districts have obviously found that the revenues available through sponsorship agreements outweigh the disadvantages of advertising messages. Other districts have encountered significant opposition to the transaction from parent and teacher groups, or have simply decided to "take a pass." This is a business decision that must be resolved by the client; however, legal counsel can certainly assist in identifying the district's advertising commitments under a proposed agreement.

If a school district decides that it is not interested in the complete "sponsorship" package there are alternatives which do not align the schools so closely with a corporate entity. For example, permitting a vendor to place coin-operated vending machines in school facilities can be a source of revenues through commissions on sales. Such an agreement probably will not generate as much revenue as a sponsorship, but it does avoid the advertising issue to a large degree, and may also permit wider competition among independent vendors.

Competitive Bidding under Texas Law:

Once the decision is made to seek a corporate sponsor one of the first questions is whether the transaction is subject to competitive bidding. The answer depends on the nature of specific transaction: Is the district merely selling an exclusive concession right, or is it also agreeing to purchase products from the vendor. If the district is agreeing to purchase products from the vendor, then the transaction is probably controlled by Texas Education Code section 44.031 [purchases of $25,000 or more in the aggregate over a 12-month period], and should be procured through a competitive bidding methodology. If there is any doubt as to whether section 44.031 or 44.033 will apply, then competitive bidding is always the prudent course due to the potential civil and criminal sanctions imposed by section 44.032.

What if the district is not agreeing to purchase any product from the vendor? In this case the transaction appears to be governed by Texas Education Code section 11.151(c), which permits the Board of Trustees to dispose of surplus property "in an appropriate manner." In this case the surplus property is the exclusive concession right granted to the sponsor.[2]

Section 11.151(c) does not establish any mandatory bidding procedures, so a school district could elect to negotiate a deal with a single vendor. A competitive bidding methodology is suggested for several reasons: First, the Board of Trustees is required by several provisions of the Texas Constitution to receive "fair value" for school property.[3] By seeking competing proposals the Board can more easily demonstrate that it has received this value. Second, vendors have shown an increased willingness to bid against each other for school district sponsorships. Finally, dealing with multiple vendors is less likely to result in claims of unequal treatment.

USDA Regulations:

United States Department of Agriculture regulations governing the operation of federally subsidized lunch programs can affect school vending contracts in two principal areas: sales of products during serving hours and competitive bidding.

Food Service Hours:

Soft drinks are classified as "competing products" and "foods of minimal nutritional value" under USDA program guidelines. Such products may not be sold in food service areas during breakfast and lunch periods, although they may be sold in food services areas during other times at the discretion of the school district. If a vendor's product is not classified as having minimal nutritional value, it may be sold during breakfast and lunch periods, although USDA regulations do place limits on the use of funds derived from sales.[4]

School districts can address these restrictions on sales of soft drinks in several ways. For example, vending machines can be disabled during breakfast and lunch serving hours. Another solution could be to prohibit the placement of vending machines in food service areas. The most comprehensive solution may be to simply remove school cafeterias from the scope of the vending contract.

USDA Competitive Bidding Requirements:

While carbonated soft drinks are of minimal nutritional value, the major soft drink manufacturers do produce branded products that may be served in school lunch programs. A good example is frozen concentrated orange juice sold under a trademarked name. Soft drink vendors are eager to market the brand as well as the product, and will want to see their product sold in cafeterias.

While Texas Education Code sec 44.031 exempts purchases of "produce" from its competitive bidding requirements, USDA regulations do impose mandatory procurement procedures for foods served in school lunch programs. It does not appear than a school district can create a "sole source" procurement exception by limiting its choice of projects through a vending contract. The soft drink industry appears resigned to the possibility of competitor's products being served in the school lunch program; however, school districts should carefully review a proposed contract to ensure the contract clearly permits such sales. Again, the more comprehensive solution may be to exempt cafeterias from the scope of the sponsorship agreement.

Contract Terms:

Corporate sponsors have increasingly pressed for longer sponsorship contract. While three to five year terms were once the norm, terms of ten and even fifteen year are now frequently requested. Texas law does not place a limit on the term of a sponsorship agreement, so long as the agreement does not purport to commit an expenditure of school district revenues in excess of current appropriations. Long term contracts are therefore permissible, but are they in the best interests of a school district?

The answer depends on the specific school district and its

experience with sponsorship agreements. A district that has experience with a particular vendor, or with sponsorship agreements in general, is probably a better candidate for a long-term agreement. A school district seeking its first vending agreement should consider whether it wishes to gain experience with a short-term agreement, or with something less comprehensive than a "full-bore" sponsorship agreement.

Without regard to a given school district's experience with sponsorship agreements, the vendor's basis for requesting a long-term agreement should be explored. There is no inherent need for an extended contract term in the typical sponsorship agreement in that the vendor seldom delivers the entire consideration for the contract at the inception of the agreement. Does the vendor simply want to preclude competition over any extended period, and if so, how much is the vendor willing to pay for that privilege? By negotiating the contract term a school district may find that it can realize many of the same benefits from the contract on an annual basis, but without committing future boards to an excessively long term.

Recalculation/Renegotiation Based on Average Daily Attendance:

Vendors have begun to include terms in sponsorship agreements which permit the sponsor to unilaterally recalculate or even cancel the agreement based on decreases in a district's average daily attendance. Such provisions are not necessarily unreasonable, although counsel should be aware of two issues:

First, some proposed terms would permit the sponsor to recalculate payments at its discretion, thus placing the school district in the position of taking what is offered or terminating the agreement. Alternatively, the agreement may permit the sponsor to terminate the agreement entirely and demand the immediate return of a portion of the contract consideration. A more balanced approach would be to provide for a *pro rata* decrease in contract consideration based on decreased enrollment.

Second, agreements that permit recalculation or renegotiation in the event of a decrease in attendance figures seldom provide for a corresponding increase in consideration if attendance figure rise. Again, these adjustments should not be left to the discretion of the sponsor.

Liquidated Damages and Equitable Remedies:

It is a fundamental rule of contract law that a party will generally be allowed to breach a contract if it is willing to pay the appropriate measure of damages to the non-breaching party. School districts have sometimes found themselves in the situation where it makes economic sense to terminate an existing contract, enter into a more lucrative contract, and "pay off" the former vendor. In response, sponsors have proposed provisions that seek to limit this option.

One means of discouraging early termination is to provide for liquidated damages in the event of early termination, and to "front load" the damage calculation so that it is more expensive to terminate in the earlier years of the agreement. Counsel should carefully consider such provisions to determine whether they are actually permissible liquidated damages, or a mere penalty. If the parties can agree to a liquidated damage amount, these damages should, to the extent possible, provide the vendor's exclusive remedy in the event of early termination.

Some sponsors have also included provisions that purport to permit the entry of injunctive relief prohibiting termination of the sponsorship agreement, or otherwise requiring specific performances by the school. These provisions typically include a recitation by the school district that the sponsor will suffer irreparable damage which cannot be compensated through monetary damages if termination occurs. It does not seem likely that a court would consider itself bound to enter injunctive relief based on such a stipulation, although it would almost certainly be a factor weighing in the sponsor's favor. In any event, however, the ability to terminate a contract and pay damages when it makes economic sense to do so is not a right that should quickly be surrendered.

Conclusion:

Public/private sponsorship agreements can offer a significant source of revenues for school districts, although they can also present significant business risks. This article discusses only a few of the many factors that should be considered when negotiating a successful sponsorship agreement. School district clients should be aware that they are seldom faced with a "take-it-or-leave-it" situation, and that they have the ability to negotiate an agreement that meets their specific needs.

ENDNOTE

1. Several of these issues apply to agreements with other types of corporate sponsors. This article focuses on the soft drink companies since they are the most common contracting party.

2. *See, generally,* TN. CONST. ART. III, § 52

3. The authority of Texas school districts to grant exclusive concessions has been established for some time. *See, generally, Southwestern Broadcasting Co. v. Oil Center Broadcasting Co,* 210 S.W.2d 230 (Tex.Civ.App—El Paso 1947, writ ref'd n.r.e.)

4. *See, generally,* 7 C.F.R. Sec. 210.11. The Texas Education Agency has indicated that school districts will be required to apply proceeds from "competing products" sold in serving areas to school lunch program accounts; however, there do not appear to be any written regulations on this issue as of the date of this article.

INVESTIGATING AND RESPONDING TO COMPLAINTS OF SERIOUS EMPLOYEE MISCONDUCT

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A lawyer's day is filled with necessary evils. One of the less pleasant—but more challenging—duties that a lawyer may be called upon to perform is assisting a school district when one of the district's employees is suspected of serious misconduct. Experience tells us that our school district clients function in a fishbowl, and the failure to timely and properly investigate and respond to complaints of such misconduct is the quickest way to attract adverse publicity and potential liability.

Initial response

Perhaps it goes without saying, but if an administrator has reason to believe that an employee's conduct or behavior poses a threat to the safety and well-being of students and/or other employees, the administrator should immediately seek the assistance of law enforcement personnel. It is also a good idea to remind the administrator that if there is reason to believe that a child has been or may be abused by any person, the person who suspects that abuse is required to make a report to any state or local law enforcement agency or to the Department of Protective and Regulatory Services no later than 48 hours after he or she has cause to believe that abuse has occurred. TEX. FAM. CODE § 261.101(b).

After any immediate reports are made, the next step will typically be to remove the employee from the premises. A temporary reassignment or a suspension should be considered when the administrator has reason to believe that an employee's continued presence in his or her current assignment may be harmful or disruptive to students and/or employees (for example, if an employee has allegedly abused a student). A reassignment or suspension may also be appropriate during the pendency of an ongoing internal investigation and/or while related criminal charges are pending. Suspension without pay might be called for in the case of a contractual employee who may be involved in a prolonged criminal proceeding, when the district lacks sufficient evidence, on its own, with a proceed to a termination hearing. However, for contractual employees, due process must be provided before compensation can be withheld. Suspension without pay is appropriate in the case of at-will employees.

Investigating the misconduct

A suspension or reassignment may be called for based on the nature of the alleged misconduct alone, or the need may not become apparent until some preliminary investigation is conducted. In any event, an investigation should be initiated as soon as practicable, and it should be undertaken by designated, qualified personnel who receive consistent supervision. Whether conducted by human resources personnel, school personnel, outside counsel, or some combination of individuals, one person should be charged with the responsibility of coordinating the investigation and responding to all questions.

The scope of the investigation should also be dictated by the nature of the alleged misconduct. It is often difficult to predict all the persons who should be interviewed over the course of the investigation, and nothing and no one's action should be taken for granted. At a minimum, the administrator(s) conducting the investigation should plan to interview: (1) the victim or complainant, when applicable; (2) witnesses to the alleged misconduct (including students, other employees, and members of the public, when applicable); and, (3) the employee(s) who allegedly engaged in the misconduct. As the investigation progresses, witnesses may refer to other individuals who have knowledge of events or circumstances relevant to the investigation, including similar, prior incidents. Those individuals should be interviewed as well. In sum, no stone should be left unturned.

Communications with law enforcement

If parallel criminal proceedings are pending, the district should attempt to open a line of communication with law enforcement authorities early on in the investigation. The law enforcement investigation does not, however, relieve the district of its obligation to conduct an independent investigation.

Student Witnesses

If students will be called as witnesses in the investigation, special concerns must be addressed. Whenever possible, the administrator responsible for conducting the investigation should attempt to obtain parental or guardian consent prior to conducting a formal interview with the student and/or before taking a written statement. In addition:

- Students should be interviewed individually, whenever possible. If a group setting cannot be avoided, the students should be monitored at all times.

- In advance of the interview(s), seek parental or guardian permission to tape-record the proceedings. Written parental consent must also be obtained if the student(s) will be videotaped. TEX. EDUC. CODE § 26.009(a)(2).

- When conducting the interview, refrain from suggesting answers or responses to questions and/or any other type of prompting. (This is especially important when dealing with very young students, mentally impaired students, students with impaired communication abilities, or students with limited-English proficiency).

- Depending on the age of the students involved, ask the students to prepare written statements. If a student is limited-English proficient, allow the student to prepare a statement in the student's native language.

- When investigating allegations of sexual abuse or inappropriate touching, anticipate that students will feel uncomfortable discussing the incidents in question. To offset a student's anxiety, invite the student's parent or guardian to attend the interview. In addition, offer to let the student demonstrate the contact and/or to depict the contact on paper (*i.e.*, where the employee allegedly placed his/her hands, etc.) or using dolls.

- If the individual conducting the interview is not particularly experienced or comfortable with the interview process, the school district's attorney should consider preparing an outline or checklist of suggested questions.

- If a student is an essential witness (for example, the alleged victim of an employee's sexually-inappropriate conduct), the district should make a record of its efforts to secure the student's participation. This may be accomplished by sending a letter to the student's parent communicating the district's efforts and the importance of the student's involvement. Even if the district is not ultimately successful in obtaining the student's participation, the letter may serve as evidence that the district and its officials did not act with deliberate indifference, should litigation result.

Use of polygraph examinations

In cases involving a significant credibility contest, the district may want to consider offering the employee the opportunity to take a polygraph examination. The employee should not, however, be required to take a polygraph exam. *Texas State Employees Union v. Texas Dept. of MHMR*, 746 S.W.2d 203 (Tex. 1987). If the employee consents to the exam, be sure to retain a licensed examiner. Under the provisions of the Texas Polygraph Examiners Act, an employer that requests an examination may not disclose the results of the examination to any other person or entity except: the examinee; a person specifically designated in writing by the examinee; governmental agencies that license, supervise, or control the activities of polygraph examiners; other polygraph examiners in private consultation; or, any other person required by due process of law." TEX. OCC. CODE § 1703.306. Finally, keep in mind that polygraph results are not admissible in civil or criminal court proceedings. TEX. OCC. CODE § 1703.004. *See, e.g., Posner v. Dallas County Child Welfare*, 784 S.W.2d 585, 588 (Tex. App.—Eastland 1990, writ denied); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973). Polygraph results are most valuable in the investigative context, in tipping the scales or turning the tide in the development of the facts.

Documenting the findings

During an investigation, documentation—effective documentation—is crucial. When properly prepared, written documentation can prove to be an invaluable source of information regarding the nature of the investigation (*i.e.*, who was interviewed, conclusions reached, etc.). More importantly, written documentation can contribute to a successful defense if litigation related to the employee misconduct should arise.

Effective documentation should generally detail:

1. The nature of the complaint or charges alleged against the employee;

2. The steps that were taken to investigate the complaint and/or verify the charges; and,

3. If the complaint is ultimately verified, the resulting disciplinary action and/or recommendation for action (*i.e.*, termination, nonrenewal, suspension, reprimand, directives).

As beneficial as effective documentation may be, written documentation may prove to be a significant liability if it is not carefully and thoughtfully prepared. When documenting virtually any type of performance problem and/or employee misconduct:

1. Use precise, unambiguous language.

2. Focus on the subject of the documentation—avoid straying into unrelated or extraneous issues.

3. Stick to the facts: who, what, when, where, why.

4. Avoid exaggeration — it destroys credibility.

5. Do not resort to personal attacks. Again, credibility will suffer.

6. When appropriate, refer the employee's attention to any relevant rules, policies, procedures, laws, regulations, or handbook provisions.

7. If the documentation contains a section pertaining to remediation, be specific when describing what is expected of the employee. Give specific timelines, when appropriate. Explain what will happen if the employee fails to show improvement. Will partial improvement suffice? If not, the documentation should so state. Use a growth plan, as appropriate.

8. Try to document while the facts are "fresh." The timing of documentation is crucial. It should be prepared as the investigation progresses: do not wait until the investigation is complete to try to summarize the various steps that have been taken and the evidence generated.

9. Always review any written documentation — for content and for form. Documentation containing typographical errors and/or grammatical mistakes looks unprofessional and lacks credibility.

Notice is an important consideration, particularly if an employee has engaged in some type of misconduct that does not result in an immediate recommendation for termination. To ensure that an employee cannot claim that he or she did not receive notice of a problem or deficiency, always request that the employee acknowledge receipt of all documents by placing his or her signature and the date on documents. If the employee is receiving the original, be sure to maintain a copy of the signed document for the district's files. If the employee refuses to sign, have someone witness the attempt to notify the employee, and note the employee's refusal on the document.

Availability of investigatory documents

Employees often request copies of documents prepared or reviewed by the administration in connection with an investigation of alleged employee misconduct. Depending upon the nature of the allegations against the employee, the requested documents may be exempt from disclosure, in whole or in part, pursuant to one or more of the exceptions to disclosure set forth in the Texas Public Information Act.

If an employee requests documents that relate to an investigation involving alleged sexual harassment, some of the documents may be exempt from disclosure pursuant to section 552.101 Public Information Act TEX. GOV'T CODE Chapter 552, *see Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. — El Paso 1992, writ denied). *Morales v. Ellen* involved documents related to an internal investigation conducted by the City of Odessa Police Department concerning allegations of sexual harassment and misconduct on the part of a police lieutenant. The court held that the names of the witnesses who participated in the investigation and the affidavits prepared by the witnesses were "exactly the sort held excluded from disclosure under the privacy exception." *Id.* at 525. Furthermore, the Public Information Act now provides that the identify of an "informer" (an employee, former employee, student, or former student who furnishes a report of another person's violation of civil, criminal, or regulatory law to the school district) is confidential. TEX. GOV'T CODE § 552.131.

If an administrator has reason to believe that certain requested documents or the identity of a witness may be withheld, the district must ask for a decision from the attorney general "within a reasonable time but not later than the 10th business day after the date of receiving the request." TEX. GOV'T CODE § 552.301(b). If the district does not request an opinion within 10 business days, the requested information is "presumed to be public information." *Id.* at § 552.302.

Investigative reports involving other types of alleged misconduct were once held to be exempt from disclosure under the inter/intraagency memorandum exception, which appears in section 552.111 of the Public Information Act TEX. GOV'T CODE. But Attorney General Dan Morales significantly narrowed the scope of section 552.111 and its application to investigative materials in ORD-615. According to ORD-615, section 552.111 "excepts from required public disclosure only those internal agency memoranda consisting of advice, recommendations, and opinions that pertain to the policy making functions of the governmental body at issue." *Id.* at p. 6. In particular, section 552.111 does not exempt documents relating to "routine internal administrative and personnel matters." A court of appeals upheld the attorney general's decision. *Klein Indep. Sch. Dist. v. Lett.* 917 S.W.2d 455 (Tex. App.—Houston [14th Dist.] 1998).

When an attorney conducts an investigation for the purpose of giving legal advice regarding employee misconduct, that investigation should be protected by the attorney-client privilege. *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000). Although the attorney general determined that most of the attorney's findings were required to be disclosed, a court of appeals ruled otherwise. When it examined the reason for which an attorney was chosen to conduct the investigation, the court found that the school board concluded that it was best to hire an attorney because the attorney could give it advice as to how to best protect the district. *Id.* at 4. Despite the dual role the attorney performed, the court concluded that she—rather than a non-attorney— was hired for her ability to provide legal advice and because the attorney-client privilege would attach to her communications. Based on this conclusion, the court held that the entire investigative report was excepted from disclosure. *Id.* at 6.

Confidentiality of student information

If students are involved in the investigation and/or the underlying misconduct, administrators should exercise caution in releasing documents to the employee or the employee's representative. The Family Educational and Rights Privacy Act ("FERPA"), 20 U.S.C. § 1232g, protects the confidentiality of student education records. The Act prohibits an educational institution from releasing personally identifiable student information without prior written consent from the following: a student's parent(s); a student's guardian(s); and/or the student if he/she is at least 18 years of age or is attending a postsecondary institution.

FERPA contains a number of specific exceptions to the consent requirement. For example, consent is *not* required if the requested information is furnished or provided to other school officials, including teachers, "who have been determined by the [local educational] agency or institution to have legitimate educational interests." 34 C.F.R. § 99.31. The attorney general has concluded that an employee pursuing a personnel dispute with his employer does not have a right of access under the Texas Public Information Act to records that are otherwise confidential under FERPA. *See* Informal Letter Ruling OR94-546.

Completion of the investigation and disciplinary action

Once the investigation is complete, and its findings have been thoroughly documented, disciplinary action may be in order. Continuing and term contract employees may be terminated at any time upon a showing of "good cause." The Commissioner of Education has defined "good cause" as "the failure of a teacher to meet acceptable standards of conduct for the profession as generally recognized and applied in similarly-situated school districts, for example: engaging in harmful or potentially harmful conduct to students, manufacturing grades, failure to comply with a corporal punishment policy, failure to meet certification requirements, failure to alleviate substandard conditions on a school campus, and criminal conduct. In other words, *a range of conduct not susceptible to remediation or inappropriate conduct that persists in spite of good faith efforts by school district administrators. Everton v. Round Rock Indep. Sch. Dist.*, Dkt. No. 070-R2-1091 (Tex. Comm'r Educ. 1993) (emphasis added). When harm or potential harm to a student or students is the basis for a termination recommendation, "even a single incident of misconduct can justify a termination for good cause." *Lang v. Tuloso-Midway Indep. Sch. Dist.*, Dkt. No. 218-R2-788 (Tex. Comm'r Educ. 1990). As the commissioner explained in *Lang*, "[t]he potential for harm can be sufficient; actual injury is not required. If a teacher's actions are inappropriate and potentially harmful to a student, the district need not risk reoccurrences and possible severe injury to a student." For an at-will employee, local pol-

icy and procedures will determine whether the alleged misconduct warrants termination, demotion, or other disciplinary action.

In many cases, employees accused of engaging in serious employee misconduct are willing to tender a resignation in lieu of termination. Even if the district accepts the resignation, the State Board for Educator Certification (SBEC) requires superintendents to notify the executive director of SBEC in writing within (7) seven days of obtaining information that:

1. An applicant or holder of a certificate has a reported criminal history;

2. A certificate holder was terminated from employment based on a determination that he or she: (1) sexually or physically abused a minor or engaged in any other illegal conduct with a minor; (2) possessed, transferred, sold, or distributed a controlled substance; (3) illegally transferred, appropriated, or expended school property or funds; (4) attempted by fraudulent or [un]authorized means to obtain or alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate or permit or to receive additional compensation associated with a position; or (5) committed a crime, any part of such crime having occurred on school property or at a school sponsored event; or,

3. A certificate holder resigned and reasonable evidence supported a recommendation for termination based upon one of the aforementioned acts.

Before accepting the certificate holder's resignation, the superintendent must inform the employee in writing that a report to SBEC is required to be filed and that such a report may result in sanctions against the employee's certificate. The superintendent must also notify the school board before filing the report with SBEC.

References, settlement agreements, and ethics reports

Often, an employee will attempt to negotiate a neutral reference as a condition of his or her resignation. Administrators should always, however, give truthful and descriptive references. Several cases have been brought against school districts that allegedly failed to disclose information about a former employee's misconduct in response to an inquiry from a prospective employer. Generally, the plaintiffs in these cases have been students who were sexually abused by a teacher who left a prior district under suspicion of sexual misconduct. The theory is, of course, that if the referring district had "come clean" with the potential employer, the teacher would not have been hired, and the plaintiff's injury would not have occurred. *See Doe v. Methacton Sch. Dist.*, 880 F.Supp. 380 (E.D. Pa. 1995), *aff'd*, 124 F.3d 185 (3d Cir. 1997) (finding that a school district's "cover-up" of an employee's misconduct could be the basis for school district and individual liability for the employee's abuse of a student at another district); *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997) (holding that liability could be imposed on district and its administrators for negligent misrepresentation when the administrators wrote glowing references about a former employee and failed to mention that the employee was forced to resign under pressure as a result of sexual harassment allegations).

Although Texas appellate courts have not yet addressed this issue, it would appear that the Texas Tort Claims Act would safeguard districts against "negligent referral" claims. Nonetheless, the Commissioner of Education has cautioned that "settlement agreements with departing employees do not supersede regulatory duties to report certain types of misconduct which may have prompted a 'voluntary' resignation." Hartmeister, Fred "Handling Requests for Employment References: Elevating Awareness Among the Pitfalls and Pendulums," 119 Ed. Law Rept. 1, 9 (FN 35). Furthermore, the Texas Legislature recently enacted a statute providing immunity to an employer who discloses information about a current or former employee's job performance to a prospective employer unless the information disclosed was known by the employer to be false or the disclosure was made with malice or reckless disregard for the truth or falsity of the information. TEX. LAB. CODE Ch. 103. Given these protections, school officials should feel secure in giving references. So long as they are truthful, the law is on their side.

The attorney general has advised that a governmental entity cannot enter into an agreement to keep information confidential unless specifically authorized by law. As such, confidentiality provisions are unenforceable unless the school district can point to a statute or court order authorizing the district to keep the terms of the settlement confidential. Tex. Att'y Gen. ORD-514 (1988). Furthermore, the terms of a settlement agreement reached through alternative dispute resolution are not confidential. Tex. Att'y Gen. ORD-658 (1998).

In addition to whatever formal disciplinary action may be taken by the employing school district, acts of serious misconduct on the part of a certified educator may result in an ethics complaint. The enforcement procedures are outlined in 19 TEX. ADMIN. CODE ch. 247, subch. F.

Liability for failing to take action

Supervisors are at particular risk of liability, especially in situations involving sexual abuse of a student by a public school employee. In *Doe v. Taylor Independent School District*, 15 F.3d 443, 454 (5th Cir. 1994), the Fifth Circuit Court held that supervisory liability can arise when a school official, by action or inaction, demonstrates "deliberate indifference" to a student's constitutional rights. In fact, a recent decision demonstrates that even "inept" or "ineffective" action is better than no action at all. In *Doe v. Dallas Independent School District*, 113 F.3d 211 (5th Cir. 1998), the Fifth Circuit Court held that an elementary principal was entitled to qualified immunity because she did not ignore information she received about possible sexual abuse of male students. Although the principal thought the allegations were untrue, she did warn the accused teacher to behave appropriately. The plaintiffs alleged that the principal's failure to reprimand the teacher or to transfer him demonstrated deliberate indifference. But the court concluded, relying on the *Doe v. Taylor* standard, that she was entitled to qualified immunity because actions by officials that are merely inept or ineffective do not amount to deliberate indifference. *Id.* at 219.

School districts are less likely to be held liable under Section 1983. In order to prevail against a school district on a Section 1983 claim arising from an employee's alleged sexual misconduct toward a student, the plaintiff must demonstrate that an official policy or custom of the district inflicted the constitutional injury. *See Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d at 220 (*citing City of Canton v. Harris*, 489 U.S. 378, 385 91 (1989)). In other words, a school district can be held liable under Section 1983 only for those acts for which the district is actually responsible. A school district cannot be held liable under a *respondent superior* theory "solely because [the district] employs a tortfeasor." *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 691 (1978).

In order to prevail against a school district on a Title IX claim arising from an employee's sexual harassment of a student, a plaintiff must demonstrate that "an official who . . . has authority to address the alleged discrimination and to institute corrective measures on the [district's] behalf ha[d] actual knowledge of discrimination . . . and fail[ed] to adequately respond." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S.274 (1998); *see also Davis v. Monroe County Board of Educ.*, 119 S.†Ct. 1661 (1999). A school district cannot be held liable in damages absent evidence of (1) actual notice and (2) deliberate indifference. *Id.* Applying this standard, the Supreme Court rejected the Title IX claim of a female high school student who alleged that she had been seduced by her teacher. The Supreme Court noted that the only school district official to have had information about the teacher's misconduct was the high school principal. However, the principal's information consisted of a complaint from the parents of other students charging that the teacher had made inappropriate comments during class. According to the Supreme Court, such complaints were "plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." Moreover, the school district terminated the teacher's employment upon learning of his inappropriate relationship with the plaintiff. Under such circumstances, the plaintiff failed to satisfy the requirements of actual notice and deliberate indifference on the part of an official with the requisite authority to implement corrective measures. The Fifth Circuit Court of Appeals recently determined that the administrator's response in *Doe v. Dallas* (above), which it described as a "tragic error in judgment," was sufficient to preclude liability under Title IX. *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000).

Conclusion

Responding to allegations of employee misconduct is an important function of any school administrator, and a school attorney can be instrumental in guiding administrators through the investigation and documentation process. A prompt, thorough investigation, supported by clear, objective documentation can go a long way towards preventing litigation or defeating litigation when it does arise. Taking the time to document thoroughly in the initial stages will make any repercussions of the misconduct that much easier to confront.

TEXAS CHARTER SCHOOL LAWS: AN OVERVIEW

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When the Texas Legislature unveiled its revised Education Code in 1995, it introduced a fresh concept to our state. It authorized an "alternative method of operation" in accordance with the provisions of the new Chapter 12. Section 12.001, Texas Education Code (TEC), provides as follows:

> As an alternative to operating in the manner generally provided by this title, an independent school district, a school campus, or an educational program may choose to operate under a charter in accordance with this chapter.

The idea seems to have taken hold. Today, over 30,000 Texas students attend charter schools. While these new schools are concentrated in the metropolitan areas of Houston, Dallas, Austin, and San Antonio, they have also opened in places such as Lometa, Donna, and New Waverly. Most charter schools in Texas are "open-enrollment" schools, created with the authorization of the State Board of Education (SBOE) under Subchapter D of Chapter12. As of October 2000, the SBOE had authorized 179 open-enrollment charters. Because the geographic areas of these schools often encompass the boundaries of more than one school district, their influence has grown tremendously over the past few years. Further, parental interest in the campus charter option available within the structure of a traditional school district continues to grow. In short, all school law attorneys, even those who represent the most rural of districts, now have a need to know the fundamentals of Chapter 12.

This overview is organized around the three types of charters authorized by the Texas Legislature. Pursuant to Chapter 12, the classes of charter are:

(1) a home-rule school district charter as provided by Subchapter B;

(2) a campus or campus program charter as provided by Subchapter C; or

(3) an open-enrollment charter as provided by Subchapter D.[1]

Following a relatively brief discussion of home-rule and campus charters, we will provide a more detailed treatment of the most common variety, the open-enrollment charter, then explore potential legal questions pertaining to open-enrollment charter schools.

Home-Rule School District Charters

Texas Education Code, Subchapter B, Chapter 12, permits a school district to take the "local control" philosophy a step farther. By adopting a home-rule district charter, a district can avoid certain restrictions and mandates under which it must otherwise operate. Most notably, a district operating under a properly adopted home-rule charter is not bound by Chapter 37[2] or, in elementary and middle grades, the Texas Essential Knowledge and Skills (TEKS).[3] Further, a home-rule district "may adopt and operate under any governance structure" and is thus free to "create offices, … determine the time and method of selecting officers … and prescribe the qualifications and duties of officers."[4]

To date, no district has undertaken the effort to adopt a home-rule charter. The process set forth in Subchapter B is, in fact, rather elaborate. Proceedings for a home-rule charter may be initiated by either a petition signed by at least five percent of the registered voters of a district or a resolution approved by two-thirds of the board of trustees.[5] Once a petition has been presented or a resolution adopted, the board of trustees must appoint a charter commission in accordance with the statute's membership requirements.[6] After this commission has drafted a proposed charter, it must submit the draft for review by the Secretary of State for a determination of compliance with the Voting Rights Act.[7] If the proposed charter is deemed to comply with the Voting Rights Act, it must then be submitted to the commissioner of education for legal review.[8] If approved by the commissioner, the board of trustees of the district must order an election on the proposed charter.[9] Finally, the charter is effective if approved in an election in which "at least 25 percent of the registered voters of the district vote."[10]

In terms of state-level accountability, all provisions of Chapter 39, TEC, apply to a home-rule district charter.[11] Additionally, the State Board of Education is empowered to revoke or place on probation a home-rule district charter if it determines that the district:

(1) committed a material violation of the charter;
(2) failed to satisfy generally accepted accounting standards of fiscal management; or
(3) failed to comply with [Subchapter B] or other applicable federal or state law or rule.[12]

It is not clear why Texas school districts have not experimented with the home-rule option. Perhaps the procedural barriers appear too daunting. On the other hand, district leaders might simply be satisfied with the level of flexibility generally available under the revised Education Code.

Campus and Campus Program Charters

Chapter 12 also provides the option for a single campus or program within a district to operate under its own charter.[13] As with the home-rule charter, a campus operating under a charter is freed from certain restrictions and mandates. In addition to the releases available under a home-rule charter, a campus operating under a charter is freed from teacher certification and contractual requirements, class size limits, and any local requirements waived by the district.[14] The statute does, however, include a special requirement concerning admission of students:

> Eligibility criteria for admission of students to the campus or program for which a charter is granted under this subchapter must give priority on the basis of geographic and residency considerations. After priority is given on those bases, secondary consideration may be given to a student's age, grade level, or academic credentials in general or in a specific area, as necessary for the type of program offered.[15]

Thus, a campus or program operating under a charter is subject to additional restrictions when assigning of students.

A campus or program charter takes the form of a contract between the board of trustees and the chief operating officer of the campus or program for which the charter is granted.[16] The arrangement may be initiated by a petition signed by the parents of a majority of the students at the school campus and a majority of the classroom teachers at the campus.[17] While the board of trustees of a district is not obliged to approve a charter when presented with such a petition, a board "may not arbitrarily deny a charter."[18] Further, in 1997, the Legislature added a requirement that each district adopt a campus charter and campus program charter policy that specifies:

(1) the process to be followed for approval of a campus charter or campus program charter;
(2) the statutory requirements with which a campus charter or campus program charter must comply; and
(3) the items that must be included in a charter application.[19]

It is estimated that 25 to 30 campus charters have been approved in Texas, with the majority concentrated in the Houston Independent School District. Not all of these charters were, however, approved under the petition process described above. Rather, some were approved under the provisions of Section 12.003, TEC, which states:

> This chapter does not limit the authority of the board of trustees of a school district to grant a charter to a campus or program to operate in accordance with the other provisions of this title and rules adopted under those provisions.

Thus, a district's board of trustees may grant a charter pursuant to the petition process set forth in Subchapter C, or it may grant a charter to a campus or program on its own initiative.[20] The critical distinction between these two forms of charters is that only those campus or program charters granted in response to a petition presented by parents and teachers serve to release the campus or program from state requirements. The rationale for this distinction is evident. A district should not be permitted to waive a portion of the state regulatory scheme absent some form of consent from those whom the regulations are designed to serve. Accordingly, the majority of parents and teachers at a campus must agree to waive protections such as the procedural and certification requirements found in TEC Chapter 21.

Because a campus or program charter is approved in the form of a contract, its content becomes a matter of negotiation between district and campus or program officials. Although the charter statute addresses issues such as student performance, public accountability, antidiscrimination, and health and safety

matters, other equally important subjects are left to be decided by the parties to the contract.[21] The district and campus will, for instance, have to come to terms regarding governance, budgetary, personnel, and special population issues. Once in effect, a campus or program charter may only be revised with the approval of the board of trustees and, again, a petition signed by a majority of the parents and classroom teachers at the campus or in the program.[22]

The accountability provisions in Subchapter C give local boards of trustees authority similar to that given the SBOE for purposes of home-rule district charters. A local board may place on probation or revoke a campus or program charter on the same bases that the SBOE may place on probation or revoke a home-rule charter.[23] On the other hand, although the continuation of a home-rule district charter is contingent on "acceptable student performance on assessment instruments adopted under Subchapter B, Chapter 39," continuation of a campus or program charter is instead contingent upon the performance targets established in the charter.[24] Thus, a district may require a campus or program to exceed the minimum level of acceptable performance under Chapter 39 in order to survive. Alternatively, it is conceivable that a district might, under special circumstances, permit a campus or program charter to establish targets lower than those acceptable in the rest of the district.[25]

The foregoing review addresses only the most elementary aspects of the Texas campus charter provisions. Because there have been no court or commissioner decisions in this area, many questions remain to be answered. It is unclear, for instance, whether a district may create a campus for the purpose of granting a charter or whether a district may grant a charter to a campus currently operating as a private school. Though it appears that a district may only issue a charter to a campus previously operating as a campus within the district,[26] the statute remains open to interpretation on this point. Further, the board of trustees may find itself in a position of having to approve a charter it did not seek since, as noted above, 12.052(c) directs that a board may not arbitrarily deny a charter. It remains unclear, for example, whether, in negotiating the content of a campus charter, a district may require terms inconsistent with those presented in the charter petition. Similarly, perhaps Chapter 12 permits a district to respond to a campus charter petition by granting the charter, but negotiating its terms and vesting authority with campus administrators who actively opposed the petition effort.[27]

Although schools operating under campus and program charters are not yet as prevalent as open-enrollment charter schools, the level of interest among parents and teachers appears to be on the rise. It is a trend that warrants continued attention by the school law bar.

Open-Enrollment Charter Schools

The open-enrollment charter is, thus far, the most popular form of charter in Texas. These charters, under the purview of the SBOE, offer the opportunity for an eligible entity to create an entirely new public school or, more precisely, a new local education agency largely equivalent to an independent school district. Open-enrollment charter schools enjoy a range of freedom similar to that allowed campus charters. In short, they are exempt from the personnel provisions of Chapter 21, the disciplinary provisions of Chapter 37, the governance provisions in Chapter 11, and many operational requirements. As discussed in more detail below, however, the provisions identifying the portions of the law applicable to charter schools are not entirely definitive.

Like campus charters, open-enrollment charters are approved in the form of a contract, negotiated in this instance between the school's sponsoring entity and the State Board. When open-enrollment charter schools were first granted, the contract for charter consisted of a one-page document. This one-page contract identified the charter holder, stated the beginning and ending dates for the charter, and provided a few other details of the transaction. Insofar as it addressed what might constitute a "material violation of the charter," the contract mostly paraphrased Section 12.115, TEC.

The contract has come a long way since then. The most recent version of the contract for charter is 16 pages long and includes 46 paragraphs, some with multiple parts. The contract incorporates a number of external sources by reference.[28] In addition, it details a number of obligations undertaken by the charter holder solely by virtue of the contract.[29]

Chapter 12 identifies four types of entities eligible to receive a charter:

(1) a [public] institution of higher education …;
(2) a private or independent institution of higher education …;
(3) an organization exempt from taxation under Section 501(c)(3), Internal Revenue Code …; or
(4) a governmental entity.[30]

To date, most open-enrollment charters have been awarded to tax-exempt, non-profit organizations, although the University of Texas and Houston each hold charters, as do the Harris and Dallas County Juvenile Boards.

Three types of open-enrollment charters are available to these eligible entities. The original twenty open-enrollment charters were authorized by Section 12.101 when that section was adopted by the 74th Texas Legislature in 1995. The SBOE awarded these charters at its February, April, and May 1996 board meetings. In 1997, the 75th Texas Legislature granted the SBOE the authority to award additional charters, as follows:

(1) not more than 100 charters for open-enrollment charter schools that adopt an express policy providing for the admission of students eligible for a public education grant under Subchapter G, Chapter 29; and

(2) additional charters for open-enrollment charter schools for which at least 75 percent of the prospective student population, as specified in the proposed charter, will be students who have dropped out of school or are at risk of dropping out of school as defined by Section 29.081.

Tex. Educ. Code §12.1011. The board approved selection guidelines for this second "generation" of charters in July 1997. In 1998, the board awarded 142 additional charters,

including 27 "75% Rule" charters. In 1999, the board awarded 9 more 75% Rule charters. The process continued, with selection rounds in March, July and November of 2000. Currently, 173 open-enrollment charters are in effect, including 56 75% Rule charters.

Open-enrollment charter schools are subject to the same range of accountability measures applicable to districts under Chapter 39, TEC, but are additionally subject to the threat of revocation under Chapter 12.[31] Open-enrollment charters may be revoked on the same bases as home-rule district charters and campus charters, except that Subchapter D specifically identifies "failure to satisfy accountability provisions prescribed by the charter" as a material violation of an open-enrollment charter.[32] The State Board has on three occasions voted to revoke an open-enrollment charter.[33]

By its terms, every open-enrollment charter expires on a date set forth in the charter contract and must be renewed in order to continue operation of the school. In January, 2001, the SBOE will consider applications for renewal of the original charters granted in 1996. The renewal application adopted by the board generally mirrors the latest version of the initial application for approval.[34] Because two of the original twenty charters are no longer in operation, the board will be considering applications from 18 schools.

Laws Applicable to Open-Enrollment Charter Schools

An open-enrollment charter school is a special government institution created when an "eligible entity" receives an "open-enrollment charter." When the eligible entity, whether public university or private corporation, acts under the charter, it acts as a public school.[35] The extent to which these new public schools participate in governmental powers and duties is outlined in Section 12.103 and 12.104, TEC.

Section 12.104(a) provides simply that, "[a]n open-enrollment charter school has the powers granted to schools under this title." Section 12.103 defines applicable duties and restrictions:

> An open-enrollment charter school is subject to federal and state laws and rules governing public schools, except that an open-enrollment charter school is subject to this code and rules adopted under this code only to the extent the applicability to an open-enrollment charter school of a provision of this code or a rule adopted under this code is specifically provided.

Note that neither provision references laws applicable to public school *districts*; rather, each cites laws applicable to public *schools*.[36] The Education Code does not, however, define the powers or duties of "schools" as it does for districts. Further, school-related statutory provisions outside the Education Code generally apply to "school *districts*" rather than "schools."[37] Thus, the intended scope of these provisions is not entirely clear.

Taken as a whole, however, the provisions of Subchapter D provide sufficient guidance to resolve many of the most critical issues affecting charter school operations. The second subsection of Section 12.104 is perhaps most instructive. Here, the Legislature provides a laundry list of Education Code requirements applicable to open-enrollment charters. The list includes provisions relating to the Public Education Information Management System ("PEIMS"), the Texas Assessment of Academic Skills ("TAAS"), special and bilingual education, and accountability under Chapter 39.[38]

A number of additional governmental requirements emphasizing the responsibilities of charter schools as public entities are also identified in other sections of Chapter 12. For example, Education Code Section 12.105(b) provides that "[t]he governing body of the school is considered a governmental body for purposes of Chapters 551 and 552, Government Code." Further, Chapter 12 clearly states that a charter school is required, with narrow exceptions, to enroll all resident students who apply.[39] More specifically, Section 12.111(6) states that the school must:

> prohibit discrimination in admission policy on the basis of sex, national origin, ethnicity, *religion*, disability, *academic or athletic ability*, or the district the child would otherwise attend in accordance with this code, although the charter may provide for the exclusion of a student who has a documented history of a criminal offense, a juvenile court adjudication, or discipline problems under Subchapter A, Chapter 37.

Thus, open-enrollment charter schools are not able to consider two of the most common selection criteria for admission to private schools — religious affiliation and academic ability.

Moreover, because open-enrollment charter schools are subject to Education Code provisions "only to the extent the applicability … is specifically provided,"[40] we can identify with a fair degree of certainty Education Code provisions that *do not* apply to open-enrollment charter schools. It is clear, for instance, that no provisions of Chapter 21, TEC, apply to charter schools. These provisions are not included in the list of requirements under Section 12.014(b), nor does any provision of Chapter 21 apply expressly to open-enrollment charter schools. Thus, pursuant to the language in Section 12.103, open-enrollment charter schools generally share in the employment options available to private schools.[41] They may enter into term contracts, hire teachers on an at-will basis, hire non-certified teachers, and make arrangements with a third-party administrator or private management company, to name but a few examples.

Chapter 12 also explicitly confers on charter schools benefits unique to public schools. For example, Section 12.105 specifies:

> [t]he school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers.[42]

(See, "Sovereign Immunity and the Private Holder of an Open-Enrollment Charter," below.) This section further provides that:

> An employee of an open-enrollment charter school who qualifies for membership in the Teacher Retirement System of Texas shall be covered under the system to the

same extent a qualified employee of a school district is covered.[43]

(Note that, in these instances, laws are made applicable to charter schools "to the same extent as a school *district*" or "to the same extent as school *district* employees and volunteers.") Funding provisions are also spelled out in some detail.[44] For example, Sections 12.106 and 12.107 state that charter schools are to receive an amount equal to what the sending district would have received to educate the same child.[45] Charters are also given the same access as school districts to transportation funding and free state textbooks.[46]

Immunity Issues Affecting the Private Holder of an Open-Enrollment Charter

The open-enrollment charter law does not "privatize" public education.[47] Instead, a mixed group of charitable organizations, counties, and colleges and universities are placed under the "federal and state laws governing public schools."[48] It is true that private 501(c)(3) corporations hold the vast majority of open-enrollment charters. It is also true that the public schools operated by these private companies are subject to the Education Code only as expressly provided by Section 12.104(b) or elsewhere in the code. But much of public school law does apply to the operation of these schools. The fact that some school laws apply and some do not often raises old questions in a new context. The lawyer who cracks open the School Law Bulletin[49] to Chapter 12, Subchapter D will soon detect fault lines where well-known principles of public school law meet the new and unfamiliar territory of private ownership and private control. In the space remaining, we offer an illustrative example of the legal issues that may arise when dealing with private charter school holders. We have chosen for this purpose the immunity provision provisions of Education Code Section 12.105(c).

Section 12.105(c) confers immunity to an open-enrollment charter, as follows:

> The school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers.

This language confers both governmental immunity to the charter school and official immunity to its employees and volunteers.

The immunity of school district employees and volunteers is conferred by Education Code Chapter 22 to charter school employees and volunteers. Chapter 22 grants a specific set of immunities, most notably granting "professional employees," immunity for acts incident to the position that involve the exercise of discretion except in certain circumstances involving discipline.[50] Chapter 22 also grants immunities to non-professional employees when administering medications to schoolchildren,[51] and extends protection to school volunteers.[52]

The statutory immunity provisions of Chapter codify common law official immunity, an affirmative defense that protects a government official from personal liability (1) for the performance of a discretionary duty (2) within the scope of the official's authority, *if* (3) the official acts in good faith.[53] While the element of "good faith" is not expressly stated in the statute, courts have included this traditional element when applying Chapter 22 immunities.[54] Consistent with the purpose of the immunity, officials also enjoy a statutory right to an interlocutory appeal from denial of immunity.[55] When official immunity shields a government official from liability, sovereign immunity also shields the governmental employer from vicarious liability.[56]

The common-law doctrine of governmental immunity consists of two separate principles: The first provides that the state is immune from suit regardless of its liability; and the second provides immunity from liability even where it has consented to suit.[57] Section 12.105(c) confers on the charter school only governmental immunity from liability, not immunity from suit. Because Section 12.105(c) confers governmental immunity on the charter *school*, as opposed to the charter *holder*, its protections extend only to the conduct of school affairs. In conducting these affairs the school is protected "to the same extent as a school district."

Because Section 12.105(c) extends immunity only to the *school* operated by the charter holder, the covered "entity" has by definition only governmental functions.[58] Private charter holders, on the other hand, often carry out non-governmental activities as well as school operations. In this respect, private charter holders resemble cities. Like private charter holders, municipalities are protected by the doctrine of sovereign immunity only when engaged in "governmental" activity; they engage in many "proprietary" activities for which they enjoy no immunity at all.[59] Yet school districts and cities are political subdivisions[60] of the state; the typical holder of an open-enrollment charter is not. Thus the proprietary-verses-governmental distinction is clearly not on all fours with the dual nature of a private charter holder. Still, although the line may be drawn by a different rule, in both cases an entity engages in governmental and non-governmental activities. We suspect that a line similar to the one traditionally drawn between proprietary and governmental functions will find a place in the law of open-enrollment charters.

Another area of interest regarding immunity as it applies to the private charter holder involves Section 1983 claims. Under Monell v. Dep't of Soc. Servs. of New York,[61] Texas courts have held that school districts are considered "persons" under 42 U.S.C. §1983.[62] The question whether a private corporation operating a charter school is a "person" for purposes of 42 U.S.C. §1983 requires no judicial gloss. Private charter holders are clearly amenable to suit under §1983 as "persons." The questions pertinent to a §1983 suit against charter schools are: Does the operation of a charter school constitute action taken "under color of state law"? If so, does this activity constitute "state action" sufficient to make school officials liable for constitutional torts? The answer to both questions is probably, "yes."

Finding state action and finding action under color of state law are two separate inquiries, although they are related. Both are highly fact intensive. In Lugar v. Edmonson Oil Co.,[63] the United States Supreme Court held that a private person may be liable under §1983 for constitutional torts under a two-part analysis. First, in order to invoke the remedy made available

through 42 U.S.C. §1983, the civil rights plaintiff must show use or abuse of a power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.[64] This is action "under color of state law" for purposes of §1983. Second, the plaintiff must show that the action taken under color of state law violated a federally protected right. The Court noted that "most rights secured by the Constitution and laws of the United States are protected only against infringement by governments,"[65] and that careful adherence to this "state action requirement" in such instances is essential to preserve "an area of individual freedom by limiting the reach of federal law and federal judicial power."[66] But the courts stressed that some federal rights are secured against infringement by private citizens as well as governments, and the state action inquiry only applies where the underlying federal right requires it.[67] Secondly, it suggested the threshold for finding action under color of state law is lower than that for finding state action.[68]

It is not our purpose here to provide a full exegesis on Lugar or its progeny. Rather, we assume for the sake of argument that, in a proper case, private officials operating an open-enrollment charter school can be liable under §1983 for constitutional torts arising out of the public school authority granted to them in the charter. Our question is rather, in such a case, are charter school officials entitled to the qualified immunity enjoyed by state officials?

Oddly the answer could be, "no." In Wyatt v. Cole,[69] the Supreme Court addressed whether private individuals were liable for a constitutional tort *they* committed by making use of a state replevin statute which was presumptively valid at the time they used it, but which was declared (in the same case) to be unconstitutional. Although the Fifth Circuit dismissed the state defendants and the private individuals on the basis of qualified immunity, the Supreme Court granted *certiorari* to resolve a split among the circuit courts on the question of the private individuals' liability, and reversed.

The Court found that §1983 "creates a species of liability that on its face admits of no immunities."[70] Nevertheless, the Court noted that it had developed a set of §1983 immunities where "the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided if it had it wished to abolish the doctrine.'"[71] All nine Justices agreed that the first prong of this test was satisfied. When Section 1 of the Civil Rights Act of 1871 was enacted,[72] malicious prosecution and abuse of process contained actual malice as an essential element of those torts. They also agreed that, in Harlow v. Fitzgerald,[73] the Court substantially reformed the common law of immunities as it existed in 1871, changing what had been an inquiry into subjective good faith into an objective analysis of the state of the law at the time of an official's action. Since Harlow, qualified immunity is a very different immunity than the good faith defense available in 1871. Accordingly, the Court undertook a frank assessment of the policy purposes behind the Harlow immunity and whether they apply with equal force when private individuals are held liable for constitutional torts under §1983.

The Supreme Court in Wyatt I held that its reformulated qualified immunity doctrine should not be extended to protect private individuals; but it expressly held open the question whether a more limited protection based on 1871 common law should be provided instead.[74] On remand, noting that each of the five Justices concurring or dissenting from the opinion supported this approach, the Fifth Circuit implied a good faith element to the §1983 cause of action.[75] Indeed, the Fifth Circuit may have gone beyond what the majority had in mind. When it restated the good faith element, the Fifth Circuit used the Harlow test: "[P]rivate persons sued on the basis of Lugar may be held liable for damages under §1983 only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional."[76] Consequently, after Wyatt I and Wyatt II, a private individual found liable under §1983 enjoys protection that closely mimics qualified immunity, but is not qualified immunity. The difference between the two types of immunity embodied in Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985). Qualified immunity protects government officials from the expense and distraction of trying cases arising out of their official conduct. To protect officials from the burdens of trial, Mitchell found a common law right to an interlocutory appeal from denial of immunity similar to the statutory right provided by Texas law.[77] Wyatt II's good faith element puts the burden of proof on plaintiff, but still exposes defendant to the burden of trial.

Thus, charter school officials could well be denied the protections of qualified immunity even if they are held to be liable for a constitutional tort under §1983. Between liability and immunity lies a danger zone, where private conduct is sufficiently public for §1983 color-of-law purposes, sufficiently public to be accounted "state action," yet not sufficiently public to merit the protections of qualified immunity. Officials falling into this zone must be satisfied with the good faith protections of Wyatt II.[78]

Conclusion

When the Texas Legislature unveiled Education Code Chapter 12 in 1995, it introduced a fresh concept to our state indeed. By authorizing the "alternative" methods of operation discussed above, it may have introduced innovative programs and choices to the public school system. It has certainly introduced unsettled questions for the school lawyer.

ENDNOTES

* The views expressed here are those of the authors, and do not necessarily represent the views of the Texas Education Agency or of the State Board of Education.

1. Tex. Educ. Code §12.002.
2. Tex. Educ. Code §37.001, *et seq*. (addressing disciplinary consequences for student behavior violations).
3. *See* Tex. Educ. Code §§12.012-12.013.
4. Tex. Educ. Code §12.025.
5. Tex. Educ. Code §12.014.
6. Tex. Educ. Code §12.015.
7. Tex. Educ. Code §12.017.
8. Tex. Educ. Code §12.018.

9. Tex. Educ. Code §12.019.

10. Tex. Educ. Code §12.022.

11. Tex. Educ. Code §12.013(b)(3)(P).

12. Tex. Educ. Code §12.027.

13. Tex. Educ. Code §12.052.

14. *See* Tex. Educ. Code §12.056. It should be noted that the campus charter provisions do not, of course, authorize a district to alter unilaterally teacher contracts in effect at the time the charter is awarded).

15. Tex. Educ. Code §12.065.

16. Tex. Educ. Code §12.060.

17. Tex. Educ. Code §12.052.

18. *Id.*

19. Tex. Educ. Code §12.058.

20. *See* http://www.tasb.org/policy/sp_charter.html

21. *See* Tex. Educ. Code §§12.056, 12.059-12.060.

22. Tex. Educ. Code §12.062.

23. Tex. Educ. Code §12.063.

24. Tex. Educ. Code §§12.054, 12.059.

25. The district and campus would remain, however, subject to the public school accountability system prescribed by Chapter 39, Tex. Educ. Code.

26. *See* Tex. Educ. Code §12.053 (authorizing charters for campuses "in the district").

27. *See* Tex. Educ. Code §12.060 (requiring charter contract to be signed by the board president and "chief operating officer of the campus or program for which the charter is granted").

28. The contract incorporates, for example, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1401, *et seq*.

29. The contract prescribes, for example, notice procedures applicable in the event a charter school must cease operation for a period of time.

30. Tex. Educ. Code §12.101.

31. Tex. Educ. Code §12.115-12.116.

32. Tex. Educ. Code §12.115(a)(1).

33. *See Texas' Open Enrollment Charter School*, 1 TEX. TECH J. OF TEXAS ADMIN. LAW 183 (Summer 2000).

34. *Id.*

35. *See* Tex. Educ. Code §12.105(a); Tex. Const. art. VII, §1.

36. *See Texas' Open Enrollment Charter School, supra*. Note that home-rule school districts are, by contrast vested with "the powers and duties granted to a school *district*." Tex. Educ. Code §12.013 (*emphasis added*).

37. *Id.*

38. Tex. Educ. Code §12.12.104(b).

39. Tex. Educ. Code §12.111(6). Additionally, Section 12.111(13) requires charter applicants to identify the geographic area the proposed school will serve. The charter contract requires that charter schools give enrollment priority to eligible students residing in this geographic area.

40. Tex. Educ. Code §12.103.

41. Federal special and bilingual education certification requirements do apply to charter schools, however.

42. Tex. Educ. Code §12.105(c).

43. Tex. Educ. Code §12.105(d).

44. *See* Tex. Educ. Code §§12.106-12.107; *cf.* Tex.Const. art. VII, §§2, 3, 5.

45. *Id.*

46. Transportation funding is provided by Section 12.109. Section 31.021(b) provides free state textbooks. *See also* Tex. Const. art. VII, §3 (providing for the textbook fund).

47. *Texas' Open Enrollment Charter School*, 1 TEX. TECH J. OF TEXAS ADMIN. LAW 183 (Summer 2000).

48. Tex. Educ. Code §12.103.

49. This is the "manual" required by Education Code §7.055(b)(9).

50. Section 22.051(a) provides:
A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgement or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

51. Education Code Section 22.052(a) provides:
On the adoption of policies concerning the administration of medication to students by school district employees, the school district, its board of trustees, and its employees are immune from civil liability from damages or injuries resulting from the administration of medication to a student if: (1) the school district has received a written request to administer the medication from the parent, legal guardian, or other person having legal control of the student; and (2) when administering prescription medication, the medication appears to be in the original container and to be properly labeled.

52. Tex. Educ. Code §22.053.

53. *University of Houston v. Clark*, 22 S.W.3d 915 (Tex. 2000); *see also Outman v. Allen ISD Bd. of Trustees*, 1999 Tex. App. LEXIS 7691 (Tex. App. — Dallas 1999) (unpublished opinion).

54. *See Barr v. Bernhard*, 562 S.W.2d 844, 846 (Tex. 1978); *Outman v. Allen ISD Bd. of Trustees*, 1999 LEXIS 7691 (Tex. App. — Dallas 1999) (unpublished opinion); *Beresford v. Gonzalez*, 1999 LEXIS 8689 (Tex. App. — Corpus Christi 1999) (unpublished opinion).

55. Tex. Civ. Prac. & Rem. Code §51.014(5); *see Newman v. Obersteller*, 960 S.W.2d 621 (Tex. 1997) (school district official entitled to interlocutory appeal from denial of official immunity under §51.014(5); Tex. Civ. Prac. & Rem. Code §101.106 is an immunity statute for purposes of Tex. R. App. P. 180).

56. *See DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1994).

57. *See Federal Sign v. Texas Southern Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *City of Mesquite v. Crawford*, 2000 LEXIS 4723 (Tex. App. — Dallas 2000).

58. *See Canutillo I.S.D. v. Olivares*, 917 S.W.2d 494, 497 (Tex. App. — El Paso 1996); *Dillard v. Austin I.S.D.*, 806 S.W.2d 589, 594 (Tex. App. — Austin 1991, writ denied); *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 949-50 (Tex. Civ. App. 1938, writ ref'd).

59. *City of Mesquite v. Crawford*, 2000 LEXIS 4723 (Tex. App. — Dallas 2000). Governmental functions are public acts that a municipality does "as the agent of the State in furtherance of general law for the interest of the public at large"; while proprietary functions are discretionary and "primarily for the benefit of those within the corporate limits of the municipality rather than for use by the general public." *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. — Austin 1998).

60. *See Guaranty Petroleum Corporation v. Armstrong*, 609 S.W.2d 529, 531

(Tex. 1980).

61. *See Monell*, 436 U.S. 658, 690, 98 S. Ct. 2018 (1978), at n10.

62. *Dallas Indep. Sch. Dist. v. Finlan*, 2000 Tex. App. LEXIS 5773 (Tex. App. — Dallas, Aug. 28, 2000), at p. 57.

63. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744 (1982).

64. *Lugar*, 457 U.S. at 929 (quoting *Ex Parte Virginia*, 100 U.S. 339, 346-347 (1880)).

65. Lugar, 457 U.S. at 936 (quoting Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156 (1978)).

66. *Id.*

67. *Id.*, at 935 n. 18.

68 *Id.*

69. *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992) ("*Wyatt I*").

70. *Id.*, at 163 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984 (1976)).

71. *Id.*, at 164 (quoting *Owen v. City of Independence*, 424 U.S. 409, 417, 96 S.Ct. 984 (1976)).

72. 17 Stat. 13. This is the source of current 42. U.S.C. §1983.

73. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982).

74. *Wyatt I*, 504 U.S. at 169; *see also* Note, *Wyatt v. Cole and Qualified Immunity for Private Parties in Section 1983 Suits*, 69 NOTE DAME L. REV. 735 (1994).

75. *Wyatt v. Cole*, 994 F.2d 1113, 1118 (1993) ("*Wyatt II*").

76. *Wyatt II*, at 1118; *cf. Harlow v. Fitzgerald*, 457 U.S. at 815-818.

77. *See* Tex. Civ. Prac. & Code § 51.014(5); *Newman, Supra*.

78. In *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997), the Court addressed whether the qualified immunity it had found applicable to state prison guards in *Procunier v. Navarette*, 434 U.S. 555, 98 S.Ct. 855 (1978) should be extended to private prison guards at a facility under contract with the state. Relying on *Wyatt I*, a 5-4 majority held that the policies underlying qualified immunity do not warrant extending it to private prison guards.[97] Given the rationale for the result reached in *McKnight*, and given the split on the Court in that case, there is good reason to hope that even private holders of open-enrollment charters will enjoy qualified immunity.

NOTES

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