State Bar
Section Report
School Law

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Dear School Law Section Members:

I am pleased to report that the Planning Committee for the 2002 School Law Section Retreat is gearing up to provide an outstanding line up of presentations for the July 11-13, 2002 Retreat. Council members Shellie Hoffman Crow and Greg Ellis have teamed up to design a program that will bring you the latest developments in school law. Please mark these dates on your calendar and remember that the Retreat will be held at the La Cantera Resort in San Antonio. Please also note that Sandra Carpenter Houston will be completing Evelyn Hick's term on the Planning Committee. Due to the overwhelming positive feedback about the 2001 retreat at the La Cantera Resort, I am certain that the 2002 School Law Section Retreat is an event you won't want to miss.

Please let me hear from you if you have any thoughts on how your School Law Section can better assist you in your practice.

Denise Hays
Walsh Anderson Brown Schulze & Aldridge P.C.
6300 La Calma Suite 200
Austin, TX 78752
(512) 454-6864
Dhays@wabsa.com

SCHOOL LAW SECTION 2001-2002
OFFICERS AND COUNCIL MEMBERS

OFFICERS

Denise Hays, Chair
Walsh, Anderson, Brown,
Schulze & Aldridge, P.C.
P. O. Box 2156
Austin, Texas 78768-2156
512-454-6864
dhays@wabsa.com

Lisa A. Brown, Chair Elect
Bracewell & Patterson, L.L.P.
711 Louisiana, Suite 2900
Houston, Texas 77002-2781
713-221-1256
lbrown@bracepatt.com

Lynn Rossi Scott, Vice Chair
Bracewell & Patterson, L.L.P.
Lincoln Plaza, Suite 4000
500 N. Akard Street
Dallas, Texas 75201-3387
214-758-1091
lscott@bracepatt.com

Lonnie Hollingsworth, Jr.,
Secretary/Treasurer
Texas Classroom Teachers Assn.
P. O. Box 1489
Austin, Texas 78767
512-477-9415
lonnie@tcta.org

Roger Dean Hepworth, Immediate Past Chair
Henslee, Fowler, Hepworth &
Schwartz, L.L.P.
816 Congress Ave., Suite 800
Austin, Texas 78701-2443
512-708-1804
hepworthr@school-law.com

COUNCIL MEMBERS

David Anderson, Council Member
Texas Education Agency
1701 Congress Ave., Suite 2-150
Austin, Texas 78701
512-463-9720
danderso@tea.state.tx.us

Shellie Hoffman Crow
Council Member
Walsh, Anderson, Brown,
Schulze & Aldridge, P.C.
P. O. Box 2156
Austin, Texas 78768-2156
Phone: 512-454-6864
scrow@wabsa.com

Greg Ellis, Council Member
Texas Association of School Boards
P. O. Box 2947
Austin, Texas 78768-2947
512-467-0222
greg.ellis@tasb.org

Wayne Haglund, Council Member
Cassels, Haglund & Clark
P. O. Box 1626
Lufkin, Texas 75902-1626
409-634-8466
whaglund@laglundlaw.com

Blake Hansen, Council Member
McMahon, Tidwell
P. O. Box 311
Odessa, Texas 79760
915-367-7271
bhansen@mcmahonfirm.com

Dohn Larson
Texas Classroom Teachers Assn.
P. O. Box 1489
Austin, Texas 78767
512-477-9415
dlarson@tcta.org

Kevin Lungwitz, Council Member
Texas State Teachers Association
316 West 12th Street
Austin, Texas 78701
512-476-5355, ext.1145
kevinl@tsta.org

Sandra Carpenter Houston
Arlington ISD
Arlington, Texas

SCHOOL LAW SECTION
CALENDAR OF EVENTS & DATES TO REMEMBER

July 11-13, 2002 — School Law Section Retreat/Summer Conference
La Cantera Resort, San Antonio, Texas

VIEWPOINT NEUTRALITY IN THE COURTROOM AND THE CLASSROOM: QUESTIONS RAISED BY *CHIU V. PLANO INDEPENDENT SCHOOL* DISTRICT

by Joy Baskin, Texas Association of School Boards

Could the First Amendment ever be bad for public education? Anyone who has ever attended a school board meeting knows that free speech and common sense do not always walk hand in hand. But, for the sake of individual liberties, representational government, and a healthy marketplace of ideas, we set aside the lesser goals of efficiency and pragmatism. The value of airing all points of view outweighs the inconvenience, and the fundamental value of the First Amendment is rarely called into question. Does the same hold true, however, when free speech leaves the boardroom for the classroom?

A recent Fifth Circuit case, *Chiu v. Plano Independent School District*, highlights continuing questions about the First Amendment in public school settings.[1] In case after case, including most recently *Good News Club v. Milford Central School*, the Supreme Court has called for "viewpoint neutrality." Briefly stated, once a school district creates a forum for expression about a particular topic, the school district may not suppress expression based solely on a speaker's viewpoint.[2] In *Chiu*, the Fifth Circuit once again had occasion to apply this standard. The court's decision focused on two key issues: (1) how does a school district create a forum for expression? and (2) because the requirement of viewpoint neutrality applies regardless of whether the district has opened a forum, does it really matter? The court's approach to these issues will certainly affect how public schools accommodate private expression on campus; it may even affect how public schools teach their students.

Math Nights Give PISD Nightmares

Plano ISD ("PISD") determined that its middle school students were entering high school unprepared for high school level mathematics. In response, PISD implemented a new math curriculum, known as "Connected Math," in its middle schools. A group of parents opposed the new curriculum, believing it inferior to "traditional math."

To facilitate the transition to Connected Math, PISD held a series of "Parent Math Nights" ("Math Nights"). The meetings were scheduled for after school hours and were announced in a local paper and through flyers sent home with students. The agenda of each Math Night included a presentation by the faculty, a question and answer session, and an informal meeting period to allow parents and teachers to discuss the progress of individual students. At its Math Nights, PISD also distributed its own printed materials explaining the curriculum.

Two of the parents who objected to the new curriculum attempted to garner additional parental support for their position during PISD's Math Nights. The parents attended the Math Nights and attempted to distribute copies of articles critical of curricula similar to Connected Math. The parents sought to collect signatures on a petition asking PISD to delay implementation of the program until further research could be conducted. When PISD officials refused to allow circulation of the parents' printed materials, one parent displayed a sign with a hotline number for parents. District officials asked him not to display the sign. A third parent asked to use the school mail delivery system to send flyers critical of Connected Math home with students. Again, PISD refused.

The parents sued PISD and its administrators under 42 U.S.C. Section 1983, claiming that PISD violated their free speech rights. The administrators filed motions for summary judgment, asserting qualified immunity, but the district court denied the motions. The administrators filed an interlocutory appeal to the Fifth Circuit.[3]

PISD Officials Fail to Qualify for Immunity

On appeal, the Fifth Circuit began its examination of the case by first recognizing that the parents' attempts to communicate were protected by the First Amendment. And, "[f]or First Amendment purposes, '[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue."[4] The court then set out the Supreme Court's forum-based framework for analyzing First Amendment issues on government property and attempted to apply the framework to the present case. "In distinguishing between the two types of forums, our precedent directs us to focus on two factors: (1) the government's intent with respect to the forum, and (2) "the nature of the [forum] and its compatibility with the speech at issue."[5]

The court denied PISD officials immunity on the First Amendment claims surrounding the Math Nights. In the court's opinion, the summary judgment record contained conflicting evidence about whether PISD intended its Math Nights to be merely informative or open forums for debating the merits of the math curriculum. In addition, the record did not clearly establish that the administrators had not engaged in viewpoint discrimination. The court's examination of the record led it to identify several genuine issues of material fact regarding potential viewpoint discrimination. Consequently, the court held that it lacked appellate jurisdiction over the PISD officials' interlocutory appeal.[6]

The court reached a very different conclusion on the school mail claim, however. The record showed that PISD had not intended to open its school mail system to the general public to facilitate debate on issues of public concern. The subject matter of the flyer—a politically-oriented petition directed to parents—was not similar to any previous use of the school mail delivery system. The court concluded, therefore, that the relevant administrator had established qualified immunity.[7]

Setting the Stage

The *Chiu* decision is only the latest in a long line of cases applying the Supreme Court's forum analysis to public schools. Public schools are not generally open to the public.[8] A school may, however, choose to open its facilities for certain specified purposes. A school's ability to regulate expression depends on the type of "public forum" it has created.[9]

Traditional public forum—Places that by long tradition have been devoted to public assembly and debate, like public sidewalks and parks, are traditional public forums. The government may impose reasonable time, place, and manner restrictions, as long as these restrictions do not relate to the content of the expression. The government may not enforce a content-based regulation unless the exclusion is narrowly tailored to serve a compelling state interest.[10]

Designated public forum—A school district can create the equivalent of a traditional public forum by government fiat.[11]

Limited public forum—A school district may open a forum to public use for certain purposes, but not for others. Control over access to such a forum may be based on subject matter or speaker identity.[12] Any restrictions on access must be viewpoint neutral and reasonable in light of the purpose of the forum.[13] A school may, however, deny access to a public forum for legitimate reasons unrelated to the speaker's viewpoint.

Nonpublic forum—If a school has not opened a public forum, the school remains a nonpublic forum.[14]

The Fifth Circuit's Take on Forums

In the *Chiu* decision, the Fifth Circuit acknowledged that previous cases from this and other circuits, as well as the Supreme Court, have been inconsistent in their use of forum terminology. "At times, the Supreme Court has referred to limited public forums as being a subcategory within a designated public forum…. In more recent cases, however, the Court has used the phrase 'limited public forum' to describe a type of nonpublic forum of limited open access."[15] In this case, the Fifth Circuit specifically concluded that a designated public forum is the equivalent of a traditional public forum, while a limited public forum is a separate creature, subject to rational basis review. "Because the level of scrutiny applied to government regulation of speech in a 'limited public forum' differs from that applied to government regulation of speech in a 'designated public forum,' it now seems clear that the two terms are not synonymous and should not be used interchangeably."[16]

Following the Script

In applying this forum framework to the case at hand, the Fifth Circuit began by reiterating what countless courts have said before: "Government intent with regard to the forum is the critical starting point for determining whether regulation of speech in a particular forum should be subject to strict scrutiny."[17] The court's first obligation was to look for evidence of indiscriminate public use: "[W]e must first ask whether the Math Nights were purposefully created to facilitate discussion or debate on math curriculum. The Court has recognized that 'school facilities may be [designated] public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or by some segment of the public, such as student organizations.'"[18] The court's approach was securely rooted in the leading Supreme Court and Fifth Circuit precedent on forum analysis. These cases repeat the familiar mantra that government intent is the key factor in forum analysis: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[19] "While it is clear that in operating an informational medium, the state creates some sort of forum, it would be absurd to hold that the state creates a public forum every time it creates, operates, or sponsors a method of communication."[20] "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum."[21]

Scouring the record for evidence of intent, the court found some evidence of a public forum: the agenda for Math Nights included a question and answer period and small group discussions; when first presented with the parents' printed materials, a PISD administrator initially permitted then withdrew permission to distribute the materials; finally, a letter from a PISD school board member stated that Math Nights would allow audience members to "express concerns" about the program. On the other hand, the invitation sent to parents made no mention of open debate, and school officials testified that Math nights were meant to be informative, not to provide an opportunity for public debate.

As a result, the court concluded that the summary judgment record was not clear as to what PISD intended with respect to Math Nights.[22] In the court's opinion, the meetings could have been a public forum, akin to the public comment section of a board meeting, or they could have been a nonpublic forum, in the form of a presentation by the district. A reasonable fact-finder could draw either conclusion. Meanwhile, the court reached an entirely different conclusion about the district's mail system. Relying on Supreme Court and Fifth Circuit precedent, the court concluded that the school's mail delivery system (sending notices home with students) was a nonpublic forum. The court found no evidence that PISD's selective opening of the school mail system to send other notices home was intended to create a designated forum for use by the general public.[23]

Much Ado About Nothing

Following Supreme Court and Fifth Circuit precedent, the *Chiu* court dutifully performed its forum analysis focused primarily on government intent. But ultimately the court concluded that it had been barking up the wrong evidentiary tree. Faced with its inability to decide what type of forum the Math Nights were, the court admitted that the requirement of viewpoint neutrality rendered the court's initial forum analysis purely academic: "Our inability to resolve the forum question on this summary judgment record does not affect our resolution of this appeal, however, because Plaintiffs have alleged viewpoint discrimination that would, if proven, violate the First Amendment whether Math Nights were designated or limited/nonpublic forums."[24]

"[O]nce the government has dedicated a particular forum as appropriate for certain types of speech or for speech on particular topics, 'speech for which the forum is dedicated is afforded protection identical to the protection provided to speakers in a traditional public forum.'"[25] As a result, "viewpoint discrimination violates the First Amendment regardless of the forum's classification."[26] The real question, therefore, was whether the school district discriminated on the basis of viewpoint.

Thus reoriented, the court concluded once again that genuine issues of material fact remained as to whether PISD officials engaged in viewpoint discrimination. The court found some evidence of potential discrimination: a PISD official first allowed, then refused to allow a parent to distribute his materials after the official reviewed the materials; a PISD official

allegedly responded to a parent in a hostile manner at a later Math Night; and a PISD official allegedly sent an e-mail memorandum warning administrators to watch for people conducting "personal campaigns" related to Connected Math. This evidence, while by no means conclusive, created a fact issue and stood between the PISD officials and summary judgment. As the court observed, this kind of evidence was not readily susceptible to summary judgment.[27]

What's in a name?

In light of the strict scrutiny associated with viewpoint discrimination, is there any point to distinguishing between the different forums? Perhaps. In a non-public forum, schools can exclude particular subject matters, including controversial subjects. Although limits on expression must be reasonable and viewpoint neutral, even within a nonpublic forum, a school district will have greater discretion to control the content of speech within such a forum. This is particularly true in light of the educational mission of the public schools.[28] For example, a school may reasonably restrict the subject matter of speech in a nonpublic forum in order to avoid controversy or prevent communication of messages deemed inappropriate for a student audience.[29] Once a subject matter is admitted, however, viewpoint discrimination will be viewed through the lens of strict scrutiny.

Message Monopoly?

What are the implications of viewpoint neutrality for public education? First, the *Chiu* decision indicates that every governmental means of communication establishes a forum subject to the First Amendment, regardless of whether the government opens the forum for public discourse. "'[A] forum may be considered nonpublic where there is clear evidence that the state did not intend to create a public forum or where the nature of the property at issue is inconsistent with the expressive activity, indicating that the government did not intend to create a public forum.' A nonpublic forum, however, is not a private forum, and because it is a government sponsored medium of communication, it is still subject to First Amendment constraints."[30] Restrictions must be reasonable and cannot be an effort to suppress expression merely because public officials oppose the speakers view.[31]

Apparently then, the viewpoint neutral standard applies even when the government's viewpoint is the only one represented. The *Chiu* court stated clearly that PISD could have denied the public an opportunity to engage in discourse at Math Night. "To be clear, the PISD was entitled to limit Math Nights to a formal presentation on the implementation of the Connected Math pilot program." Does this imply that PISD's own presentation had to be viewpoint neutral? If not, would the public have a right of rebuttal? In the political arena, at least one court has concluded that a school district opened a limited open forum for expression on a particular subject matter when the school alone had spoken on the topic.[32]

Courts in the Classroom

These questions take on heightened significance when the state-sponsored speech in question is the school district's own curriculum. Courts have traditionally afforded school districts nearly plenary control over the curriculum taught in the public schools. While parents have constitutionally-protected rights concerning their children's education, they have no constitutional right to provide their children with an education unfettered by reasonable government regulation.[33]

Moreover, within the nonpublic forum of classroom instruction, schools may limit student expression for any reasonable pedagogical concern. In *Hazelwood School District v. Kuhlmeier*, a principal with final editorial control deleted two pages from an issue of the school's newspaper because they included articles dealing with students' experiences with pregnancy and divorce. Student staff members objected to the deletion and challenged the principal's actions based on the First Amendment. Ultimately, the Supreme Court upheld the principal's decision. The Court distinguished between students' private speech, which schools must tolerate unless it is somehow inconsistent with the fundamental values of public school education, and school-sponsored speech, over which educators may exercise greater control.[34] "[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[35] In the Court's opinion, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate rests with the school board rather than with the federal courts."[36] And yet, the Court clearly concludes that newspaper was a nonpublic forum, meaning that any restrictions must be viewpoint neutral.[37]

If streets and parks are quintessential public forums, then a classroom is a quintessential nonpublic forum. It would undermine the forum's purpose to open a classroom to all subject matters and viewpoints at the whim of the students. But, for the reasons explained above, the fact that a classroom is a nonpublic forum means only that the school does not have to permit students to inject controversial topics into the classroom. History demonstrates that controversial topics – from religion to human sexuality, from evolution to racism – are already integral to school curriculum. When these interests come into conflict, how does judicial deference with respect to curriculum interface with the First Amendment's protections against viewpoint discrimination? If a biology class is studying evolution, does a student who believes in creationism have a right to disagree during class discussion? How far does that right extend? Is he entitled to equal time to present his case? Can he distribute materials on the subject? Can he do an oral presentation on the subject to fulfill a class requirement? (And if so, could the school be held liable for an Establishment Clause violation?[38]

In this context, the obvious solution offered by the *Chiu* court – disallowing citizens' comments altogether – is wholly unsatisfying. The curriculum standing alone is "state-sponsored" speech, and arguably it is not subject to any kind of rebuttal. But what if the teacher invites discussion? The most effective teaching methods involve class participation. Classroom discussions, oral reports, artwork placed on display, and group projects are an indispensable part of a well-taught curriculum. "Learning how to express thoughts in your own words is an essential component of education…. A person does not really understand an idea until he has experienced the process of translation, organization, and critique that is necessary to put the idea into his own words."[39] Once the teacher has invited participation, has a door been opened, if not to "indiscriminate use" then at least to viewpoint neutrality?

Not surprisingly, the first cases to test these boundaries involve religion.[40] Secular issues offer at least as many opportu-

nities for conflict. In a civics class, could a student make an oral presentation arguing that the federal government lacks authority to impose taxes? Or that the school's drug-testing program violates the Fourth Amendment? In a health class, could a student distribute a medical journal article containing the latest research on the source of homosexuality?

Impending Lawsuits

So far, courts have viewed these disputes as being about education, not free speech. With a valid educational purpose, school officials may be able to justify excluding or limiting particular speech. Nevertheless, the scope of First Amendment rights in the classroom will continue to be a source of conflict and confusion. Judicial decisions deferring to schools on matters of curriculum reflect the fact that, as a society, we have traditionally entrusted curriculum decisions to qualified educators. Increasingly, however, educators' decisions are being second-guessed as the public's trust in public schools erodes and as the public served by public schools grows more diverse. If students and parents believe that public school curriculum expresses only one of a variety of viewpoints, First Amendment challenges will follow.

Admittedly, the study of these judicial principles is an engaging academic exercise. Bear in mind, however, that a lawyer's dream is often a principal's nightmare. The real-life application of these First Amendment concepts requires school officials to make judgments that lawyers cannot make with confidence. Courts idealistically see this as a learning opportunity. In the words of Judge Easterbrook of the Seventh Circuit Court of Appeals, "Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the … schools can teach anything at all."[41] School officials, on the other hand, are more likely to hear their own thoughts echoed in the words of Justice Black: "I disclaim any purpose…to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.[42]

Author's note: After the submission of this article, a New Jersey district court issued an opinion addressing related issues. In *Walz v. Egg Harbor Township Board Of Education*, a student challenged a school district's refusal to allow the student to distribute small gifts with religious messages during a kindergarten class's holiday party. The only other gifts distributed had been donated to the parent-teacher organization and were generic, without any messages at all. The court concluded that the school had not created a forum for expression during the holiday party, the school's refusal was viewpoint-neutral and rationally related to legitimate pedagogical concerns, and the school provided a "reasonable accommodation" by allowing the student to distribute his religious messages outside of class. *Walz v. Egg Harbor Township Bd. Of Educ.*, No. 00-2149 (JBS), 2002 U.S. Dist. LEXIS 1984 (D.N.J. Feb. 11, 2002).

ENDNOTES

1 260 F.3d 330 (5th Cir. 2001)
2 *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, ___, 121 S. Ct. 2093, 2100 (2001).
3 *Chiu*, 260 F.3d at 336-340.
4 *Id*. at 344 (quoting *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 44 (1983)).
5 *Id*. at 346 (citing *Estiverne v. La. State Bar Ass'n*, 863 F.2d 371, 378 (5th Cir. 1989)).
6 *Id*. at 355.
7 *Id*. at 356.
8 *Perry Educ. Ass'n*, 460 U.S. at 44; *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972).
9 *See generally Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985).
10 *Perry Educ. Ass'n*, 460 U.S. at 45.
11 *See, e.g., City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174-76 (1976) (concluding that a forum for citizen involvement was created by a state statute requiring open board meetings).
12 *Cornelius*, 473 U.S. at 806.
13 *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-94 (1993) (holding that because school had opened limited forum for expression about family values, school could not exclude expression on that subject matter from a religious viewpoint).
14 *See, e.g., Perry Educ. Ass'n*, 460 U.S. at 46 (holding that school's on-campus mailboxes were a nonpublic forum, and school's decision to allow only one union to use the mail system was viewpoint neutral because it was based on the approved union's status under a collective bargaining agreement).
15 *Chiu*, 260 F.3d at 345 n.10 (citations omitted).
16 *Id*. at 346.
17 *Id*.
18 *Id*. at 348 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)).
19 *Cornelius*, 473 U.S. at 802.
20 *Estiverne*, 863 F.2d at 376-77 (emphasis in original).
21 *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1988).
22 *Chiu*, 260 F.3d at 348-49.
23 *Id*. at 350.
24 *Id*. at 349.
25 *Id*. at 347 (quoting *Hays County Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992).
26 *Id*. at 349-50 (quoting *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992)).
27 *Id*. at 349.
28 *Hazelwood*, 484 U.S. at 265 ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school.") (citations omitted).
29 *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (upholding district's decision to refuse paid advertisement containing the Ten Commandments for display on baseball field as viewpoint-neutral and reasonable considering the district's concerns regarding disruption and controversy); *see also Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (en banc) (school newspaper did not create public forum by selling advertising space merely to fund the project, and school's reason for declining ad from Planned Parenthood about birth control was reasonable and viewpoint-neutral).
30 *Chiu*, 260 F.3d at 347 (quoting *Estiverne*, 863 F.2d at 376) (emphasis in original).
31 *Id*.
32 *See, e.g., Bonner-Lyons v. School Comm. of Boston*, 480 F.2d 442 (1st Cir. 1973) (holding that school district violated the First Amendment by sending home literature opposed to busing while denying similar distribution rights to a group in favor of busing).
33 *Chiu v. Plano Indep. Sch. Dist.*, No. 4:99-CV-196 (E.D. Tex. May 4, 2000) (unpublished opinion) (granting summary judgment for school district on parents' claims of constitutional and statutory rights to demand change in math curriculum). *See also Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525 (1st Cir. 1995) (holding that parents who objected to content of student assembly had no fundamental right to dictate public school curriculum); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2nd Cir. 1996) (holding that parents who objected to public service requirement for graduation had no fundamental right to demand change in curriculum); *Hubbard v. Buffalo Indep. Sch. Dist.*, 20 F. Supp. 2d 1012 (W.D. Tex. 1998) (holding that policy requiring testing before awarding class credit for classes taken at unaccredited schools was rationally related to legitimate state interest).
34 *Hazelwood*, 484 U.S. at 266-67.
35 *Id*. at 273.
36 *Id*. at 267.
37 *Id*. at 270.
38 *See Freiler v. Tangipahoa Parish Bd. Of Educ.*, 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).)
39 *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) (upholding school's restriction on student distribution of literature as reasonable and viewpoint neutral).

40 *See, e.g., DeNooyer v. Livonia Pub. Sch.*, 799 F. Supp. 744 (E.D. Mich. 1992) (upholding teacher's decision to stop student from showing religious video during show-and-tell because second-grade classroom was nonpublic forum subject to reasonable restrictions and legitimate pedagogical concerns), *aff'd without opinion*, 1 F.3d 1240 (6th Cir. 1993); *C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997) (allowing student to read Bible only to the teacher was a proper accommodation of his right to free expression while maintaining the separation of church and state), *aff'd in relevant part*, 226 F.3d 198 (3rd Cir. 2000) (en banc).

41 *Hedges*, 9 F.3d at 1300.

42 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 526 (1969) (Black, J., dissenting).

RETIRE AND REHIRE–A SCHOOL LAWYER'S PRIMER

by David Backus[1]

As the legislature began its work in January 2001, it had a $5 billion surplus in the Texas Retirement System retirement fund and a 40,000 shortfall in the number of classroom teachers needed to fill Texas classrooms. It was only a matter of time before legislators and the public education lobby took advantage of the former to help solve the latter. Before the 77th Legislature adjourned, *sine die*, on May 28, 2001, it had passed two bills, SB 273 (Armbrister) and HB 3147 (Smith, Todd), that expanded the ability of educators who had retired to return to work in public schools without sacrificing any of their retirement annuity benefits.

Generally Applicable Return-to-Work Law

As a general rule, Subchapter G, Chapter 824, Texas Government Code, prohibits a TRS retiree from receiving a retirement benefit for any month that he or she is employed by a "Texas public educational institution."[2] A Texas public educational institution includes all public school districts and public colleges and universities. The term does not include, however, the Texas Education Agency, the State Board of Education, or the State Board for Educator Certification.[3] Therefore, if retirees wish to return to work for either a public school district or university, the law requires that they sacrifice any benefit they would receive by virtue of their retirement under TRS. Since members of TRS are eligible to retire with full benefits when their age and years of creditable service equal 80,[4] many of them are only in their mid-50s when they exercise this option—long before their working career is over. From a prospective retiree's financial point of view, however, the day he or she meets the "rule of 80" and is eligible to retire, it is tremendously unwise for him or her to continue working in the system, even if he or she loves to teach. The loss of these highly qualified and experienced teachers has motivated the legislature to carefully carve out several exceptions to the general rule. These exceptions are found in Section 824.602, Texas Government Code.

In granting these exceptions, the legislature is always cautious not to significantly alter the behavior of active members of the retirement system so as to harm the long-term actuarial soundness of the retirement fund. The legislature wants schools to take advantage of the rich resource that the retiree pool represents, but at the same time it does not want to make it so attractive to active members of TRS to retire and return to work that the fund becomes unstable. Thus, historically, the legislature has been comfortable allowing retirees to return to work in public schools in three primary ways. First, it limits the number of days a retiree may be employed by a district. Second, it restricts the positions to which a retiree may return to work. Third, it requires that a retiree be separated from all employment with any district for a significant period of time before becoming eligible to return to work.

Impact on the Law by the 77th Legislature

When the 77th Legislature convened in January 2001, four exceptions to the return to work law allowed retirees to be reemployed by public schools without losing their monthly benefit payment. Retirees could return under the follow circumstances:

> In any position on as much as a full-time basis only if the work occurs in not more than six months of the school year that begins after the retiree's effective date of retirement;[5] and
>
> In a position as a classroom teacher on as much as full-time basis if the retiree is:
>
> - retired without reduction for early retirement;
> - certified by SBEC to teach the subjects assigned;
> - teaching in a critical shortage area as defined by the commissioner of education; and
> - separated from service with all public schools for at least 12 months.[6]

Five months later, when the session ended, two bills affecting retiree return to work passed into law—HB 3147 (Smith, Todd) and SB 273 (Armbrister). Whereas HB 3147 simply added a new category to the list of exceptions, SB 273 radically modified the return-to-work landscape.

SB 273 (Armbrister)

Under the law as modified by SB 273, retirees desiring to return to work full-time without a reduction in benefits are divided into two categories—those who retired before January 1, 2001, and those who retired on or after January 1, 2001. Treatment of those two categories of retirees is thoroughly different.

Retirees with an effective retirement date before January 1, 2001. For this category of retiree, the new return-to-work law is very simple—they may return to work in any position in a school district on as much as a full-time basis without restriction or reduction in benefit.[7]

Retirees with an effective retirement date on or after January 1, 2001. For this category of retiree, the applicable law remains the same for those wishing to return to work as substitutes, in non-substitute positions for no more than one-half time, and in non-substitute positions full-time for no more than six months of the school year. Retirees wanting to return to a full-time classroom teaching position all school year without penalty, however, may now do so only if he or she is:

- receiving a standard retirement benefit, i.e., there is no reduction for early retirement;
- hired in the position of classroom teacher;
- certified by SBEC to teach the subjects assigned;
- teaching in a critical shortage area *as determined by the board of trustees of the hiring school district according to guidelines adopted by the commissioner of education*; and

- separated from service with all public schools for at least 12 months before returning.

The italicized language is significantly different than that which existed under prior law. With respect to the guidelines the commissioner is required to adopt to assist school boards in determination of their critical shortage areas, the new statute states that the commissioner must include in them the following:

- a list of critical shortage areas;
- suggested criteria for identifying local acute shortage areas, and
- a requirement that a certified applicant for a position as a classroom teacher who is not a retiree be given preference in hiring.

The commissioner fulfilled this legislative mandate on August 8, 2001, when he published his guidelines that contained the following information:

1) Statewide critical shortage areas are:

   - Mathematics (secondary)
   - Science (secondary)
   - Special Education (all levels)
   - Languages other than English (secondary)
   - Bilingual/ESL (all levels)
   - Technology Applications (secondary)

2) Districts should develop practices that outline recruitment practices that take advantage of a variety of approaches such as advertisements, job fairs, personnel coops, and university recruiting. Districts exercising a variety of approaches that still are unable to fill vacancies with qualified individuals may declare the area a local shortage area. Documentation substantiating recruiting efforts must be maintained locally.

3) How a hiring preference will be given is a district decision. In reaching that decision, districts are advised to develop criteria that outline the manner in which the preference will be given in the hiring process.

Therefore, in advising school districts regarding the hiring of retirees in full-time positions, the most important question to ask is: "What is the retiree's effective date of retirement?" If the answer is before January 1, 2001, the analysis is relatively simple. If the answer is on or after January 1, 2001, the analysis is quite complex.

SB 273 made one other change to the return-to-work exceptions in Section 824.602. Beginning September 1, 2001, retired educators, regardless of their effective retirement date, may return to work in the position of bus driver on as much as a full-time basis without loss of benefits. There is no accompanying statutory requirement that the retiree be separated from service for any length of time before taking advantage of this return-to-work exception. (Note: The critical deadlines applicable to all retirements and discussed in the "Practice Tips" section of this article must still be met, however.)

HB 3147 (Smith, Todd)

The second bill affecting retiree return to work was HB 3147 (Smith, Todd). This law became effective September 1, 2001, and simply added the position of principal to the list of exceptions contained in Section 824.602. Again, in order for a retiree to take advantage of this provision and work full-time all school year, he or she must be:

- retired without reduction for early retirement;
- certified by SBEC to be a principal; and
- separated from service with all public schools for at least 12 months.[8]

Practice Tips

Although several of the positions to which retirees may return to work without penalty do not have a statutory layout period, practitioners are advised to consider the language in several Texas Government Code Sections and in TRS rules that is critical when analyzing retiree return-to-work issues.

1) Effective dates of retirement will always be on the last day of the month. Thus, an educator may retire from a school district effective the 15th of the month, but his or her effective retirement date will be at the end of that month.[9] The effective retirement date is critical for determining how quickly a retiree may return to work at a public school.

2) There can be no effective retirement if the educator is on a leave of absence or has a contract for future employment in a public school, unless that contract is for a position excepted under Section 824.602.[10] If TRS becomes aware of a contract for employment that would have served as a bar to an effective retirement, it will not hesitate to carry out its statutory duty to recoup any erroneously paid annuity benefits.

3) No retiree may return to work without laying out for at least the month following his or her effective retirement date. If a retiree returns to work prematurely, Section 824.005(b) provides for the automatic revocation of the retirement. It states:

   > A person who is retired under the retirement system *revokes that retirement if the person becomes employed in any position in a public school during the first month following that person's effective date of retirement*, or during the first two months following an effective retirement established by reliance on Section 824.002(d), and must return any retirement benefits received under the original retirement. (Emphasis added.)

This section essentially prohibits a retiree from retiring one month and returning to work the next. For example, if an educator retires in December and returns to work at a public school in January, he or she automatically revokes the retirement and must pay back TRS for any annuities paid from January through the date TRS discovers the reemployment. The layout period is not a thirty-day period following the effective date of resignation from employment. The retiree must sit out at least one full month following the month in which his or her effective retirement date falls. Thus, if an educator resigns from the employment of a district effective December 15 and applies to TRS for retirement benefits with an effective retirement date of December 31, the earliest he or she could return to work without revoking the retirement is February 1.

The language in the statute referring to 824.002(d) does not alter the layout period. Section 824.002(d) allows retirees to claim an effective retirement date of May 31 and continue to work through June 15. The statute does this in order for the retirees to complete any responsibilities related to the school year. The two-month layout required under this scenario refers back to the effective retirement date of May 31 and, thus again, it requires a one-month layout following the actual end of employment with the district. Failure to sit out for the required period automatically revokes a retirement and can create a financial disaster for an unwary retiree.

Beware: The automatic revocation applies even if the retiree qualifies for an exception under Section 824.602.[11]

TRS rules are critical to applying return to work law accurately. Some of the more significant rules, in the context of each Section 824.602 exception, are as follows:

1) After the required one-month layout, a retiree may return-to-work every day as a substitute at substitute pay. Disability retirees are limited to 90 days.[12] TRS considers substitute work for any portion of a day to constitute one day's work.[13]

2) After the required one-month layout, a retiree may return to work every day in a non-substitute position for no more than one-half time. Disability retirees are limited to 90 days.[14] "One-half time" is defined by TRS as employment that does not exceed 92 clock hours for any calendar month employed and is not more than one-half the normal load for full-time employment at the same teaching level (usually no more than two courses during any one semester of the long term).[15]

3) Starting with the school year after the effective retirement date, a retiree with an effective retirement date of January 1, 2001, or after may return to work on as much as a full-time basis in any position for up to six months in a school year. TRS defines "school year" as a 12-month period beginning on September 1 and ending on August 31 of the next calendar year.[16]

4) Starting 12 months after service from all public schools has been severed, a retiree with an effective retirement date of January 1, 2001, or after may return to work in a critical shortage area as determined by the hiring school board. TRS defines the 12-month layout period as any 12 consecutive months following the month of retirement so long as the person is not employed in any position or capacity, including substitute, in a public school during any part of the 12 months.[17] A retiree need only teach one classroom hour per day in the shortage area to be considered eligible for the exception.[18]

5) In order for TRS to keep track of the hiring of its retirees, school districts must furnish TRS with a monthly certified statement informing them of all retirees who have returned to employment with sufficient information for the system to determine the exception under which they are employed.[19] A separate certification must be sent to TRS by the employing district regarding retirees returning to work full-time on as much as a six-month basis.[20]

Applicability of the State Minimum Salary Schedule

Whether a retiree returning to work full-time at a school district as a classroom teacher must be paid at least as much as required under the state minimum salary schedule has been the subject of some debate. Many school law practitioners argue that they must. They arrive at this conclusion because the Education Code makes the minimum salary schedule applicable to "classroom teachers."[21] The Code defines "classroom teacher" as "an educator who is employed by a school district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting."[22] The Code defines "educator" as "a person who is required to hold a certificate issued [by the State Board for Educator Certification]."[23] Thus, if a retiree who is being hired by a district must hold a certificate issued by SBEC and teach not less than an average of four hours per day, he or she is a "classroom teacher" for purposes of the salary schedule statute.

CONCLUSION

The TRS retiree return-to-work statutes allow school districts to have access to a valuable resource for filling the many thousands of vacant and hard-to-fill positions caused by the current teacher shortage. The law as modified by the 77th Legislature through SB 273 and HB 3147 only increases depth and richness of that resource. School districts will be tapping this resource more and more as the teacher shortages continue and in some areas get worse. School attorneys must be prepared to navigate their clients through this unique hiring process.

ENDNOTES

1 Editor's note: At the time this article was written, David Backus was an attorney with the Texas Association of School Administrators in Austin. He is currently serving as general counsel for the Region 17 Education Service Center in Lubbock, Texas. His e-mail address is dbackus@esc17.net.
2 Tex. Gov't Code §824.601.
3 *id*.
4 Tex. Gov't Code §824.202.
5 Tex. Gov't Code §824.602(a)(3).
6 Tex. Gov't Code §824.602(a)(5).
7 Act of May 27, 2001, 77th Leg., R.S., ch. 1229, § 20.
8 Act of May 22, 2001, 77th Leg., R.S., ch. 567, § 1.
9 *See* Tex. Gov't Code §824.002(a).
10 *See* Tex. Gov't Code §824.002(c).
11 Tex. Gov't Code §824.602(i).
12 Tex. Gov't Code §824.602(a)(1).
13 34 Tex. Admin. Code §31.6.
14 Tex. Gov't Code §824.602(a)(2).
15 34 Tex. Admin. Code §31.8.
16 34 Tex. Admin. Code §31.9(b).
17 34 Tex. Admin. Code §31.9(c).
18 34 Tex. Admin. Code §31.9(d).
19 34 Tex. Admin. Code §31.10.
20 34 Tex. Admin. Code §31.12(f).
21 Tex. Educ. Code §21.402(a).
22 Tex. Educ. Code §5.001(2).
23 Tex. Educ. Code §5.001(5).

H-1B VISA OPTION AND OTHER IMMIGRATION ALTERNATIVES FOR FOREIGN TEACHERS

By Bruce A. Coane and Cathy Nguyen[1]

Texas school districts regularly experience a shortage of qualified teachers. Texas is not alone, as many states are trying to solve the teacher shortage by providing training subsidies or raising pay, as well as by recruiting foreign teachers. School districts in California, New York, Texas, Florida and Chicago have recruited foreign teachers to help alleviate their teacher shortage problem.[2]

Foreign teachers must obtain a visa in order to teach in the United States. Generally, school districts are obtaining visas under "emergency" H-1B status and temporary exchange programs.[3] Both of these are non-immigrant visas—the H-1B specialty worker visa and the J-1 exchange visitor—and both types of visas must be approved by the United States Immigration and Naturalization Service and/or the Department of State before a foreign teacher can teach in the United States. Foreign teachers can also enter the United States with an O-1 extraordinary ability visa, provided they possess the required certification to teach or at least an interim permit. For teachers to work permanently in the United States, school districts can sponsor a foreign teacher for employment-based permanent residency.

The H-1B visa

A foreign teacher entering the United States as an H-1B is deemed to be qualified to perform in a "specialty occupation" or professional position. A specialty occupation is one which requires a theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including education, among others, and the attainment of a baccalaureate or higher degree or its equivalent.[4] Furthermore, the term "profession" shall include teachers in elementary or secondary schools.[5] To qualify, a foreign teacher must have at least one of the following for the specialty occupation: (1) hold a United States bachelor's degree or higher; (2) hold a foreign degree determined to be equivalent to a United States bachelor's degree or higher; (3) hold an unrestricted State license, registration or certification which authorizes her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or (4) have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States bachelor's degree or higher, and have recognition of expertise in the specialty through a progressively responsible position directly related to the specialty.[6]

In order to be a beneficiary of the H-1B visa, a foreign teacher must be sponsored by a U.S. employer, who files a petition with the INS.[7] The employer must have a U.S. taxpayer identification number.[8] Furthermore, the employer must file a Labor Condition Application (LCA) with the Regional office of the United States Department of Labor prior to the filing of the H-1B petition, making four attestations. First, the employer attests that the H-1B non-immigrant will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment.[9] Second, the employer attests that the employment of the H-1B non-immigrant will not adversely affect the working conditions of workers similarly employed, and the H-1B non-immigrant will be afforded working conditions on the same basis as offered to similarly employed U.S. workers.[10] Third, the employer attests that on the date the LCA is signed and submitted, there is not a strike, lockout, or work stoppage in the course of a labor dispute in the named occupation at the place of employment.[11] Lastly, the employer attests that as of the date of filing, notice of the LCA has been or will be provided to workers employed in the named occupation.[12] Once the LCA is approved, and this normally takes one to three weeks, the employer files a petition with the INS.

If a license is required for practice of the particular specialty occupation then the H-1B beneficiary must have the required license.[13] Thus, an H-1B teacher must possess the required certification to teach in the State of Texas, or, at the least, an interim or emergency permit, if available, so that immediately upon full certification, the beneficiary may engage in the field of teaching.[14] Consequently, a foreign teacher must possess the State-issued certification to teach, or an interim permit. In Texas, a school district may request a waiver to hire a qualified individual who does not have the necessary certification to fill a critical position within the district.[15] Nonetheless, a foreign teacher seeking a Texas standard certificate must apply for and receive a review of her credentials by the State Board for Educator Certification.[16] Similar to the Texas waiver, South Carolina permits its State Board of Education to grant a waiver to the school district which shall permit that school district to employ the foreign nationals to teach their native or acquired language in the schools of the district for a period of not exceeding three years, provided the foreign national has the Immigration and Naturalization Service's approval to enter and work in the United States, plus, the foreign national must meet all requirements for South Carolina teacher certification prior to employment.[17]

An H-1B foreign teacher is permitted to be in the United States for a total of six years. Initially, admissions may be for three years, which can be renewed for a subsequent three-year period by filing another petition with the Immigration and Naturalization Service.[18] After the H-1B worker reaches the six-year cap, they must spend one year outside the United States before being eligible for a new six-year period in H-1B status. However, for those H-1B workers wishing to apply for a permanent resident visa ("green card"), they can begin the process anytime during their stay in the U.S., and thereby avoid the need to leave after six years. Furthermore, dependents of H-1B foreign teachers may be admitted as H-4 non-immigrants; however, the H-4 dependents are not permitted to work in the United States.[19]

The J-1 visa

Foreign teachers may also enter the United States on a J-1 visa. A J-1 visa is issued to foreign individuals accepted to participate in exchange visitor programs, intended to promote the interchange of American and foreign teachers in public and private schools and the enhancement of mutual understanding between people of the United States and other countries.[20] Such teachers must come through an established exchange visitor

program which is authorized by the U.S. government to issue Form IAP-66. J-1 non-immigrants include teachers, as well as scholars and professors, and J-1 status holders may engage in employment within the United States for the length of time necessary to complete the exchange program, which shall not exceed three years.[21]

To be eligible to participate in an exchange visitor program as a full-time teacher, the designated school must satisfy the objective of the exchange visitor program in the teacher and the foreign teacher must meet five criteria. First, the foreign teacher must meet the qualifications for teaching in primary or secondary schools in his/her country of nationality or last legal residence.[22] Second, the foreign teacher must satisfy the standards of the United States state in which he/she will teach.[23] Third, the foreign teacher is a person of good reputation and character.[24] Fourth, the foreign teacher seeks to come to the United States for the purpose of full-time teaching at a primary or secondary school in the United States.[25] Fifth, the foreign teacher must have a minimum of three years of teaching or related professional experience.[26]

The O-1 visa

Another visa category for foreign teachers is the O-1 visa, provided the foreign teacher possesses the required certification to teach or at least possess an interim permit. An O-1 visa is a non-immigrant visa for a foreign national of "extraordinary ability" in the sciences, arts, education, business, or athletics. Proof of "extraordinary ability" requires that the alien must have extraordinary ability in his/her field, in this case being a primary or secondary school teacher. An O-1 beneficiary in education must have extraordinary ability "demonstrated by sustained national or international acclaim."[27] The O-1 educator must have achieved extraordinary ability, indicating that the "person is one of a small percentage who have risen to the very top of the field of endeavor."[28] The petitioner must show that the beneficiary received a "major, internationally recognized award, such as the Nobel Prize" or documentation of at least three of the following: (1) receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor; (2) membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields; (3) published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought; (4) participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought; (5) original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field; (6) authorship of scholarly articles in the field, in professional or major trade publications or other major media; (7) employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or (8) High salary or other remuneration for services, in relation to others in the field (as evidence by contracts or other reliable evidence).[29]

In order to receive an O-1 visa, a foreign teacher must be sponsored by a U.S. school district that files a Form I-129 petition with the INS Service Center having jurisdiction over the location where the foreign teacher will work. A foreign teacher cannot self-petition for an O-1 visa. The O-1 petition must be accompanied with (1) evidence that the foreign teacher is a person of "extraordinary ability" who is coming to the U.S. to continue work in the field of primary or secondary school teaching, (2) a filing fee of $110, and (3) a consultation with an appropriate peer group, labor and/or management organization. The consultation is mandatory before an O-1 petition can be approved, and it must consist of a written advisory opinion regarding the nature of the proposed work and the foreign teacher's qualifications.[30] Unlike the H-1B visa, the O-1 petition neither requires the filing of an LCA nor the additional $1,000 filing fee.

An O-1 non-immigrant visa holder is permitted to be in the United States for an initial period of stay of three years.[31] There is no explicit statutory limitation on the period of stay for O-1 non-immigrants. Dependents of O-1 non-immigrant visa holders are permitted to enter the U.S. along with the O-1 teacher.[32]

The Immigrant Visa ("Green Card") for Foreign Teachers

A. Employer Sponsorship

A school district can sponsor a foreign teacher to enter the United States as an immigrant. This process, in Texas, typically takes one to two years. A school district can also sponsor a foreign teacher to switch from H-1B or J-1 status to immigrant status ("green card"), which typically takes three to four years in Texas.

In order to begin the sponsorship process, the school district begins with Reduction in Recruitment ("RIR") Labor Certification. The employer makes a written request to the State Employment Security Agency (SESA), demonstrating the following: (1) there is little or no United States worker availability for the occupation; (2) the application does not contain any restrictive requirements; (3) the job is being offered at the prevailing wage; (4) and "adequate recruitment" has been conducted within the six months prior to filing the application.[33] The SESA reviews the recruitment documentation for completeness and accuracy and forwards the RIR application packet to the appropriate U.S. Department of Labor (DOL) office. Upon receipt of the application from the SESA, DOL reviews it before issuing either a Notice of Findings, which identifies a defect in the application that the petition can cure or challenge, or issues an approval or denial. A labor certification is valid for as long as the petitioner intends to and will employ the beneficiary in the position certified.[34] Upon the approval of the labor certification, the employer files an immigrant visa petition, known as Petition for Alien Worker, for the foreign teacher with the Immigration and Naturalization Service. Only after the immigrant visa petition is approved can the foreign teacher obtain temporary/permanent permission to work in the United States.

B. Family Sponsorship

Foreign teachers can get an immigrant visa ("green card") based on marriage to a U.S. citizen. The U.S. citizen spouse can petition for his or her foreign teacher spouse, provided that the marriage is valid and bona fide. Foreign teachers who are spouses of U.S. citizens are considered to be an "immediate relative."[35]

If the foreign teacher is physically present in the U.S., and legally entered the U.S, then the regulations allow the simultaneous filing of the I-130 visa petition and the application for

permanent residence (I-485) in the INS district office with jurisdiction over the foreign teacher's residence.[36] At the same time, the foreign born teacher can file an application for employment authorization (I-765), since an I-130/485 applicant is entitled to immediate work authorization. The employment authorization generally takes from 30 to 90 days in Texas, but it can also be approved in less than one week if there is an immediate need to work. After the foreign teacher receives their employment authorization from INS, they can work for any U.S. employer.

CONCLUSION

There are a variety of immigrant and non-immigrant visas available for foreign teachers to work in the United States. While most visas require a sponsoring U.S. employer, other visas allow the individual's U.S. citizen spouse to petition for immigrant status.

ENDNOTES

1 Bruce A. Coane is Board Certified in Immigration and Nationality law by the Texas Board of Legal Specialization, since 1987. He received a Bachelor of Arts Degree with Honors from Penn State University in 1979, and he received his Juris Doctor Degree in Law from the University of Houston in 1981. He is the Past-President of the American Immigration Lawyers Association-Texas, New Mexico & Oklahoma Chapter. He is licensed by the Supreme Court of Texas and has been admitted to practice before the United States Supreme Court, the United State Court of Appeals in Chicago, New Orleans, Philadelphia and San Francisco, and by the U.S. District Court for the Southern District of Texas, plus, he has been specially admitted to practice before the U.S. District Courts in Dallas, Abilene, Lufkin, Baton Rouge and Chicago.
Cathy Nguyen is a Law Clerk at Coane & Associates. She received her Bachelor of Arts Degree in Sociology from the University of Texas at Austin and her Juris Doctor Degree from Loyola University in New Orleans.
2 Foreign teachers find a place in US Schools. Stephanie Cook. August 22, 2000. http://www.csmonitor.com/durable/2000/08/22/fp18s1-csm.shtml
3 *Id*.
4 8 C.F.R. § 214.2(h)(4)(ii)(4).
5 INA § 101(a)(32).
6 8 C.F.R. § 214.2(h)(4)(iii)(C).
7 8 C.F.R. § 214.2(h)(2)(i)(A).
8 8 C.F.R. § 214.2(h)(4)(ii).
9 20 C.F.R. §655.731.
10 20 C.F.R. § 655.732.
11 20 C.F.R. § 655.733.
12 20 C.F.R. § 655.734.
13 *Matter of St. Joseph's Hospital*, 14 I&N Dec. 202 (R.C. 1972).
14 8 C.F.R. § 214.2(h)(4)(v); *Matter of St. Joseph's Hospital*, 14 I&N Dec. 202 (R.C. 1972).
15 Description of Most Common State Waivers. http://www.tea.tx.us/special.pop/waivers/stategranted/waiverdesc.html. The district must provide the individual's name, social security number, and area of certification held or type of degree granted. This waiver only allows the district to hire a person without the proper credentials. The waiver does not confer certification and is not transportable to another district.
16 http://www.excet.nesmc.comexcetrd/testing%20requirements.html.
17 Foreign nationals may be employed in school districts as teachers of native language; Curriculum. S.C. H. 4933.
18 INA § 214(g)(4); 8 CRF § 214,2(h)(9)(iii)(B)(1), (h)(13)(iii)(A), (h)(15)(ii)(B)(1).
19 22 C.F.R. § 41.12; 8 CFR § 214.2(h)(9)(iv).
20 22 C.F.R. § 62.24(a). Foreign teachers are provided the opportunity to teach in primary and secondary accredited educational institutions in the United States, to participate actively in cross-cultural activities with Americans in schools and communities, and to return home ultimately to share their experiences and their increased knowledge of the United States.
21 22 C.F.R. § 62.24(h).
22 22 C.F.R. § 62.24(c).
23 *Id*.
24 *Id*.
25 *Id*.
26 *Id*.
27 8 C.F.R. § 214.2(o)(1)(ii)(A)(1).
28 8 C.F.R. § 214.2(o)(3)(ii).
29 8 C.F.R. § 214.2(o)(3)(iii).
30 8 C.F.R. § 214.2(o)(5)(ii)(A).
31 8 CFR § 214.2(o)(6)(iii).
32 8 CFR § 214.2(o)(6)(iv).
33 20 C.F.R. § 656.21.
34 20 C.F.R. § 656.30.
35 INA § 201(b)(2)(A)(i).
36 8 C.F.R.§ 245.2(a)(1).

"IF THESE WALLS COULD TALK" MOLD, ASBESTOS, AND LEAD PAINT: HOW TO RESPOND WHEN THESE PROBLEMS ARISE IN YOUR BUILDINGS

by Michelle R. Herrmann

INTRODUCTION

One of the greatest challenges for school administrators, and certainly one of the most hotly debated of late, from both a personnel and facilities point of view, is indoor air quality. Agencies such as the Environmental Protection Agency (EPA) and the Texas Department of Health (TDH) have devoted significant resources to studying the relationship between Building Related Illnesses/Sick Building Syndrome and indoor air quality, especially in public schools.

Building-Related Illness refers to a clinically defined illness that is traceable to specific chemical or biological substances in a building. Typically, symptoms of a Building-Related Illness continue even after the occupant leaves the affected building. By contrast, the term Sick Building Syndrome is used to describe a general condition of recurring medical symptoms caused by unidentified contaminants, or a combination of contaminants. Occupants suffering from Sick Building Syndrome typically experience relief from their symptoms upon leaving the affected building. In these cases, identifying and remediating the source of irritation can be frustrating for building owners, especially since so many factors can contribute to indoor air quality problems. There are two main culprits of poor indoor air quality: (1) microbes, such as bacteria and fungi, and (2) chemical compounds formerly and currently used in building construction. This paper addresses three of the most publicized and potentially troublesome threats to indoor air quality: mold (fungi), asbestos, and lead-based paint, and provides practical guidance to attorneys whose clients seek guidance when they suspect or encounter such substances in their buildings.

MOLD

Understanding Mold: Fear v. Fact

There are many types of molds, and molds have the potential to cause many types of health problems. Molds produce allergens that trigger reactions in people with allergies or asthma. Some molds are known to produce potent toxins and/or irri-

tants. All molds are opportunistic, and seem to adversely affect occupants with existing allergies or respiratory problems, or who are otherwise immunocompromised.

In recent years, there has been significant media attention on what has been dubbed "deadly" or "killer" mold. Although excessive levels of common indoor molds such as *apergillus* and *cladosporium* can potentially cause health problems (typical reported symptoms include allergy and respiratory problem, headaches, nausea, general malaise), not all mold is equally toxic. In high profile cases involving infant deaths, coughing-up blood, hearing loss, hair loss and cognitive dysfunction, experts have discovered high levels of *stachybotrys*, a mold which produces a particularly potent mycotoxin. It seems, however, that media hype has caused occupants to panic when even the smallest amount of any type of mold is discovered in their building.

Although the surge of panic is a fairly recent phenomenon, the presence of mold in buildings is not. Molds grow almost anywhere moisture, warmth, and oxygen are present. When excessive moisture accumulates in buildings or on building materials, mold growth will often occur, particularly if the moisture problem remains undiscovered or unaddressed. Molds reproduce by making spores, which continually travel throughout indoor and outdoor air. When mold spores land on a damp spot indoors, they begin growing and digesting whatever they are growing on in order to survive. While it is impossible to prevent or eliminate all mold in buildings, mold growth can be controlled.

The key to reducing mold growth is to prevent indoor moisture problems. Many moisture problems in buildings have been linked to changes in building construction practices during the energy crisis of the 1970s. During this time, efforts to conserve energy led to the design and construction of buildings that were tightly sealed, but lacked adequate ventilation, thus leading to moisture buildup. Many common building materials, while effective insulators, do not allow moisture to easily escape.

Major potential sources of mold for schools are roof leaks, plumbing leaks, and heating, ventilation, and air conditioning ("HVAC") systems. Inadequate maintenance is also associated with moisture problems in schools and large buildings. Finally, portable classrooms and other temporary structures—especially those with individual heating and air conditioning units—have frequently been linked to mold problems resulting from condensation.

How much Mold is too much?

In response to complaints by building occupants, many school districts have hired consultants to conduct indoor air quality testing. The district is then furnished a report that compares the building's indoor air with the outdoor air in the area. While the report may identify the disturbing substances floating in those buildings, such a report provides little guidance as to the severity or extent of any mold problem. Testing companies are not being elusive. Rather, regulatory agencies, which are awaiting definitive reports from the scientific community, simply have not agreed upon a minimum microbial concentration level at which building occupants are at risk.

In Texas, for example, there are no regulatory requirements with respect to bacterial and fungal growth in buildings and indoor air, like there are for chemical or organic substances such as radon, lead paint, or asbestos. In 1998, however, the Texas Department of Health ("TDH") published "Voluntary Guidelines for Indoor Air Quality in Schools," including guidelines for ventilation and air pollution control systems.[1] The TDH has no enforcement authority over implementation of these guidelines, nor do the guidelines create liability for school districts who fail to comply with them.

Likewise, the Environmental Protection Agency ("EPA") has yet to promulgate any regulations that address acceptable levels of mold spore concentrations. The EPA has, however, developed a website with an extensive library of publications and guidelines, available online, on the subject of indoor air quality in schools and remediation of mold in schools.[2]

Strategies for Mold Prevention

The best way to prevent excessive mold growth is to prevent and address excessive moisture. School maintenance personnel should be trained to:

- fix leaks in the building envelope, plumbing, or HVAC as soon as possible;
- watch for condensation and wet spots and clean and dry any such spots within 24-48 hours;
- keep HVAC drip pans clean, flowing properly, and unobstructed;
- schedule and perform regular building and HVAC inspections, cleaning, and maintenance;
- prevent excess moisture caused by condensation by increasing surface temperature and outdoor air circulation, or by reducing the moisture level in the air (dehumidification). The EPA recommends that indoor humidity levels remain below 60% relative humidity (RH), ideally 30-50%, if possible;
- operate HVAC systems to provide adequate outside air as well as moisture control;
- visually inspect high risk areas on a regular basis;
- use a moisture meter to assess the extent of any water damage.

Even if these measures are taken, some amount of mold growth may still occur over time. Moreover, even the most effective preventative measures cannot eliminate mold that is already present.

Locating "Hidden Mold"

In some cases, indoor mold growth may not be obvious. One may suspect hidden mold if a building smells musty, if there has been recent water damage, or if building occupants are reporting health problems. Molds thrive on hidden surfaces, such as the backside of drywall, wallpaper, paneling, the top of ceiling tiles and the underside of carpets and pads. Other common locations of hidden mold include pipe chases and utility tunnels (with leaking or condensing pipes), walls behind furniture (where condensation forms), condensate drain pans inside air handling units, porous thermal or acoustic liners inside duct-

work, or roof materials above ceiling tiles (due to roof leaks or insufficient insulation). Some building materials, such as drywall covered with vinyl wallpaper or wood paneling, may act as vapor barriers, trapping moisture underneath their surfaces and thereby providing a moist environment where mold can grow.

Investigating hidden mold problems can be difficult and will require caution. When the investigation requires disturbance of potential sites of mold growth, protective equipment may be necessary. Removal of suspected surfaces can lead to a massive release of spores from mold growing behind the surface. If a serious hidden mold problem is suspected, an experienced professional should be consulted to assist in assessment and remediation.

Creating a Remediation Plan

The EPA has created a "Checklist for Mold Remediation," located at www.epa.gov/iaq/molds/checklist.html. The checklist identifies many factors that should be considered in creating a remediation plan, including:

- the type and extent of known mold and suspected hidden mold;
- the level of expertise and training needed to contain and remediate mold, depending on the circumstances;
- the type of materials affected by mold or water damage — some materials can be dried, while others should be discarded and replaced;
- protective measures to be taken by building occupants and remediation workers;
- the appropriate use of biocides, such as bleach, which can affect occupants and workers in small, enclosed spaces.

Remember that when addressing mold problems, it is not enough to remediate areas affected by mold growth. The source of the moisture problem must also be investigated and addressed, or the mold problem may simply reappear.

Liability Issues Surrounding Mold Contamination

Pursuant to the Tort Claims Act, school districts are immune from negligence claims brought by building occupants claiming a Building-Related Illness or Sick Building Syndrome. School districts should be aware, however, that a custom, practice, or policy of deliberate indifference towards mold problems could give rise to constitutional claims, although no such cases have been decided. Moreover, under the Americans With Disabilities Act, school districts may have a duty to reasonably accommodate occupants with preexisting disabilities who may be at increased risk for mold-related symptoms. Although, disability laws themselves do not create liability for physical conditions that may have been caused by indoor air contaminants, school officials should be advised to document all occupant complaints, responses to complaints, mold prevention measures, school maintenance activities, and any assessment or remediation activities.

As a plaintiff, a school district may also have a number of legal theories available to recover damages caused by mold that can be traced back to the construction of the building. Architects, engineers, manufacturers, and contractors who fail to take proper steps to prevent, identify or remediate mold during construction may be liable to the district — and, in some cases, occupants — for breach of contract, breach of express and implied warranties, strict liability, negligence, fraudulent concealment, fraudulent or negligent misrepresentation, nuisance, assault and battery, breach of covenant of quiet enjoyment by constructive eviction, and/or violations of the Texas Deceptive Trade Practices Act.

ASBESTOS, LEAD PAINT, AND OTHER HARMFUL CHEMICAL COMPOUNDS

Many common construction materials are made with chemicals that have been linked to health problems. Two main areas of concern surrounding older school buildings, especially during renovation projects, are asbestos and lead.

Asbestos

Both Texas and federal law impose strict regulations on building owners with respect to asbestos. The Asbestos Hazard Emergency Response Act of 1986 ("AHERA") requires inspection of all K-12 school buildings and requires school administrators to develop and file with TDH an asbestos management plan relating to the controlling and removing of asbestos from school buildings.[3] The Texas Asbestos Health Protection Act ("TAHPA")[4] governs any asbestos-related activities in Texas buildings. An asbestos-related activity is defined as:

> The disturbance (whether intentional or unintentional), removal, encapsulation, or enclosure of asbestos, including preparation or final clearance, the performance of asbestos surveys, the development of management plans and response actions, asbestos project design, the collection or analysis of asbestos samples, monitoring for airborne asbestos, bidding for a contract for any of these activities, or any other activity required to be licensed under the Texas Asbestos Health Protection Act.[5]

According to these rules, a building owner "retains primary responsibility for the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos encountered in the construction, operations, maintenance, or furnishing of that building or facility."[6]

The TAHPA requires that TDH be notified prior to the demolition of any public building, regardless of whether asbestos has been identified.[7] The owner must also arrange to have a licensed asbestos inspector identify and assess the location and extent of any possible Asbestos Containing Building Materials ("ACBM") in the building. Federal law sets forth levels at which asbestos must be abated.[8] These federal regulations have been adopted by the TDH as part of TAHPA, and TDH has authority to enforce these regulations.

If ACBMs are discovered, only a licensed asbestos abatement contractor or a licensed asbestos operations and management contractor may contain, abate, and dispose of them. The owner must send written notification to TDH within ten days prior to the start of any asbestos-related activities. The owner must also inform, in writing, all persons who will work in the building of the presence and location of any ACBMs in the building.

TDH has the right to inspect or investigate, with or without advance notice, any public building or site to determine com-

pliance with TAHPA. TDH also has enforcement authority over all asbestos-related activities in public buildings.[9] It is within the department's discretion to take any appropriate administrative or legal action for a violation of TAHPA or any federal law adopted under TAHPA. Penalties up to $10,000 per day may be imposed for violations. Under TAHPA, each day a violation continues is considered a separate violation.[10]

Lead Paint

Up until the late 1970s, before its harmful effects were known, lead was used in paint, as well as many other products. Lead-based paint is the most significant source of lead exposure in the United States today. Children are at the greatest risk for lead poisoning, and the younger the child, the greater the risk.[11]

Accordingly, Texas law requires the owner of a "child-occupied facility" to provide written notification to the Texas Department of Health before conducting lead abatement activities, and to use only licensed persons or firms when conducting any lead-related activities.[12] The rules define a "child-occupied facility" as:

> [A] building, or part of a building, constructed before 1978 that is visited regularly by the same child, six years of age or younger, on at least two different days in any seven-day period beginning on Sunday and ending on Saturday, if each day's visit lasts at least three hours, the combined weekly visits last at least six hours, and the combined annual visits last at least 60 hours. The term may include, but is not limited to, day-care centers, preschools, or kindergarten classrooms.[13]

Harmful exposure to lead can occur when lead-based paint is improperly removed from surfaces by dry scraping, sanding, or open-flame burning. TDH recommends leaving lead-based paint undisturbed if it is in good condition. If the paint begins to flake, peel or crack, abatement will be necessary to prevent lead particles from being dispersed into the air.

Building owners wishing to assess the presence of lead, create a lead abatement project, or perform lead abatement work in any building, even if not a "child-occupied facility," should contract with an individual or firm licensed in lead-related activities. Information about certified persons or firms, and the Texas Environmental Lead Program in general, can be obtained from the TDH website, located at www.tdh.texas.gov. Notification forms for child-occupied facilities can also be downloaded from the TDH website. Regulations governing lead-related activities in general are published at 25 Tex. Admin. Code § 295.201 et seq.

Like violations of state asbestos regulations, violations of the Texas Environmental Lead Reduction Rules fall within the enforcement authority of TDH. Owners of child-occupied facilities who violate the rules are subject to administrative penalties of up to $5,000 per day, per violation.

CONCLUSION

Facilities personnel should avail themselves of the numerous resources published by the EPA and TDH on the subject of indoor air quality. Indoor air quality reports, while difficult for the layperson to interpret, can be useful in identifying areas of a building that suffer from relatively high mold spore concentrations, poor ventilation (high carbon dioxide levels), or harmful chemical and organic particles such as lead or asbestos. Districts should also develop remediation plans and renovation projects with the aid of consultants who are licensed (if necessary) or experienced in the area of indoor air quality. Finally, maintenance departments should engage in aggressive prevention by strictly adhering to recommended maintenance schedules, keeping an eye out for moisture buildup, and paying attention to complaints made by occupants. Although prevention is the ideal, indoor air quality problems in school facilities are sometimes inevitable. A district that takes a prompt, proactive stance to address such problems will be in a stronger position should litigation result.

ENDNOTES

1 *See* 25 Tex. Admin. Code §§ 297.1-297.6.
2 *See* Mold Remediation in Schools and Commercial Buildings, EPA-402-K-C1-001 (March 2001) (available at www.epa.gov/iaq/molds).
3 *See* 15 U.S.C. § 2641, *et seq.*
4 25 Tex. Admin. Code 295.31 *et seq.*
5 25 Tex. Admin. Code § 295.32(18).
6 25 Tex. Admin. Code § 295.34(b).
7 *See* 25 Tex. Admin. Code § 295.61(a)(1).
8 *See* National Emissions Standards for Asbestos ("NESHAP") 40 C.F.R. part 61 (1997).
9 25 Tex. Admin. Code § 295.67.
10 25 Tex. Admin. Code § 295.70(b).
11 *See* Lead Poisoning and Your Children, EPA No. 800-B-92-0002 (Sept. 1992) (available at www.epa.gov/iedweb00/pubs/lead.html).
12 *See* Texas Environmental Lead Reduction Rules, 25 Tex. Admin. Code §§ 295.212-295.214.
13 25 Tex. Admin. Code §§ 295.202.

OFF TO SCHOOL WE GO – A LOOK AT THE 77TH LEGISLATURE'S REVISIONS TO STUDENT TRUANCY

by Marquette M. Maresh, Walsh, Anderson, Brown, Schulze & Aldridge, PC

As they say, nothing is sacred when the legislature is in session, and truancy was one of the many areas that the legislature decided to tinker with in the 77th Legislative session. Senate Bill 1432, which took effect on September 1st, addresses a variety of truancy related issues such as school district responsibilities, the criminal sanctions for students and parents, and court involvement in the truancy process. With Average Daily Attendance (ADA) funds potentially affected by student truancy, Senate Bill 1432 means more than just attendance – it means money for school districts.

Crank up the Presses and Notify Parents. The most immediate change made by Senate Bill 1432 is the requirement that school districts notify parents in writing *at the beginning of the school* year that the student and parent are both subject to prosecution if the student is absent from school on ten or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period. The written notice must also warn parents that the student is subject to referral to the juvenile court for the same truancy offenses in counties with a population of less than 100,000.

Beyond saying that the notice has to be in writing, the new requirement, codified at Texas Education Code § 25.095(a), does not specify how the notice must be made. Thus, school districts have discretion as to how to accomplish the notification. The obvious options are to include the notice in the school district's student handbook or send notice to parents via regular mail.

In addition to providing notice at the beginning of the school year, school districts must notify a student's parent if the student has three or more full or partial day absences within a four-week period without a recognized excuse listed in Texas Education Code § 25.087. The notice must remind the parents of their duty to monitor the student's attendance at school and require the student to go to school. The notice must also warn the parent that he or she is subject to prosecution for contributing to truancy if the student continues to be truant from school. Moreover, the District must request a conference with the parent to discuss the absences. The notice requirements are located in Texas Education Code § 25.095(b).

Attendance Officers Have Broadened Responsibilities and Authority. Texas Education Code § 25.091 now distinguishes between the rights and responsibilities of a peace officer serving as an attendance officer and the rights and responsibilities of an attendance officer who is not also a commissioned peace officer. Both peace officers serving as attendance officers and regular attendance officers generally share the following powers and duties: (1) to investigate violations of compulsory school attendance, (2) enforce compulsory school attendance, (3) monitor or review school attendance records for compliance, and (4) maintain an investigative record on each violation and provide that record to certain requesting parties.

The biggest difference is that peace officers may serve court-ordered legal process, and attendance officers no longer have that power. Both peace officers and attendance officers may make home visits or contact parents of truant students; however, only peace officers may enter a residence without permission to serve court-ordered legal process. Additionally, peace officers may take a student into custody with parent permission or to obey court-ordered legal process, whereas regular attendance officers may only escort students to school at the request of a parent. The regular attendance officer may solicit the local sheriff, constable, or peace officer to take a student into custody if he or she is informed of court-ordered legal process directing the student be taken into custody and the school does not have its own police officers.

Gone are the days when juvenile courts had to waive jurisdiction in order for a referral to be made to a justice court. Senate Bill 1432 eliminates the requirement that juvenile courts waive jurisdiction, and with that waiver, attendance officers and peace officers have two options for enforcing compulsory school attendance: (1) refer the student to juvenile court, or (2) file a complaint against the student or parent in justice or municipal court.

Parents Must Take Responsibility. A change of terminology is another alteration made by Senate Bill 1432. Instead of "thwarting compulsory attendance" as § 25.093 of the Texas Education Code was formerly titled, now parents commit the offense of "contributing to truancy" – a Class C misdemeanor. Besides that facial change, the new bill states that parents "contribute to truancy" if: (1) a school district issues a warning to the parent as required by law (see Texas Education Code § 25.095), (2) the parent with criminal negligence fails to require the child to attend school as required by law, and (3) the child has the required number of absences.

Complaints against parents for "contributing to truancy" may be filed in either a justice court in any precinct in the county or municipal court of the municipality in which the parent resides or in which the school is located; the option of filing in county courts has been eliminated. Section 25.093 retains the former provision allowing each day the child remains out of school to be counted as a separate offense, which is advantageous to schools because the Legislature kept intact the provision permitting one-half of any fine collected against a parent to be deposited to the operating fund of the school the child attends.

However, § 25.093(h) now provides parents a defense to prosecution for "contributing to truancy." It is an affirmative defense if the parent can prove by a preponderance of the evidence that one or more of the absences was either excused by a school official or should be excused by the court. However, a decision by the court that one or more absences should be excused only impacts the truancy charge and does not affect the ability of the school to determine whether to excuse the absence for another purpose.

Students Better Count Those Absences Carefully. If a student subject to compulsory attendance under Texas Education Code § 25.085 fails to attend school on ten or more full or partial days within a six-month period in the same school year or three or more full or partial days within a four-week period, the student commits the offense of "failing to attend school." The student may be prosecuted in either a justice or municipal court or referred to a juvenile court in counties with a population of less than 100,000.

However, students can avail themselves of two new affirmative defenses to prosecution. First, as with the prosecution of parents, it is an affirmative defense if the student can prove by a preponderance of the evidence that one or more of the absences was either excused by a school official or should be excused by the court. A decision by the court that one or more absences should be excused only impacts the truancy charge and does not affect the ability of the school to determine whether to excuse the absence for another purpose. Second, it is an affirmative defense if one or more of the absences was involuntary.

Senate Bill 1432 raises the standard for taking a student into custody. Where a peace officer formerly was able to take a child into custody if there were "reasonable grounds to believe" the child failed to attend school, the new law limits a peace officer's authority to take a student into custody where there is a court order supported by an affidavit showing probable cause that the student committed the offense.

Learning to Count to Ten. While the terms "unexcused" and "voluntary" have been removed from sections 25.093 and 25.094, school districts should not be overly zealous in counting to "ten or more days or parts of days" or "three or more days or parts of days." In a TEA Letter to the Administrator Addressed dated November 13, 2001, TEA clarified that student absences from school still need to be unexcused in order to count against the student for truancy purposes. Likewise, TEA indicated that school enforced absences such as suspension should not be included in counting truancy absences since

it is the school prohibiting attendance rather than the student failing to attend. Also, do not forget that tardiness to class does not count against a student for compulsory attendance enforcement, although in some circumstances the tardiness may be sufficiently egregious enough to constitute an absence. For more information on counting tardies, please see Tex. Att'y Gen. Op. DM-200 (1993).

Options for Pursuing Truancy Abound. It is mandatory that school districts file a complaint or referral in the appropriate court against either the student, the student's parent, or both the student and parent if the student fails to attend school without excuse on 10 or more full or partial days within a six-month period within the same school year. Schools have discretion whether to file a complaint or referral in the appropriate court against the student, the student's parent, or both the student and parent if the student fails to attend school without an excuse on three or more full or partial days within a four-week period. While the new attendance laws did not go into effect until September 1st, the bill allows schools to include any absences occurring during the 2001-2002 school year in calculating the days for truancy. Be sure to check out new Texas Education Code sections 25.0951 and 25.0952 for the options and procedures for filing a complaint against parents or students.

Look to the Texas Code of Criminal Procedure for Guidance. A new section was added to Chapter 25 of the Texas Education Code clarifying that courts will follow the procedures and powers set out in Chapter 45 of the Code of Criminal Procedure when handling complaints of "contributing to truancy" or "failure to attend school." Most of the court procedures formerly referenced in the Education and Family Codes are contained in Chapter 45 of the Texas Code of Criminal Procedure. For example, the old provision in § 25.094(g) permitting students to have their truancy conviction expunged from their record has been deleted. New provisions about expunction of criminal records are now included in Article 45.055 of the Code of Criminal Procedure. Likewise, the courts' options for handling a student convicted of failing to attend school have been moved from Texas Family Code § 54.021(d) to Article 45.054 of the Code of Criminal Procedure. If your local judiciary needs some suggestions about handling student truancy, Article 45.054 includes several creative options such as orders requiring the student to: (1) complete community service; (2) attend school without unexcused absences; (3) attend a prepatory class for a high school equivalency exam; or (4) attend special programs on alcohol and drugs, rehabilitation, counseling, work and job skills, manners, violence avoidance, sensitivity, and advocacy and mentoring.

And You Can Create a New Position. So long as a school district gets approval from the school board, it has the authority to employ a "truancy case manager" and may apply to the criminal justice division of the Governor's Office for reimbursement of all or part of truancy case manager costs – but not without strings attached. A school district also has the option of jointly employing a truancy case manager with the justice court, municipal court, juvenile probation department or other appropriate governmental entity. To be eligible for reimbursement the school must present a comprehensive plan to reduce truancy in the entity's jurisdiction and the plan must address the role of the case manager in that effort. For more information on truancy case managers, refer to Article 45.056 of the Texas Code of Criminal Procedure.

Open-Enrollment Charter Schools. Most of the attendance provisions in the Texas Education Code have been expanded to include open-enrollment charter schools. For example, the selection and compensation of school attendance officers and the allocation of fines collected all include references to open-enrollment charter schools. If you are dealing with an open-enrollment charter school, review the statutes for more specific information.

CONCLUSION

The 77th Legislature made a massive overhaul of student truancy by adopting Senate Bill 1432 in 2001. Titles were changed, statutory provisions reorganized, and affirmative defenses created. The result is a workable means of enforcing student attendance at school. After all, in addition to gaining additional ADA money school districts can better fulfill their purpose of educating students if students actually attend school.

ENDNOTES

1 Tex. Educ. Code § 25.095(a).
2 Tex. Educ. Code § 25.095(b).
3 Former Texas Education Code § 25.096 permitting compulsory attendance to be enforced by any peace officer as the term was defined by the Code of Criminal Procedure was repealed by the 77th Legislature. That provision has been subsumed by Texas Education Code § 25.091(c).
4 Tex. Educ. Code § 25.091.
5 *Id*.
6 Tex. Educ. Code § 25.093.
7 Tex. Educ. Code § 25.093(a).
8 Tex. Educ. Code § 25.093(b).
9 Tex. Educ. Code § 25.094(a).
10 Tex. Educ. Code § 25.094(h).
11 *Id*.
12 Tex. Educ. Code § 25.094(d).
13 Tex. Educ. Code § 25.0951(a).
14 Tex. Educ. Code § 25.0951(b)
15 Tex. S.B. 1432 § 20, 77th Leg., R.S. (2001).
16 Tex. Educ. Code § 25.0952.
17 Tex. Code Crim. Proc. art. 45.054.
18 Tex. Code Crim. Proc. art. 45.056.

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