State Bar
Section Report
School Law

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Welcome from the State Bar School Law Section!

First, let me thank the editors, editorial board members and writers who have contributed their knowledge, talent, and untold (and nonbillable) hours to bring you this excellent newsletter. Please take advantage of this great resource now, and please consider contributing to this publication in the future.

Second, let me thank the volunteers who have agreed to serve as officers and directors of the State Bar School Law Section. Their names and addresses are listed below. Please feel free to contact any of us if you have any questions, ideas or offers of assistance.

At this time, the School Law Section's planned program of work includes: 1) preparation for the next State Bar School Law Section Retreat, which will be held July 16-17, 2004; 2) consideration of participation in the Texas State Bar Convention on June 24-25, 2004, given that the Bar will induct as its president, Kelly Frels, the first school lawyer to be so elected; 3) improvement in use of technology to assist Section members; 4) consideration of coordination of continuing legal education with the Government Law and Family Law Sections; 5) consideration of better inclusion into the Section of attorneys involved in other related areas, including special education and higher education; and 6) consideration of proposed legislation to cure common problems related to family law and child custody matters arising in schools.

Also, don't forget to attend the UT School Law Conference scheduled to be held in Austin on February 26-27, 2004. Your conference planners have developed an interesting and informative program, and I urge you to join us there.

Finally, thank you for the opportunity to serve you as chair of our great Section. Just as you never know the full story until you hear both sides, our strength in this Section comes from having both sides of the Bar serving in integral roles. Together, we make education better in Texas!

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2003 LEGISLATIVE UPDATE FOR SCHOOL ATTORNEYS

TEXAS ASSOCIATION OF SCHOOL BOARDS

LEGAL SERVICES DIVISION

The 78th Texas Legislature did not address school finance in its regular session, but it did make statutory changes that substantially impact Texas school districts and their trustees, administrators, teachers, parents, and students.

This legislative summary attempts only to hit the high points of the regular session. A careful reading of each bill is required for a comprehensive understanding. Watch for subsequent action that may be taken in special sessions of the Legislature and in agency rulemaking. Text of the bills is available at the Web site for Texas Legislature Online at www.capitol.state.tx.us/.

STUDENT DISCIPLINE

Student Code of Conduct (SCOC)

- Must specify whether self-defense is considered as a factor in a decision to order suspension, removal to a disciplinary alternative education program DAEP, or expulsion. [HB 1314]
- Must provide guidelines for setting the length of a term of DAEP removal and expulsion. The district must report the number of DAEP placements and expulsions that were inconsistent with the SCOC guidelines. [HB 1314]
- Must address the notification of a student's parent or guardian of a violation of the SCOC that results in suspension, DAEP removal, or expulsion. [HB 1314]
- Must list conduct for which a student can be suspended. [HB 1314]
- May be available for review at the campus principal's office, rather than being "prominently displayed." [HB 1314]
- A school district must provide, each school year, notice to parents of information regarding the SCOC. [HB 1314]
- Former requirement of 24-hour notice of violation of SCOC is repealed. [HB 1314]
- "Truancy" is now "nonattendance." [HB 1314]
- A "non-custodial" parent may request in writing that a school provide to him or her for the rest of the school year a copy of any written notification to parents or guardians required by statute relating to student misconduct. [HB 1314]
- A school or district must comply with any applicable court order of which the school or district has knowledge. [HB 1314]

Special Education Discipline

- "Restraint" and "time-out" are redefined. [HB 1314]
- Restrictions on seclusion generally do not apply to seclusion in a court-ordered placement, with some exceptions. [HB 1314]
- Education Code section 37.0021 and applicable rules or procedures do not apply to a peace officer performing law enforcement duties, with some exceptions. [HB 1314]
- The placement review committee's placement determination regarding who receives special education services is subject to the requirements of the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.) and applicable implementing regulations. [HB 1314]
- Juvenile justice officials must participate in ARD committee meetings for special education students who have been expelled to the JJAEP. [HB 469]

Withdrawal and Enrollment

- When a student enrolls in another school while still subject to disciplinary action, the original school district or charter school must provide to the receiving school a copy of the "order of disciplinary action," along with the other educational records. [HB 2061]
- The receiving school may continue the disciplinary action under the terms of the order or may allow the student to attend regular classes without completing the period of disciplinary action. [HB 2061]
- The principal or board in the original school may complete the disciplinary proceedings and enter an order if a student withdraws from the district pending removal or expulsion. [HB 1314]
- The original school district may enforce the order if the student subsequently re-enrolls in the original district during the same or subsequent school year, except for any period of the placement or expulsion that has been served in another district. [HB 1314]
- If the principal or board fails to enter an order after the student withdraws pending disciplinary action, the next district in which the student enrolls may complete the proceedings and enter an order, as appropriate. [HB 1314]
- An enrolling school district may continue a student's DAEP placement under terms of a previous order or allow the student to attend regular classes if (1) the student was placed in a DAEP by an open-enrollment charter school, and the school gives the district a copy

of the order; or (2) the student was placed in a DAEP by a school in another state, the school sends the district a copy of the order, and the grounds for the out-of-state placement would be grounds for placement in the enrolling district. [HB 1314]

- If an out-of-state school has placed a student in a DAEP and the enrolling Texas district continues the placement, the enrolling district must reduce the period of DAEP placement, if necessary, so that the aggregate placement does not exceed one year. [HB 1314]

JJAEP

- Only a DAEP operated under the authority of a county juvenile board is considered a JJAEP. [HB 1314]

- JJAEPs must provide educational services to a student who is expelled for a mandatory reason. [HB 1314]

- School districts are not required to provide funding for a student who has not been expelled but has been assigned to a JJAEP by a court. [HB 1314]

ISS

- School districts must offer a student placed in ISS or another setting other than the DAEP the opportunity to complete before the beginning of the next school year each course the student was enrolled in at the time of the removal from the regular classroom. The opportunity may be by any method, including distance learning, correspondence courses, or summer school. [HB 1314]

DAEP Generally

- Throughout Chapter 37, "alternative education programs" are now referred to as "disciplinary alternative education programs." [HB 1314]

- All DAEP teachers must be certified by the beginning of the 2005-06 school year. [HB 1314]

- A school district must offer a student removed to DAEP an opportunity to complete coursework before the beginning of the next school year. The school district may provide this opportunity through any method available, including a correspondence course, distance learning, or summer school. The district cannot charge students for a course provided under this provision. [HB 1314]

- Compulsory attendance now applies to a summer program under Education Code sections 37.008(l) (enabling students in a DAEP to complete coursework) or 37.021 (enabling student in ISS to complete coursework). [HB 1314]

- The DAEP order must give notice of any inconsistency if the period of placement is inconsistent with the guidelines stated in the SCOC. [HB 1314]

- A DAEP placement may not be for longer than one year unless, after review, the district determines that either the student is a threat to the safety of other students or to district employees or that extended placement is in the best interest of the student. [HB 1314]

- Districts must review DAEP placements that extend beyond the next grading period or 60 days, whichever comes earlier. [HB 1314]

- Districts must conduct additional proceedings and enter an additional order if, during the term of the DAEP or expulsion, the student engages in additional conduct for which placement or expulsion is required or permitted. [HB 1314]

- The commissioner must develop a process to evaluate a school district DAEP electronically. [HB 1314]

- Decisions of the board or designee regarding DAEP placements are final and may not be appealed. [HB 1314]

Permissive DAEP

- A principal or other appropriate administrator may, but is not required, to remove a student to a DAEP for off-campus conduct requiring DAEP placement if the administrator does not have knowledge of the conduct before the first anniversary of the date the conduct occurred. [HB 1314]

- New Education Code section 37.0081(a) provides that "after an opportunity for a 'hearing,'" the board or the board's designee may place a student in DAEP if the student has, for conduct defined as a Title 5 felony in the Penal Code, either: (1) received deferred prosecution under section 53.03 of the Family Code; OR (2) been found by a court or jury to have engaged in delinquent conduct under section 54.03 of the Family Code; AND the board or board's designee determines that the student's presence in the regular classroom (1) threatens the safety of other students or teachers; (2) will be detrimental to the educational process; OR (3) is not in the best interests of the district's students. The decision of the board or designee is final. This section applies regardless of the date or location of the conduct, whether the student was enrolled in the district at the time of the conduct, or whether the student has completed any court disposition requirements with respect to the conduct. [HB 1314]

- Permits DAEP placement of a child under six years old who violates the Gun Free Schools Act. [HB 1314]

Mandatory DAEP

- For conduct on or within 300 feet of campus that contains the elements of an offense relating to "an abusable volatile chemical," as defined by the Health and Safety Code (formerly, "abusable glue or aerosol paint"). "Volatile chemical" expressly includes "aerosol paint" and appears to include any glue that could be subject to abuse. [HB 1314]

Expulsions Generally

- The district must inform a teacher who has regular contact with a student through a classroom assignment (not "each" teacher) of the expulsion conduct of the student. [HB 1314]

- Section 37.015(a) adds to the list of on-campus offenses about which the school principal must notify local law enforcement: (1) the reasons for mandatory expulsion under 37.007(a); (2) retaliation against a school employee under 37.007(d); and (3) violation of the Gun Free Schools Act under 37.007(e). [HB 1314]

- Section 37.009(j) now requires additional proceedings to be conducted and an additional order to be entered if, during the term of the DAEP or expulsion, the student engages in additional conduct for which placement or expulsion is required or permitted. [HB 1314]

Permissive Expulsions

- The relevant geographic boundary is extended to expel for specified conduct occurring within 300 feet of school property. [HB 1314]

- The following conduct is added to the list of permissive expulsion offenses:

  1. Deadly conduct [HB 1314]

  2. Conduct that would require a mandatory expulsion if it occurs on campus or at a school-related event [HB 1314]

  3. Possession of a firearm [HB 1314]

  4. Conduct that contains the elements of an offense relating to "an abusable volatile chemical." [HB 1314]

  5. Certain violent offenses (aggravated assault, sexual assault, aggravated sexual assault, murder, capital murder, criminal attempt to commit murder or capital murder, and aggravated robbery) committed against another student, regardless of when or where the conduct occurs. [HB 567]

  6. Conduct that is punishable by mandatory expulsion, if the conduct takes place on the school property of another Texas school district or while attending a school-sponsored or school-related activity of a school in another Texas school district. [HB 552]

- The district must continue to provide funding for student expelled for permissive reasons. [HB 1314]

Mandatory Expulsions

- The list of mandatory expulsion offenses for on-campus conduct now includes: aggravated robbery, manslaughter, and criminally negligent homicide. [HB 1314]

- A district may, but is not required to, provide educational services to a student age 10 or older who is expelled for violation of the Gun Free Schools Act. [HB 1314]

Law Enforcement Notices

- Prosecutors must now notify districts of students receiving deferred prosecution and deferred adjudication. [HB 1314]

- Principals must also notify law enforcement for on-campus offenses for any reason listed in the mandatory offenses, retaliation against a school employee, or violation of the Gun Free Schools Act. [HB 1314]

PENAL CODE

- Second degree felony for any employee of a public or private primary or secondary school to engage in sexual contact, sexual intercourse, or deviate sexual intercourse with a person (except the employee's spouse) who is enrolled in the same school. Applies to all students, not just minors. [HB 532]

- State jail felony to be intoxicated while operating a motor vehicle in a public place with a passenger younger than 15. [SB 45]

- Disorderly conduct (Class C misdemeanor) now includes a "peeping tom" provision that criminalizes looking into an area designed to provide privacy in a public place, e.g, bathroom stall or changing room, for a lewd or unlawful purpose. [HB 12]

- Enhanced punishments for the offenses of assault and aggravated assault on a person the actor knows is an on-duty security officer. [HB 565]

- Enhanced punishment for the offense of threatening bodily injury and offensive touching against a "sports participant" by a non-participant either while the participant is participating or in retaliation for the participant's role. "Sports participant" means a person who participates in any official capacity with respect to an interscholastic, intercollegiate, or other organized amateur or professional athletic competition. [HB 716]

- Several changes to the offense of terroristic threat:

  - Capital murder now includes intentionally committing murder in the course of committing a terroristic threat. [HB 11]

  - Terroristic threat now includes threatening to commit any offense involving violence with the intent to place the public in fear of serious bodily injury or influencing the conduct or activities of a governmental unit. [HB 11]

  - It is now a state jail felony to commit a terroristic threat if the actor causes $1,500 or more pecuniary loss to the owner of the facility. Pecuniary loss is the amount of loss suffered as a result of the interrupted occupation of the facility. [HB 616]

Sex Offenders

- A victim of sexual assault or aggravated sexual assault may apply for an ex parte protective order to protect the victim or a member of the victim's family or household if there is a clear and present danger of sexual assault or other harm to the applicant, regardless of the relationship between the victim and the offender. The protective order may prohibit going to or near the school of the applicant or member of the applicant's family. [HB 433]

- The judge must establish a "child safety zone" as a condition of community supervision for offenders whose victims were under the age of 17 and not the offenders' spouse. The order must require that the offender not go in, on, or within 1,000 feet of a school and other places, with some exceptions. [HB 1054]

- Sex offenders who are workers and students at institutions of higher education or volunteers must now register. [HB 871]

- Newspaper notice of sex offenders is now required for all sex offenders, regardless of age, with some exceptions, such as when incest is involved or if the person has a low risk rating. [HB 871]

- Notice of sex offender status will be sent to school administrators only if (1) the victim was a student enrolled in the school, (2) the offender is a student enrolled in a secondary school, or (3) the registration is based on a conviction, deferred adjudication, or adjudication for delinquent conduct for child pornography. Notice may not be sent if the registration is based on incest. [HB 871]

Patriotic And Religious Observances

- The board must require all students, once a day at each school, to recite the pledge of allegiance to the U.S. and Texas flags. On written request of a student's parent, the student may be excused from recitation. [SB 83]

- The board must provide for a minute of silence at each school following the recitation of the pledges. During the minute, students may "reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student." "Each teacher or other school employee in charge of students during that period shall ensure that each of those students remains silent and does not act in a manner that is likely to interfere with or distract another student." [SB 83]

- A public school may display the national motto, "In God We Trust," in each classroom, auditorium, and cafeteria. [HB 219]

- Celebrate Freedom Week is now the week of November 11. The SBOE can make rules regarding the appropriate curriculum and conscientious objectors and permit districts to change the week designated. [HB 1776].

- Excuses a student from attending classes or other required activities, including exams, for the observance of holy days, including travel days. The student cannot be penalized and must be allowed to take an exam or complete an assignment within a reasonable time after the absence. Repeals the requirement that the student give notice of the absence in writing and not later than the 15th day after the first day of the semester. [SB 256]

Truancy

- County courts in counties with over 2,000,000 population have original jurisdiction for 'nonattendance" violations and may appoint magistrates to hear truancy cases. [SB 358]

Elections

Voting Procedures Generally

- The secretary of state is required to implement and maintain a statewide computerized voter registration list that serves as the single system for storing and managing the official list of registered voters in the state. [HB 1549]

- Effective January 1, 2006, the secretary of state must furnish information in the computerized system to any person on request not later than the 15th day after the date the request is received. [HB 1549]

- Effective January 1, 2006, each polling place must provide at least one voting station that complies with the ADA and the Rehabilitation Act, and "provides a practical and effective means for voters with physical disabilities to cast a secret ballot." The provision applies only to polling places that use electronic voting systems unless the secretary of state certifies that federal law requires the application to all polling places. [HB 1549]

- New provisions are added regarding how to determine the "intent" of a voter. [HB 1549]

- If the first date for early voting happens to fall on a Saturday, Sunday, or legal state holiday, the early voting period begins on the next business day. This change eliminates the option for early voting to also begin on a Saturday or Sunday at the main polling place. [HB 1695]
- Increases the level of severity for many currently existing offenses, and creates new, more specific offenses related to assisting voters in elections. The offenses range from marking a ballot in a way different than the voter wishes, to improperly signing the ballot as a witness in an effort to render the ballot void, to possessing ballots that do not belong to you in some cases! [HB 54]

Unopposed Candidates

- Political subdivisions may cancel elections if there is only one candidate "to qualify" as a candidate. [HJR 59—approved 9/13/02 election] An election authority

may declare a candidate elected to office if the candidate is the only qualified person to appear on the ballot for the office and there are no candidates who met the qualifications to be write-in candidates. There is no need to list the office on the ballot, and no election will be held for that office. A copy of the declaration must be posted during early voting and on election day at each polling place where a voter would have been eligible to vote for the candidate. [HB 1344]

- Districts and other election authorities covered in the act cannot pick and choose which unopposed candidates to declare "elected." For example, if a district has only one candidate for each of two single member districts, the district cannot cancel the election for one but not the other. [HB 1344]

- Unopposed candidates for office must have certificates of election issued at the same time as candidates who faced opposition. [HB 1695]

Restrictions on Political Advertising and Electioneering

- An officer or employee of the district may not knowingly use or authorize use of the district's internal mail system to distribute political advertising. Includes exceptions for stamped mail and mail that is being delivered because it is the subject of an official proceeding of the district. Violation of this section is a Class A misdemeanor. [HB 736]

- Individuals may not electioneer within 100 feet of an outside door through which a voter may enter of any polling place. Early voting and election day polling places are subject to the same distance requirements. [HB 2093]

Election Dates

- Effective January 1, 2004, the general election date in May is changed from the first Saturday to the third Saturday of the month. The governing body of a political subdivision other than a county may, not later than December 31, 2004, change the date on which it holds its general election for officers to another authorized uniform election date. The November election date option is left unchanged. [HB 1549]

- Restores the authority of the governing body to change the date of its general election for officers to a date other than a uniform election date, so long as it does so before December 31, 2003. An election on the new authorized date may not be held before the uniform election date in May 2004. [HB 1777]

- Effective November 1, 2003, political subdivisions must order elections no later than 62 days (no longer 45 days) prior to election day. [SB 1215]

Filing Dates

- Effective November 1, 2003, an application for a place on a ballot must be filed by not later than the 62nd day before election day. Candidates may not withdraw after the 53rd day prior to election day. [SB 1215]

- Write-in candidates must file a declaration of write-in candidacy not later than 5:00 p.m. of the fifth day after the normal filing deadline if the office is one that has a normal filing deadline of 45 days before election day and if write-in votes may only be counted for names appearing on a list of write-ins. [HB 1695] (*But see* SB 1215).

Post Election Matters

- Effective January 1, 2004, the local canvass for elections other than ones for state and county officers must take place not earlier than the eighth day and not later than the eleventh day after an election. [HB 1549] But effective September 1, 2003, the canvassing authority of a political subdivision that holds an election jointly with a county or one or more other political subdivisions must convene to conduct the local canvass on the seventh day after election day. [HB 1695]

- For joint elections with other governmental entities, the early voting ballot board shall convene to count the mailed ballots on the sixth day after the election. For districts on their own, the early voting ballots must be counted on not earlier than the third day and not later than the fifth day after the election. [HB 1695]

- An automatic recount must be conducted if two or more candidates receive the highest number of votes in a main election; two or more candidates receive the second highest number of votes in a main election; or if candidates in a runoff election tie. If recounts do not resolve the ties, then the tied parties must cast lots. [HB 2152]

- Premature disclosure of election results is changed from a Class C misdemeanor to a Class A misdemeanor. [HB 403]

- Runoff elections must be held not earlier than the 20th day or later than the 45th day after the date the final canvass of the main election is completed (previously between 20 and 30 days). [HB 1695]

Election Personnel

- A person who is both a permanent employee of a political subdivision and a qualified voter of any territory is not required to be a qualified voter of the political subdivision to be an early voting clerk in a political subdivision election. [HB 1695]

- Provides procedures for at least one clerk who is fluent in both English and Spanish at a central location to provide assistance for Spanish-speaking voters. Applies only to election precincts located wholly or partly in a county with 5% or more of the population of Spanish descent or origin according to the latest census. [HB 2085]

BUSINESS ISSUES

Caps on Reimbursements for Travel Services

- Officers (trustees) and employees of districts and junior colleges may participate in Building and Procurement

Commission (BPC) contracts for travel services. "Travel services" seems to include any travel-related expense. [HB 898]

- Reimbursement for any travel expense may not exceed the applicable amount determined using the state travel allowance guide adopted by the Comptroller. This guide can be found on the Comptroller's Web site: www.window.state.tx.us. [HB 898]

Accounting

- Removes the requirement of public accountant audits of dropout records. The commissioner will develop a process to audit dropout records electronically. [SB 894]

- Requires the commissioner to develop a system to identify districts likely to misuse comp ed funds or inadequately report comp ed expenditures. [SB 894]

Procurement

- Political subdivision corporation is now a purchasing option for electricity purchases. School districts may now join political subdivision corporations. Overrules Op. Tex. Att'y Gen. No. JC-492 (2002). [HB 2528]

- School board may establish regulations permitting the district not to contract with a person indebted to the district. District may even refuse to accept the low bid. [SB 850]

Vendor Remedy for Non-Payment

- District vendors of goods and services may suspend work for non-payment by the district. Specific timelines and notice requirement apply to vendors who suspend performance. [HB 2397]

AG Assistance to School Districts

- A school district may request the assistance of the attorney general on any legal matter. The district must pay any costs associated with the assistance. [HB 3459]

School District Expenses and Personnel

- Districts must report annually to the commissioner the percentage of total expenditures for direct instructional activities and percentage of full-time equivalent employees whose job function was to directly provide classroom instruction to students (number of hours of classroom instruction/number of hours worked by all district employees). [SB 900]

- District must also report to educators a list of the district employees who directly provided classroom instruction, with the percentage of time for each employee. [SB 900]

CONSTRUCTION

- Removes limited exemption for projects that require "structural" engineering. [HB 2081]

- Coordinates Government Code and Education Code provisions for construction manager at risk (CMAR) arrangements for BPC, districts, and colleges. Architects and engineers responsible for complying with Occupation Code Chapter 1001 (Engineering Practice Act) or 1051 (Architects Licensing Act). Engineer or architect can provide customary construction phase services under original contract but not as the CMAR, unless the engineer or architect has a separate or concurrent CMAR agreement. [SB 1331]

PERSONNEL GENERALLY

- Eliminates the mandate that districts automatically distribute employment policies. Districts must provide the policies upon the teacher's request. Districts must place a copy of the policies on the district web sites and must make a copy available for inspection at each school in the district. [HB 912]

- Grades assigned by a teacher for an examination or a course may not be changed unless arbitrary, erroneous, or inconsistent with district grading policy, as determined by the board of trustees, generally without appeal. [HB 1949]

- A teacher may not be required to prepare "any written information" other than a (1) report on the health, safety, or welfare of a student, (2) report of a student's grade on an assignment or examination, (3) report of a student's academic progress in a class or course, (4) report of a student's grades at the end of each grade reporting period, (5) a textbook report, (6) a unit or weekly lesson plan that outlines in a brief and general manner the information to be presented during each period at the secondary level or in each subject or topic at the elementary level, (7) an attendance report, (8) any report required for accreditation review, (9) any information required by a school district that relates to a complaint, grievance, or actual or potential litigation and that requires the classroom teacher's involvement, or (10) any information specifically required by law, rule, or regulation. The board shall review paperwork requirements imposed on classroom teachers and shall transfer to existing non-instructional staff a reporting task that can reasonably be accomplished by that staff. The teacher can agree to report more. [HB 3459]

- Local school districts now have discretion to establish their own topics, standards and types of staff development. [HB 1024]

- Adds "head director of a school marching band" to the list of school employees (head coaches and chief sponsors of extracurricular athletic activity) who must acquire and maintain current certification in first aid and cardiopulmonary resuscitation. [SB 741]

- Prohibits the board of trustees of a school district from requiring an employee to pay for a textbook or "instructional technology" that is stolen, misplaced, or not returned by a student. [HB 2072]

- The commissioner of education must establish a program to reimburse classroom teachers who expend personal funds on classroom supplies. Program must be implemented no later than 2005-2006 school year, but only if the legislature specifically appropriates funds or if the commissioner identifies available funds not from general revenue. If the commissioner provides funds, the school district must provide matching local funds. [HB 1844; HB 3459]

- Eliminates the duplicative parent notice requirements. If the district is required under the No Child Left Behind Act of 2001 to notify parents when their child has been taught for more than four consecutive weeks by a teacher who is "not highly qualified," then the district is not required to comply with the companion state law obligation to notify parents if an "inappropriately certified or uncertified teacher" is assigned to their child's classroom for more than 30 consecutive instructional days. [HB 673]

- A "crime victim" who is an employee of a governmental body may elect whether to allow public access to identifying information held by the Attorney General or "other governmental body" that would identify the person as a crime victim. If an employee does not make an election, the information is excepted from disclosure until the third anniversary of the date the crime was committed. [HB 1027]

Educator Contracts

Probationary Contracts

- A district may now reemploy under a probationary contract a teacher who returns "after at least a two-year lapse in district employment." [HB 558]

- A district may now return a teacher to probationary status under a new superintendent-initiated procedure by which the teacher and district agrees after the teacher receives notice of the superintendent's intent to recommend to the board termination or nonrenewal of the teacher's contract. The notice must contain certain information. [HB 1113]

- A district may now initially employ an experienced principal or classroom teacher under a term contract, instead of a probationary contract. The experience must be in public schools and must be in the same capacity for which the person is being hired. [SB 1394]

Teacher Termination or Suspension Without Pay

- Clarifies and streamlines certain notices, timelines, procedure for selection of a certified hearing examiner, extensions of time, and proposed findings of fact and conclusions of law from the certified hearing examiner. [SB 893; HB 3459]

- An educator's failure to hold or acquire full certification voids the educator's employment contract without any need for a termination or nonrenewal hearing. Certified teachers assigned to teach a subject for which they are not certified are exempt. The district may terminate, suspend with or without pay, or keep the person on in a non-teaching position at the current or a reduced rate of pay. The educator also loses entitlement to state minimum salary. The district's decision is not appealable under Chapter 21. [HB 1022]

- Expedites the process for revoking the certificates of educators receiving conviction or deferred prosecution for offenses requiring sex offender registration, if the victim is under 18 years of age. [SB 1109]

Reporting Certified Educator Misconduct

- Codifies, with minor changes, SBEC rule (19 TAC 249.14) requiring the superintendent or director of school district, ESC, shared services arrangement, or open enrollment charter school to notify SBEC within 7 days of learning about certain alleged misconduct by a certified educator. The sexual abuse category is expanded to include sexual conduct involving an educator and a "*student or minor*." [SB 1488]

Appraisals

- A teacher is eligible to skip annual appraisal, for up to five years, if the board adopts a policy permitting the exemption and the teacher (1) agrees in writing, (2) received a rating of at least proficient, or the equivalent, on last appraisal, and (3) had no identified areas of performance deficiency on last appraisal. [HB 1440]

Leaves and Absences

- During a term of active military service, school employees are also entitled to use for compensation "any personal or sick leave available under former law or provided by local policy of a school district." [SB 1669]

- School districts are explicitly authorized to adopt a local policy providing for paid military leave "as part of consideration of employment." [SB 1669]

- HB 174 grants a member of the state military forces who is ordered to active state duty the same benefits and protections provided to certain persons in the federal uniformed military services. [HB 174]

Liability

- Expands the definition of "professional employee" of a school district, for immunity purposes, to include substitute teachers, teachers employed by a company that contracts with the district to provide the teacher's services, and members of the board of trustees. [SB 930; HB 4]

- Adds the Paul Coverdell Teacher Protection Act (Coverdell Act) to the immunities already enjoyed by professional employees of school districts, making school employees immune from liability for injuries to a student while the employee is engaged in "efforts to control, discipline, expel, or suspend a student or main-

tain order or control in the classroom or school." [SB 930; HB 4]

- Limits the liability of a professional employee "or of an employee who is entitled to any immunity and other protections under [the Coverdell Act]" to $100,000 for an act incident to or within the scope of duties of the employees' position of employment. [SB 930; HB 4]

- Education Code section 22.0513 imposes procedural protections in a lawsuit against a "professional employee," including 90 days' notice before bringing suit against the employee, exhaustion of administrative remedies "provided by the school district" before filing suit against a professional employee, court referral to alternative dispute resolution, and employee recovery of attorney's fees and court costs if the employee is found to be immune from liability. [SB 930; HB 4]

- Makes "teachers" immune from "disciplinary proceedings" based on use of physical force. "Disciplinary proceedings" include actions by the district to suspend, nonrenew, or terminate the employee, and actions by SBEC to enforce the educator's code of ethics. A school district may still enforce its corporal punishment policy. [SB 930; HB 4]

- Extends the protection from civil liability for dispensing from a "properly labeled unit dosage container" that was filled by a registered nurse or other qualified district employees. [SB 930; HB 4]

- A plaintiff must generally elect whom to sue or against whom to assert a claim regarding the same subject matter: either the governmental unit or its employee. [HB 4]

TRS Issues

- Texas Attorney General Opinion GA-0018 is overruled. An individual employed by a company that contracts with a public school and who performs the duties of a teacher is considered to be employed by the school and thus is not entitled to draw TRS retirement benefits if he or she works beyond the TRS return-to-work limits. Applies only to payment of retirement benefits to a retiree who is first employed by a third party entity on or after May 24, 2003. [HB 2169]

- A retiree may now work as a substitute ***plus*** another of the TRS return-to-work positions as long as the total number of days that the retiree works in the positions in that month do not exceed the number of days per month for work on a one-half time basis. [HB 3237]

- Changes eligibility for TRS-Care (retiree health insurance):

  - Extends eligibility to persons who have 5 years of service in the public schools plus 5 years of military experience;

  - Limits eligibility to persons who either are 65 years old or meet the "Rule of 80";

  - Requires that creditable service be "actual service." Out-of-state service credit will no longer be counted toward eligibility for retiree health benefits. [SB 1369]

- Increases contribution rates to the retiree insurance fund and requires school districts to contribute. [SB 1369; HB 3459]

Eligibility for TRS benefits

- Effective September 1, 2003 to September 1, 2005, membership in TRS (for purposes of accruing retirement benefits) will begin on "the 91st day after the first day a person is employed." Allows a member to purchase service credit in TRS for the "90-day waiting period" (Credit Purchase Option). [HB 3459]

ActiveCare Pass-Through

- Reduces the per-employee supplement for TRS-ActiveCare from $1,000 to $500 for "full-time employees" and $250 for "part-time employees" for the period from September 1, 2003 to September 1, 2005. Effective September 1, 2005, the supplement returns to $1,000 per employee.

  - Makes members of the "professional staff" of a district ineligible for the supplement. The term "professional staff" is to be defined by TRS rules.

  - Provides that an employee is not eligible to receive the state contribution "until the 90th day after the date the employee is employed." [HB3459]

Open Meetings Act

- A school board may deliberate in closed session if personally identifiable information about a student will necessarily be revealed. The student's parent can opt for open session, and "directory information" is not "personally identifiable information" unless parent directed that it not be released without consent. [HB 1226]

- A school board that administers a public insurance, health, or retirement plan may deliberate in closed session about the medical or psychiatric records of an applicant for a benefit from the district's plan. [SB 984]

- A school board may deliberate in closed session if the deliberation will reveal certain confidential information regarding Homeland Security. The board must make a tape recording of the proceedings in closed session. [HB 9]

Public Information Act

- PIA officer must produce information "promptly," defined as "as soon as possible under the circumstances, that is, within a reasonable time, without delay." [SB 84]

- Requests, notices, and other documents may be sent by common or contract carrier as well as First Class Mail. [SB 919]

- For a request of 50 or fewer pages, the charge is limited to the "charge for each page of the paper record that is photocopied" unless pages are in remote storage or in two or more buildings. Requestor must respond within 10 "business" days after the governmental body sends an itemized statement of charges or the request is considered withdrawn. A requestor can respond by making an overcharge complaint. All references to "General Services" are changed to "Texas Building and Procurement." If the Building and Procurement Commission investigates allegation of overcharging, the governmental body has 10 "business" days to respond. [SB 653]

- An e-mail address is not confidential under the Public Information Act if it is provided: (1) by a person (or the person's agent) who has a contractual relationship with the governmental body, (2) by a vendor (or the vendor's agent) who seeks to contract with the governmental body, (3) in a response to a request for bids or proposals or similar offer or in the course of negotiating the terms of a contract or potential contract, or (4) on a letterhead, cover sheet, printed document, or other document made available to the public. A governmental body is not prevented from disclosing an e-mail address for any reason to another governmental body or to a federal agency. [HB 2032]

HEALTH ISSUES

Foods of Minimal Nutritional Value (FMNV)

- A joint interim committee will hold statewide hearings to evaluate, among other things, school contracts relating to competitive food products and vending machines. [SB 474]

- The Texas Department of Agriculture (TDA) now administers the federal Child Nutrition Programs. Effective August 1, 2003 the TDA issued a new "policy" that restricts the selling or distribution of FMNV (carbonated beverages, water ices, chewing gum, certain candies) in schools:

1. An elementary school campus may not serve or provide access for students to FMNV at any time anywhere on school premises during the school day.

2. A middle school campus may not serve or provide access for students to FMNV anywhere on school premises during meal periods (breakfast, lunch and snack).

3. In addition, a middle school campus may not serve or provide access for students to prohibited carbonated beverages with volumes in excess of 12 ounces anywhere on school premises during the school day.

Psychotropic Drugs

- Prohibits a school district employee from recommending that a student use a psychotropic drug or from suggesting any particular diagnosis, or using the parents' refusal to consent to the administration of a psychotropic drug or to a psychiatric evaluation or examination as the sole reason to prohibit the child from attending class or participating in a school-related activity. [HB 1406]

- Prohibits a school employee from using or threatening to use the refusal of a parent to administer or consent to administration of a psychotropic drug or to consent to any other psychiatric or psychological testing or treatment of a child, as the sole basis for making a report of neglect, with some exceptions. [HB 320]

- Makes exceptions for certain medical personnel and for discussions about the child's behavior and academic progress between a school employee and the parent or another school employee. [HB 1406]

Immunizations

- Physician's affidavit must now state that the immunization poses a "significant risk" (instead of "would be injurious") to the health and well-being of the student or any member of the student's family or household. [HB 2292]

- Parent's affidavit must now state that he or she declines the immunization for "reasons of conscience, including a religious belief" (instead of that the immunization "conflicts with the tenets and practice of a recognized church or religious denomination of which the applicant is an adherent or member"). [HB 2292].

CONFLICTS

- The definition of "political advertising" now includes a communication on an Internet website. [HB 1606]

- School board trustees in districts of over 5,000 enrollment on or after January 1, 2005, must file a personal financial statement as required under Government Code Chapter 572. The first such statement is due April 30, 2005 to reflect personal financial activity for 2004 and must be filed with (1) the board of trustees, and (2) the Texas Ethics Commission. The personal financial statement form may be accessed at: http://www.ethics.state.tx.us/filinginfo/pfsfrm1.htm. [HB 1606]

GOVERNANCE

- TEA's compliance monitoring of programs or processes is limited only to ensure (1) compliance with federal law and regulations, (2) financial accountability, including compliance with grant requirements, and (3) data integrity for PEIMS and Chapter 39 accountability. The school board has primary responsibility for ensuring that the district complies with all applicable requirements of state educational programs. [HB 3459]

- Consolidation and annexation process under Chapters 13 and 41 now permits greater flexibility in effective date and governance details of the new district. The districts may agree in the consolidation agreement how the new consolidated board will be structured and provide other details that will bind the new district. [HB 3459]

2003 LEGISLATIVE UPDATE -- COMMUNITY COLLEGES

Myra McDaniel
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.

PUBLIC INFORMATION ACT

SB 84 amends the definition of "prompt" production of information to mean as soon as possible under the circumstances, that is, within a reasonable time, without delay. Effective September 1.

SB 919 adds common and contract carriers to the definition of timeliness of action by U.S. mail and Interagency mail. Effective September 1.

HB 2032 permits disclosure of the email address of a member of the public if the person has a contractual relationship with the governmental body or the address is provided on a letter head or other document made available to the public. Additionally, the bill makes use for purpose other than the purpose for which the confidential information was received or permitting inspection and/or disclosure of confidential information by a person not authorized an offense. Effective September 1.

LOCAL GOVERNMENT OFFICIALS

SB 735 provides that elected or appointed local government officials may be appointed to the governing body of a state agency if otherwise eligible, but may not receive compensation for service on the governing body of the state agency other than reimbursement for reasonable and necessary expenses. Effective September 1.

INTERNAL MAIL SYSTEM

HB 736 prohibits the use of the internal mail system for political advertising unless the advertising is delivered to the premises through the U.S. postal service or is the subject of or related to an investigation, hearing or other official proceeding of the agency or municipality. Effective September 1.

TRADEMARK OR SERVICE MARK

SB 1532 establishes a classification of goods and services that conforms to the classification adopted by the U.S. Patent and Trademark Office; permits the secretary of state to amend the trademark records to reflect a change of registrant address; establishes registration by electronic filings and reproduction. Effective September 1.

AD VALOREM TAXES

HB 136 limits the amount of taxes that may be imposed by a county, city or community college district on residence homesteads of disabled and/or individuals 65 years of age or older. The total annual amount of ad valorem taxes may not be increased above the amount imposed in the first tax year preceding the tax year in which the limitation was established unless the individual makes improvements that enhance the value. Effective January 1, 2004 if the constitutional amendment is approved by the voters.

CONTRACTS AND PROCUREMENT PROCEDURES

SB 733 provides that local governments in counties with a population of 50,000 or less may purchase an item from local vendors without following a competitive purchasing procedure if the vendor's price is equal to or less than the price under a government purchasing program of the state. Effective September 1.

SB 850 permits refusal to award a contract with an apparent low bidder or successful proposer that is indebted to the community college if the Board establishes a resolution to that effect. Effective September 1.

SB 1331 provides for use of a construction manager-agent method for a project and also requires designating an engineer or architect to prepare construction documents for a project unless the engineer or architect has been hired to serve as the construction manager-at-risk. Effective September 1.

EMPLOYEES

HB 898 permits community colleges to participate in the state's contract for travel services; and requires that the college not reimburse an employee or officer for travel expenditures in excess of the applicable amount determined using the state travel allowance guide adopted by the comptroller.

HB 3308 provides that employers may elect to pay wages to employees through a direct deposit plan. Effective September 1.

STUDENTS

HB 256 provides that students may be excused from attending classes, including examinations for the observance of a religious holy day, including time for travel. Effective for the Fall 2003 semester.

HB 261 provides that the spouse or child of a member of the Armed Forces who has been assigned to duty elsewhere immediately following assignment to duty in Texas is entitled to pay resident

tuition and fees. If the member of the Armed Forces is killed, the spouse or child may pay resident tuition if the spouse or child becomes a resident within 60 days of the date of death. Effective when signed by the Governor.

HB 944 prohibits colleges from requiring home schooled students to obtain credentials or certificates of high school equivalency or to take an examination other than that generally applicable to other applicants for admission. Effective September 1.

HB 1621 permits community colleges to waive all or part of the tuition and fees for high school students enrolled in course for which the student receives joint credit. Contact hours attributable to enrollment shall be included in the contact hours used to determine the college's proportionate share of state money even if the college waives all or part of the tuition or fees. The bill also permits pledging 25% of the tuition charges for payment of grants. Effective when signed by the Governor.

HB 3015 permits the college to charge a different tuition rate for each program and course level as it considers appropriate to increase graduation rates, encourage efficient use of facilities or enhance employee performance. Effective when signed by the Governor.

SB 814 exempts military from the requirements of the Texas Academic Skills Program. Effective when signed by the Governor.

SB 968 establishes a program to provide student financial aid offices at community colleges with information and other assistance to enable those offices to provide students with information and referrals regarding the availability of and services offered by individual development account programs. Effective when signed by the Governor.

SB 1546 prescribes the amount of laboratory fees for community colleges. Effective when signed by the Governor.

SB 1652 is an omnibus bill on issues related to higher education institutions covering the following issues applicable to community colleges:

- non public purpose portions of mixed use property owned by the institution are subject to ad valorem tax;
- some of the requirements for higher education authorities have been changed, including provisions about revenue bonds;
- adopted students formerly in foster or other residential care are exempt from payment of tuition and fees if they were the subject of an adoption assistance agreement under Chapter 162 of the family Code;
- colleges may charge a fee (in an amount reasonable related to the expense incurred by the institution in processing and handling) in addition to the amount of tuition or other charge including a service charge for the transaction, charges for dishonored checks, etc.;
- compensation for condemnation by a college does not include any amount that compensates for, or is based on, the present value of an exemption from ad valorem taxation applicable to the property before its condemnation;
- if a college brings suit to collect delinquent student loans, the college must pay in advance one-half of the applicable filing fees; if the borrower prevails, the college will pay the rest of the court costs. If the college prevails, the judgment will include a finding that the borrower is liable to the college for the full amount of filing fees and costs and the college shall pay the remaining one-half of the filing fees not later than the seventh day after the borrower pays the institution.
- if a college processes its own payroll, it is not required to submit payroll information to the comptroller relating to individual employees that is not required to make any distribution of state money to the institution to cover the college's payroll.
- a college may contract with an employee for the deferment of any part of the employee's compensation;
- a college may create a 457 plan for deferred compensation;
- the names of donors may be excepted from the open records requirement, but the amount or value of an individual gift, grant or donation shall be disclosed.

Effective when signed by the Governor.

2003 LEGISLATIVE UPDATE -- ELECTION BILLS

David Mendez
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.

*The following bills **take effect September 1, 2003:***

HB 54 – Changes in the early voting by mail procedure:
- Adds several sections to the Election Code containing penalties for violations and makes some offenses state jail felonies;
- Amends the Penal Code to make the stealing of an official ballot or official carrier envelope an offense;
- Requires that the notice of Voters' Rights be mailed with other material and ballot to those voters voting by mail;
- Information about a person to whom a ballot has been sent by mail will not be available until the first business day after the Election Day or on the day following the date the ballot is received.

HB 2636 – If information is missing from an application for a ballot by mail and a telephone number or e-mail address is listed, the clerk shall notify the applicant by that medium and if the missing information is received by the prescribed time, the applicant is entitled to receive a full ballot to be voted by mail. If the information is received after the deadline for that election, the voter is entitled to receive a full ballot for all elections that occur after that date.

HB 1695 – Changes in the Election Code:
- Requires access on election day for disabled voters at the main early voting polling place from **7a.m. to 7p.m.**;
- Establishes the 45th day after the date of the final canvass of the main election as the last day a runoff election can be held;
- Requires the Secretary of State to adopt standards of training for election judges and provides for payment for training;
- Requires the canvass of elections held jointly with an election of a county or under an election services contract with the county to be held on the **7th day** after the election;
- Amends some of the duties for the early voting ballot board in Section 87.

HB 2094 – Defines "assistance" in reference to voting as:
- Reading the ballot to the voter;
- Directing the voter to read the ballot;
- Marking the voter's ballot;
- Directing the voter to mark the ballot.

HB 736 – Makes unlawful the use of an internal mail system for political advertising.

HB 1696 – A watcher that serves more than five continuous hours can choose his/her hours to be at the polling place except that if the watcher is present at the polling place when ballots are counted, the watcher may not leave until the counting is complete.

HB 2093 – Electioneering at polling places during early voting is not allowed in or within 100 feet of any outside door through which a voter may enter.

HB 2085 – Requires the appointment of at least one clerk who is fluent in both English and Spanish to serve at a central location to provide assistance for Spanish-speaking voters on Election Day.

*The following Bill **takes effect November 1, 2003:***
SB 1215 – The following deadlines in the Election Code for elections are changed:
- Elections must be called by the 62nd day before the election day;
- Filing deadline for candidates is 62nd day before election day;
- Filing deadline for place on ballot changed to 57th day before election day, if no application received from a candidate by deadline of Section 143.007;
- Filing deadline for candidates of political subdivisions other than county or city is the 62nd day before election day;
- Other deadlines required by other laws must be adjusted by appropriate action of the governing body to conform to these requirements; the Secretary of State shall prescribe any rules necessary;
- Deadline for withdrawal of candidacy is the 62nd day before election day;
- Deadline for name of ineligible candidate or candidate who has died to be left off the ballot is the 53rd day before election day.

The following deadlines in other codes are changed:
- Water Code deadline for write-in candidates is 5th day after the date an application for place on the ballot is required to be filed;
- Education Code deadline for application for place on the ballot to be filed no later than 62nd day before election day;
- Education Code deadline for write-in candidates is 5th day after the date an application for place on the ballot is required to be filed;
- Health and Safety Code deadline for write-in candidates is 5th day after the date an application for place on the ballot is required to be filed.

*The following Bill **takes effect January 1, 2004:***
HB 1549 – Relating to changes required in election laws to implement the federal Help America Vote Act of 2002:
- Uniform election date for May changed to the Third Saturday;
- Statewide voter registration system;
- All voting systems be accessible for individuals with disabilities;
- Reimbursement for replacement of punch card or lever machine voting systems;
- Provide for provisional voting.

DO I HAVE TO GET BETWEEN MOM AND DAD?

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1. Introduction

This paper focuses on the hard situations that arise when parents do not agree on educational decisions affecting their children. Teachers, principals and counselors can unfairly be put in the middle of an enormous tug-of-war. What is the obligation of the schools to the child and their parents?

The good news is that custody orders (more formally known as "orders in suits affecting the parent-child relationship") bind the parents, not the schools. In other words, neither a school nor its employees should be held in contempt for violating a custody order, since they were not parties to the suit and have not been ordered to do (or not do) anything.

It would be unusual for a school employee to be held responsible when a custody order is violated, but there are two statutes that should be noted. First, if a restraining order or an injunction has been issued by the court against a parent, and the school receives a copy of the order, Texas Rule of Civil Procedure 683 provides that injunctions and restraining orders are binding upon people in active concert or participation with a party who "receives actual notice of the order by personal service or otherwise." Second, Texas Family Code Chapter 42 provides that someone who aids or assists in retaining or concealing the whereabouts of a child in violation of another person's possessory right of the child is civilly liable if the person assisting had actual notice of the order or had reasonable cause to believe that there was an order and it was being violated.

Schools should not intentionally thwart orders of the court. However, educating students is a hard enough job without having to figure out what court order is in place and deciphering what it means. This paper is an attempt to navigate the murky waters of what to do when Mom and Dad are at odds about Junior.

2. Who are the legal parents of a child?

"Parent" is defined four different ways in four different places for the purpose of school law. The conflicting nature of these definitions can cause confusion. The definition of a "parent" for the purpose of parental rights in a school setting "includes a person standing in parental relation."[1] The term does not include a person as to whom the parent-child relationship has been terminated or a person not entitled to possession of or access to a child under a court order."[2]

Pursuant to the Texas Family Code, a person is considered to be the mother of the child if:

a) she gives birth to the child; or
b) maternity has been adjudicated; or
c) she legally adopts the child; and
d) her rights have not been terminated.[3]

A person is the legal father of a child if:

a) he is married (or believes that he is married) to the mother of the child at the time the child is born; or
b) the child is born within 301 days after the marriage ends, regardless of whether the marriage ends by death or divorce; or
c) he marries the mother of the child after the child was born, voluntarily asserts paternity, and this assertion is in a record filed with the bureau of vital statistics, or he is voluntarily named on the child's birth certificate; or he promised in a record to support the child as his own; or
d) he executes an unrevoked and unsuccessfully challenged acknowledgment of paternity; or
e) he is adjudicated to be the child's father; or
f) he adopts the child; or
g) he consents to assisted reproduction by his wife, which resulted in the birth of the child (i.e. used a surrogate).[4]

FERPA defines a parent as a guardian, a natural parent, and an individual acting as a parent in the absence of a parent or guardian.[5] This definition should be used for issues surrounding a request for student records.

Finally, the IDEA defines a parent as a natural or adoptive parent; a guardian, but not the state if the child is a ward of the state; a person acting in the place of a parent, such as a grandparent or step-parent with whom the child lives or a person who is legally responsible for the child's welfare; or a surrogate parent who has been appointed in accordance with IDEA regulations.[6]

This definition should be considered when the issue involves a student with a disability.

3. Who has the legal right to make decisions regarding a child's education?

The Texas Family Code sets out a long list of rights and duties of a parent when there is no court order limiting these rights and duties.[7] The two provisions that deal with education are Texas Family Code §151.001(a)(3) and (10). Specifically, parents have the duty to provide the child with an education and the right to make decisions concerning the child's education.

The Texas Education Code expands the right to make educational decisions for the child to those "standing in parental relation" to the child.[8] This would presumably mean that if the child had no parent acting on his behalf with the school, then whoever was caring for the child would have this right. Interestingly, the Texas Education Code also limits parental rights by providing that a person who is not entitled to possession or access to a child (but who is otherwise a parent of the child) is not a "parent" for the purpose of exercising the parental rights provided in the Texas Education Code.[9] That limit is not recognized by the Texas Family Code. It is possible that a court order would give a parent the right of access to educational records of a child while giving them no rights of possession and access to a child. However, it is unlikely that a parent would be given the important right to make educational decisions while having no right of access to the child.

Even if the parents are separated, both parents may exercise their rights and duties independently as long as there is no court order limiting them. For example, Mom and Dad are separated. Mom has filed for divorce, but there is no court order in place yet. Billy is a student with some special needs. At the ARD meeting, which both Mom and Dad attend, they are asked to make a decision about whether they want Billy mainstreamed or whether they want him to be in special education classes. Who has the right to make this decision? They both do, independently. If the parents disagree about what should be done, what are the schools to do? There is no clear answer. Encouraging the parents to get some temporary orders in place through the divorce process would be the best bet.

If the parents have a court order in place, the order may give the right to make educational decisions to one parent. However, the order may allow each parent to make educational decisions independently or require the parents to agree on the educational decisions. The obvious problem here is when parents (who both have rights of possession and access to the child) do not agree. If each can make independent decisions, then a real tug-of-war could develop if conflicting decisions are made. In situations where the parents must agree on educational decisions and they do not agree, the schools are left in a hard place. The best resolution is for the parents to modify their court order to allow one parent to make these decisions.

Finally, poorly drafted custody orders may be completely silent on who has the right to make educational decisions. If this is the case, and the parents are arguing over who has this right, the parents should be encouraged to modify their court order so that it is finally decided who may make these decisions.

4. How do I decipher custody orders?

With the invention of form books and pretty specific family code provisions, most custody orders look alike. The provisions regarding the children are divided into three categories: a) Conservatorship – This portion sets out the rights and duties of each parent; b) Possession and Access – This portion sets out who has visitation with the child and when; c) Support – This portion sets out how much child support is to be paid, who is to provide medical insurance, and how uninsured medical expenses are to be split.

Conservatorship (the rights and duties of each parent) is divided into three categories: 1) rights a parent has at all times;[10] 2) rights a parent has during their visitation period;[11] and 3) the "big" rights.[12]

Parents who are appointed conservators will typically have the following education-related rights at all times (i.e. whether the child is currently in their possession or not):[13]

1) the right to receive information from the other parent and to confer with the other parent in making decisions concerning the education of the child;
2) the right of access to the educational records of the child;
3) the right to consult with school officials concerning the child's educational status and school activities;
4) the right to attend school activities;
5) the right to be designated on a child's records as a person to be notified in case of emergency.

If a right is omitted from the order, the parent does not retain that right.[14]

There are no rights specifically related to education that a parent has only during his or her period of possession of the child.[15]

The third set of rights is considered to be the "big" rights and make custody litigation lengthy and expensive. What makes this part of the order a bit tricky is that these rights can be assigned to one parent, assigned to both parents to be exercised independently, or require the agreement of both parents. The right to make decisions concerning the child's education is part of this set.[16]

The school lawyer should pay little attention to what a party is called (sole managing conservator, joint managing conservator, possessory conservator). Many cases are settled by naming someone a joint managing conservator when, in fact, they have the rights of a possessory conservator. What really matters is not what a parent is called in the order, but the rights assigned to the parent.

5. What should a school do if a parent requests their child's school records and their divorce decree does not give them the right of access to educational records?

Three somewhat conflicting laws converge to make this question a hard one to answer. First, pursuant to the Texas Family Code, unless limited by court order, parents have the right of access to the educational records of their children.[17] Although unusual, if there is a good reason, courts will sometimes restrict this right. This limitation may be spelled out in the court order or the right may simply be omitted in the order. If there is a court order and this right is not specified in the court order, the parent does not retain this right.[18]

Second, the Texas Education Code provides that "a parent is entitled to access to all written records of a school district concerning the parent's child."[19] However, people who have no right of possession or access to their child are not "parents" for the purpose of this code section.[20]

Finally, FERPA requires that schools receiving federal funds allow parents access to their children's records.[21]

Probably the prudent thing to do in this situation is follow the court order. If the court order is silent on whether the parent has a right of access to the child's educational records or it denies the parent access to the records, it is probably safe to deny the request based on the divorce decree.

The only unresolved issue is FERPA which states: "No funds shall be made available . . . to any educational agency . . . which has a policy of denying, or which effectively prevents, the parents of students . . . the right to inspect and review the education records of their children."[22] However, the obvious intent of this legislation is to allow a parent access to a child's educational records. It is not the obvious intent to allow such access to a person whose rights have been limited by a court order.

6. What can school employees expect when they are subpoenaed to testify in custody cases?

In custody litigation, it is common for all of the adults to be represented. Children often do not have anyone to speak for them or to even give the court unbiased information on how they are doing. Since school employees spend most of a child's waking hours with them during the week, they are often important witnesses in custody litigation.

Usually the information sought from a school employee will be factual information such as:

a. how is the child doing in school
b. attendance record of the child
c. does the child get to school on time
d. who brings the child to school on days when s/he's late
e. whether either parent has ever been late picking the child up from school, if so, how often, when, why
f. is the child clean and appropriately dressed when s/he comes to school
g. who typically signs homework, report cards
h. who comes to parent/teacher conferences
i. how does the child react when Mom picks them up from school
j. how does the child react when Dad picks them up from school
k. whether either parent volunteers at the school, if so, how often and for what
l. any concerns about Mom or Dad
m. does the child appear to have a preference for Mom or Dad.

Rarely is it a good strategy for a lawyer to rake a school employee over the coals. Aside from the normal aversion a person has to being a witness in court, school employees are often reluctant to come to court due to their concerns about tainting their relationship with a parent or the child. The purpose of their testimony is not to say which parent is better, but to tell what they know about the child and how they are doing at school.

7. A school teacher received a subpoena the day before a hearing via facsimile requesting that documents be produced. The subpoena requests that all the student's records be produced. How do I advise him?

This scenario raises a couple of questions. First, is the faxed trial subpoena valid? Technically, no. Texas law provides that the subpoena must be delivered to the witness (or their lawyer, if represented) by someone not a party to the suit and 18 years of age or older, and the $10 witness fee must be tendered.[23] In this scenario, the subpoena would not be technically valid because it was not delivered by a person and the $10 witness fee was not tendered.

Although there is no rule regarding how much notice one must give to a testifying witness, the rules do require that the summoning party be "diligent" in its efforts to procure the testimony of a witness.[24]

Second, the schoolteacher is probably not the custodian of records for the school. The documents in her possession, custody or control are the records that she kept, but probably not the student's other records (i.e. counseling records, enrollment records). Therefore, the teacher should not be required to produce documents not in her custody or control.[25]

As a practical matter, when a witness is friendly, it is not unusual for a lawyer to ask the witness if they will accept a faxed subpoena in order to keep litigation costs down. Most friendly witnesses only need a subpoena to show to their employer. If the teacher has agreed to accept a faxed subpoena, it would be best for him to comply with it. Furthermore, having one employee (the schoolteacher) out of the office instead of two (the schoolteacher and the custodian of records of the school) is probably best for everybody. It will be up to the party issuing the subpoena to worry about whether the school records not kept by the school teacher can be authenticated by the school teacher.

As a family lawyer who has had cases won and lost by the testimony of school employees, I would encourage school employees to come to court cheerfully knowing that they are going to be highly regarded by the courts, and that they are often the only unbiased voice for the child.

8. Are school counselor's records confidential?

If a parent requests a child's counseling records from a school, the records may only be withheld under limited circumstances.[26] Several things must be considered in determining whether a parent's access to the school counseling records of their child may be denied. First, has the parent's right of access to educational records been limited by court order?[27] If so, then they probably should not be produced. If not, then were the records kept in the sole possession of the counselor, used only as the counselor's personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the counselor?"[28] If not, then the records should be produced. If so, then it must be determined whether the counselor is a "professional" as defined by the Health and Safety Code.[29] If the counselor does not meet the definition of a "professional", then the records should be released.[30] If the counselor is a "professional" under the statute, then has the counselor determined that the release of the record would be harmful to the child's physical, mental, or emotional health?[31] If so, then the records need not be released, if not, then they should be.

If the counselor's records are subpoenaed in a custody proceeding, school counselors' records are typically not confidential. Texas Rule of Evidence 510 provides that communications between mental health professionals and their patients are privileged in civil cases; however, there are exceptions. Even if the school counselor could meet the definition of a "mental health professional" for the purposes of the privilege provided by rules of evidence,[32] the information regarding the child regularly comes in under an exception.

Texas Rule of Evidence 510(d)(5) provides that "Exceptions to the privilege in court or administrative proceedings exist as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." It is customary for the mental health records of all of the parties and their children to be considered by the court in custody litigation.

9. May a parent come to the school on days when it is not his/her period of possession?

If a custody order is in place and the order gives a parent the right to attend school activities, it is unlikely that a parent would be held in contempt for coming to have lunch with a child, attend a school party, attend a school play, or some other activity at the school. There is no case law defining "school activity" for the purpose of custody litigation.

In unusual circumstances, a parent may not have the right to attend school activities. In this case, the parent should not be at school events. In extreme cases, a parent may be restrained from coming to the school at all, either through a temporary restraining order, temporary injunction, permanent injunction or protective order. If this is the case, the school should get a copy of the order and abide by it. As mentioned in the introduction above, Texas Rule of Civil Procedure 683 provides that injunctions and restraining orders are binding upon people in active concert or participation with a party who receive "actual notice of the order by personal service **or otherwise.**" (emphasis added)

If the parent's attendance at the activity is disruptive to the child, and the disruptive parent will not agree to stay away from school events, the parents should be encouraged to modify their court order so that it is clear who has the right to come to which activity.

10. Are custody orders from other states valid and enforceable in Texas?

Custody orders from other states are valid and enforceable in Texas under both the Uniform Child Custody Jurisdiction & Enforcement Act (state law)[33] and the Parental Kidnapping Prevention Act (federal law).[34]

11. May step-parents attend ARD meetings over the objection of the legal parent?

Unless a school has a policy of allowing step-parents or other third parties to attend ARD meetings, a step-parent probably has no legal right to attend an ARD. It would be unusual for a

custody order to address this issue. This issue is best dealt with through school policy.

12. Does a parent who has a right of access to mental health records have a right to attend ARD meetings?

Although there is no case law on this issue, there are several different rights a parent may have in a custody order that may be interpreted to give a parent the right to attend an ARD meeting:

a) The right to make educational decisions for their child[35] – If a parent has this right, they should be able to attend ARD meetings.
b) A right of access to medical, dental, psychological, and educational records[36] – This right would probably not include the right to attend an ARD meeting. Certainly, if any medical or educational records were reviewed or produced as part of the meeting, the parent would have a right to access those records.
c) The right to attend school activities[37] - It is arguable that an ARD meeting is a school activity, and a parent who has the right to attend school activities probably has the right to attend an ARD meeting. However, the parent(s) with the right to make educational decisions is the one who can ultimately make the decisions.
d) The right to consult with school officials concerning the child's educational status and school activities[38] – Certainly a parent with this right would be able to attend an ARD meeting.

13. What should a school do when a parent shows up to pick up their child and it is not their time pursuant to a custody order?

Unless a school or one of its employees has received notice of a court order or has reason to believe that the person coming to pick up the child is violating a court order, school districts and their employees should not deny a parent access to their child.[39]

Parents sometimes agree to a visitation schedule that is different than what is written in their court order. Most visitation orders will begin with the following language:

"IT IS ORDERED that the conservators shall have possession of the child at times mutually agreed to in advance by the parties, and, in the absence of mutual agreement, it is ORDERED that the conservators shall have possession of the child under the specified terms set out in this Standard Possession Order."

If parents have agreed to go outside of the court ordered visitation times, schools would not have a right to force parents to comply with the schedule in the order.

14. What is a Protective Order and what is the school's obligation when there is a one?

Protective Orders are issued when family violence has occurred and is likely to occur again in the future.[40] A protective order can require a parent to stay a specified distance (typically 200 yards) away from where a child goes to school. These orders are unusual in their enforcement. Unlike most civil orders that are enforceable through contempt, violation of a protective order – a civil court order – is a violation of the Texas Penal Code.[41] A person who violates a protective order may be immediately arrested.

The clerk of the court is responsible for sending a copy of a protective order to the school of a child protected by the order.[42] As a practical matter, the clerk will only send the information if the attorney for the protected party gets the information about where the child goes to school to the clerk. It is a good idea to get a copy directly from the protected person if the school is aware that there might be an order, but has not yet received a copy from the clerk. For the safety of everyone involved, schools should call the police immediately if a protective order is violated.

15. What should a school do when a parent shows up to pick up their child and s/he is not listed on the enrollment card as a person that can pick up the student?

Unless limited by court order, a parent has a superior right of possession of their child to a third party[43] (e.g. the school). Absent a court order to the contrary and regardless of whether a parent is listed on the enrollment card (presumably by the other parent who filled out the card) as a person who may pick up the child, a person who can prove that they are the parent of the child should be able to pick up the child from school.

If the school has been given notice of a court order limiting this right, or the person cannot prove that they are the child's parent, then there is no obligation to allow the child to go with the parent who is not on the enrollment card (or a parent who is on the enrollment card, for that matter).

16. What happens when there is a person with power-of-attorney for a parent of a child?

The important thing to note about powers of attorney is that they do not limit a parent's right to their child, and they are revocable at any time.[44] They expand the number of people who may perform the rights or duties given by the power of attorney. For example, if Mom signs a power of attorney giving Grandmother the power to enroll her child in school, then both Mom AND Grandmother may enroll the child in school. Giving Grandmother the authority to enroll a child in school through a power of attorney does not take away that right from Mom.

17. When is a school obligated to report child abuse or neglect?

Child abuse and neglect is defined in Texas Family Code §261.001(1), (4). A person who has reason to believe that a child has been abused or neglected must immediately report what they know to the Texas Department of Protective and Regulatory Services[45] (1-800-252-5400). Teachers and other professionals are required to report within 48 hours of first suspecting the abuse or neglect.[46] A teacher or other professional may not delegate to or rely on another person to make the report.[47] The requirement to report applies without exception to otherwise privileged communications.[48] In other words, if a client tells an attorney about a situation where the client abused or neglected their child, the attorney must report it.

18. Conclusion

Schools encounter highly charged emotional situations when parents are in custody litigation. In some instances there are black and white laws and court orders to guide them. In many situations the school district will have to look to their own policies, perform social work, and refer parents to the courts to resolve the conflicts so that they can get back to the mission of educating children.

ENDNOTES

1 Texas Education Code § 26.002
2 *Id*.
3 Texas Family Code §§101.024, 160.201
4 Texas Family Code §§101.024, 160.201 and 160.204
5 34 C.F.R. 99.3
6 34 C.F.R. 330.20
7 Texas Family Code § 151.001(a) states that a parent of a child has the following rights and duties:
(1) the right to have physical possession, to direct the moral and religious training, and to establish the residence of the child;
(2) the duty of care, control, protection, and reasonable discipline of the child;
(3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
(4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
(5) except as provided by Section 264.0111, the right to the services and earnings of the child;
(6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
(7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
(8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
(9) the right to inherit from and through the child;
(10) the right to make decisions concerning the child's education; and
(11) any other right or duty existing between a parent and child by virtue of law.
8 Texas Education Code §26.002
9 *Id*.
10 Texas Family Code §153.073
11 Texas Family Code §153.074
12 Texas Family Code §153.132
13 A complete list of the rights-at-all-times that parents appointed conservators typically have are: the right to receive information from the other parent and to confer with the other parent in making decisions concerning the health, education, and welfare of the child;
    1) the right of access to the medical, dental, psychological, and educational records of the child;
    2) the right to consult with a physician, dentist, or psychologist of the child;
    3) the right to consult with school officials concerning the child's educational status and school activities;
    4) the right to attend school activities;
    5) the right to be designated on a child's records as a person to be notified in case of emergency.
    6) the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
    7) the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.
14 Texas Family Code § 153.073(b)
15 A complete list of rights conservators typically have during their periods of possession are:
    1) the duty of care, control, protection, and reasonable discipline of the child;
    2) the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure:
    3) the right to consent for the child to medical and dental care not involving an invasive procedure;
    4) the right to consent for the child to medical, dental, and surgical treatment during an emergency involving immediate danger to the health and safety of the child; and
    5) the right to direct the moral and religious training of the child.
16 A complete list of the "big" rights under Texas Family Code §153.132 are:
    1) the right to establish the primary residence of the child;
    2) the right to consent to medical, dental, and surgical treatment involving invasive procedures, and to content to psychiatric and psychological treatment;
    3) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
    4) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
    5) the right to consent to marriage and to enlistment in the armed forces of the United States;
    6) the right to make decisions concerning the child's education;
    7) the right to the services and earnings of the child; and
    8) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.
17 Texas Family Code §153.073(a)(2), 151.001(a)(10)
18 Texas Family Code §153.073(b)
19 Texas Education Code §26.004
20 Texas Education Code §26.002
21 20 U.S.C. §1232g(a)(1)(A)
22 *Id*.
23 Texas Rule of Civil Procedure 176.5 and Civil Practices and Remedies Code §22.001
24 *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 526 (Tex. App. – Houston [1st Dist.] 1994, no writ) – 9 days not diligent; *Victor M. Solis Underground Util. & Paving Co. v. City of Laredo*, 751 S.W.2d 532, 537 (Tex. App. – San Antonio 1988, writ denied) – 3 days not diligent; *Dairyland Cty. Mut. Ins. Co. v. Keys*, 568 S.W.2d 457, 460 (Tex.App. – Tyler 1978, writ ref'd n.r.e.) – day of trial not diligent.
25 *In re Colonial Pipeline*, 968 S.W.2d 938, 942 (Tex. 1998); *Smith v. O'Neal*, 850 S.W.2d 797, 799 (Tex.App. – Houston [14th Dist.] 1993, no writ).
26 Op. Tex. Att'y Gen. No. JC-0538 (2002)
27 Texas Family Code §153.073(a)(2), (b)
28 Op. Tex. Att'y Gen. No. JC-0538 (2002)
29 *Id*. See also, Texas Health and Safety Code §611.001(2)
30 Op. Tex. Att'y Gen. No. JC-0538 (2002)
31 *Id*. See also, Texas Health and Safety Code §611.001(2)
32 Texas Rule of Evidence 510(a)(1) provides: "As used in this rule: 'Professional' means any person: (A) authorized to practice medicine in any state or nation; (B) licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder; (C) involved in the treatment or examination of drug abusers; or (D) reasonably believed by the patient to be included in any of the preceding categories."
33 Texas Family Code Chapter 152
34 28 U.S.C. §1738A
35 Texas Family Code §153.132(6)
36 Texas Family Code §153.073(a)(2)
37 Texas Family Code §153.073(a)(5)
38 Texas Family Code §153.073(a)(4)
39 Texas Rules of Civil Procedure 683 provides that injunctions and restraining orders are binding upon people in active concert or participation with a party who "receives actual notice of the order by personal service or otherwise." And see Texas Family Code Chapter 42.
40 Texas Family Code Chapters 71 – 88 govern family violence protective orders.
41 Texas Penal Code §25.07
42 Texas Family Code §85.042(b)
43 Texas Family Code §151.001(a)(1) provides that "A parent of a child has the following rights and duties: (a) the right to have physical possession . . . of the child"
44 For more information about powers of attorney, see the Durable Power of Attorney Act, Texas Probate Code Chapter XII.
45 Texas Family Code §261.101(a)
46 Texas Family Code §261.101(b)
47 *Id*.; See also Texas Education Code §38.004
48 Texas Family Code §261.101(c)

COGGIN V. LONGVIEW INDEPENDENT SCHOOL DISTRICT: ***DUE PROCESS AND OTHER LESSONS FROM THE EN BANC COURT***

The Fifth Circuit Court of Appeals, in a recent *en banc* decision, has held that school districts may be held liable for constitutional due process violation if they terminate teachers without first affording them a hearing - even if the district's conduct was the result of the Texas Education Agency's error in refusing to appoint a hearing examiner under Chapter 21 of the Education Code in the first instance. *Coggin v. Longview Independent School District*, 337 F.3d 459 (5th Cir. 2003), cert. den., 124 S.Ct. 579.

The *Coggin* ruling makes clear that a district which chooses to terminate a teacher, or otherwise deprive a teacher or other contract employee of a property interest, without an opportunity for a hearing acts at its own peril regardless of the prior action of others. It also provides insight for teachers and those representing teachers regarding the correct response to take when the Texas Education Agency wrongfully denies a request for appointment of a hearing examiner.

I.

Neither the facts nor the underlying legal rules were in dispute. On August 12, 1999, Mr. Coggin received written notice that the board of trustees of the Longview Independent School District had voted to propose the termination of his term contract. On August 24, 1999, he deposited his request for appointment of a hearing examiner into the mail to the Texas Education Agency along with a copy to the board. *Id*. at 461.

The district received its copy two days later on August 26 but TEA did not receive its copy until August 30, 1999. TEA refused to appoint a hearing examiner based on its reasoning that the request, in order to be timely, would have had to have been *received* by TEA not later than August 27, 1999, or 15 days after Coggin received the board's written notice of proposed termination. (Texas Education Code § 21.253 requires that a teacher "file" a request for a hearing with the commissioner within 15 days of receiving the notice of proposed termination.)

TEA's deputy chief counsel wrote to Coggin and the district on September 2, 1999 to notify them of TEA's refusal to appoint a hearing examiner based on the tardiness of the request. On September 13, 1999, the district voted to terminate Coggin's employment without hearing or notice to him. 337 F.3d at 461. At the meeting the Superintendent "showed the Board the TEA letter refusing to appoint a hearing examiner and informed the Board that he had consulted attorneys who indicated that the Board lacked authority to conduct its own evidentiary hearing on the proposed termination under state law." *Brief of Appellant Longview Independent School District*, page 15.

Subsequent to the Board's action Coggin filed suit against the district, the Commissioner and the TEA alleging deprivation of his property interest in employment without due process; he eventually dismissed the TEA and the Commissioner from the case, which left the school district as the sole defendant.

Legally there was no dispute about the underlying rights which were at issue. The district conceded that "its termination of Coggin's employment in the middle of his two-year term employment contract deprived him of a constitutionally protected property interest in continued employment, or that Coggin was entitled to constitutional due process in conjunction with the proposed termination of that employment." 337 F.3d at 462.

After a bench trial Judge Ward in the Eastern District held in favor of Coggin and awarded him in excess of $200,000.00 in damages and attorney's fees.

The district took an appeal to the Fifth Circuit arguing that Coggin had waived his right to a due process hearing by, among other things, his failure to timely file his request for appointment of a hearing examiner. The district also argued that any deprivation of a legally protected interest was the result of the Commissioner's conduct and not properly chargeable against it because a school district is prohibited from conducting Chapter 21 type hearings in termination cases. In support for the proposition that a school board lacks authority to conduct evidentiary hearings the district cited *Montgomery Independent School District v. Davis*, 34 S.W.3d 559 (Tex. 2000).

The Court of Appeals had no difficulty in rejecting the district's first argument; the Court determined that a mailbox rule applied to Coggin's August 24, 1999 request to TEA for the appointment of a hearing examiner. Coggin's request was *mailed* before the 15 day deadline of Texas Education Code § 21.253 expired on August 27, 1999 and was *received* at TEA within three days of the deadline.

In holding that the mailbox rule governs calculations under § 21.253 the court's analysis is straightforward and rational. The Education Code, it noted, at times specifically requires *receipt* of documents in calculating time such as the former requirement that hearing examiners conduct hearings and issue recommendations within 45 days after *receipt* of a request for hearing or the Code's former requirement that a hearing examiner be assigned within 10 business days after the commissioner *receives* a request for hearing. The Code's requirement that a teacher must "file" a request for a hearing within 15 days under § 21.253 could not, therefore, require receipt within 15 days. The appellate panel was also persuaded by a provision from TEA's regulations which specifically utilizes a mailbox rule in requests for hearings. 19 TAC 157.1050 Interestingly, the Commissioner of Education has also noted that the three day mailbox rule of 19 TAC § 157.1050 governs filing requirements. *Belavitch v. Dallas Independent School District*, 109-R1-802 (2002).

The panel next turned its attention to the district's argument that it was the Commissioner's conduct rather than the school district's which was the legal cause of Coggin's constitutional deprivation. The Court quickly addressed a school district's authority to conduct due process hearings in circumstances where jurisdiction had not been already vested in a hearing examiner and held that the *Montgomery* decision "does not prohibit an independent school district from holding a due process hearing in accordance with the federal constitution." 289 F.3d at 337.

In order to respond to the district's next argument, that the "direct cause" or "moving cause" of the acknowledged constitutional violation was "the Commissioner's refusal to appoint a hearing examiner for Coggin rather than the school board's termination of his employment without a hearing," the court reviewed the constellation of jurisprudence developed under 42 USC § 1983 to ascertain who was the final policymaker or final decision maker responsible for the deprivation. 289 F.3d at 333.

Judge Dennis, writing for the panel, reasoned that because neither the TEA nor the Commissioner possessed jurisdiction or other authority to terminate the employment relationship between the district and Mr. Coggin, and because only the district is the "final policy and decision maker with respect to terminating employment contracts for cause," the moving force in the deprivation was the district's action. *Id*. at 335-336. "Although the board knew that Coggin had not been afforded any kind of a hearing, and that he had not waived his right to one, it made a deliberate choice to follow the course of discharging him without a hearing from various alternatives … The Commissioner's failure to appoint a hearing examiner … merely caused Coggin to lose his initial state examiner's hearing, it did not deprive him of his constitutionally protected property right." *Id*. at 336.

II.

In early July, the Fifth Circuit reheard the case en banc and noted at the threshold that "the only question presented is who is the state actor responsible for the violation – the LISD or the Commissioner." *Coggin v. Longview Independent School District*, 337 F.3d 459, 464 (5th Cir. 2003).

Recognizing that under well-developed Texas law the boards of trustees of Texas school districts are "the governing body of the school district [and the] exclusive policy making authority with regard to employment decisions" the en banc court had no difficulty in concluding that liability under 42 U.S.C. § 1983 rested with the district rather than the Commissioner. *Id*. at 464.

The court's analysis of the district's waiver argument centered upon Coggin's purported waiver of procedural due process guarantees by virtue of his failure to seek judicial review under Texas Education Code Section 7.057(d) upon the Commissioner's initial refusal to appoint a hearing examiner. Section 7.057(d) allows for judicial review by a district court in Travis County of "an action of the [TEA] or decision of the commissioner."

The court was not unsympathetic to the district's argument and did not foreclose such an argument in the future. However, because the district terminated Coggin "just 4 business days after his receipt of the Commissioner's notice" it held that the district had "prematurely cut off Coggin's right to appeal under §7.057(d) and unreasonably foreclosed the possibility of a pretermination due process hearing in his case." *Id.* at 463. It was this behavior on the part of the school district – the prompt termination of Coggin after TEA refused to appoint a hearing examiner - which was deemed by the court to give rise to liability and refute an argument that the district was being held responsible for the acts of another. "To the point," concluded the en banc court, "had the school board given Coggin the statutorily allotted time to appeal the Commissioner's decision, there would have been no denial of due process." *Id.* at 466. The "statutorily allotted time" is 30 days as ascertained not from §7.057, which is silent on the topic, but, rather, the Administrative Procedure Act, Texas Gov't Code § 2001.176.

III.

Much of the *Coggin* ruling is unremarkable – the mailbox rule has existed in Title 19 of the Administrative Code for a decade and the well choreographed waltz by which a 'final policymaker' under 42 U.S.C. § 1983 is as much a part of the lexicon of school law as any topic. Also very predictable is the bedrock notion that a state actor can not deprive an individual of a protected interest without due process. "Contrary to LISD's arguments, Texas law has not removed or separated from the school board the function of providing pretermination due process to its employees. Under well established federal law, the constitutional minimums for due process require that the final decision maker must hear and consider the employee's story before deciding whether to discharge the employee." 337 F.3d at 465.

This fundamental federal right would seem to apply even where, as under the recently enacted HB 1022, an employment contract is rendered void by operation of law if a temporary, emergency, or provisional certificate or permit lapses. Of further interest is the legally enforceable duty which school districts have in cases assigned to hearing examiners; would a refusal to assent to a continuance give rise to a due process violation under the right set of facts? Decades ago the United States Supreme Court "clearly rejected" the argument that compliance with state procedures insulates an employer from violation of employee's rights under the Fourteenth Amendment. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The Fifth Circuit's *en banc* decision in *Coggin* is an important reminder of that.[1]

ENDNOTE

1 The *Coggin* decision reminds us also that §7.057 is a multifaceted tool and that the failure to exercise its provisions may result in waiver of significant legal rights.

SOCIAL SECURITY UPDATE

Michael Shirk
Texas State Teachers Association

Not so long ago President Bush stated the obvious in declaring "Social Security faces long term problems that demand bipartisan solutions."[1] After Congress returned from its summer recess in early September the Senate acted promptly to move Social Security amendments out of the Finance Committee for floor consideration and in light of similar action previously taken in the House, there is now the very real probability of changes to the Social Security Act on at least one, and possibly two, provisions which have been of considerable interest to teachers and administrators: the Government Pension Offset (GPO) and the Windfall Elimination Provision (WEP).

History

When the present Social Security Act was passed in 1935 it excluded state and local governmental employers such as school districts. In the 1960's this changed and local public employers were permitted to opt into the federal Social Security structure. The overwhelming majority of Texas school districts elected to remain outside of the Social Security system opting instead for participation in the state's Teacher Retirement System. District employees in nonparticipating districts receive retirement pensions from the System's trust fund which itself is maintained by member and state contributions.[2]

This combination of factors – nonparticipation in Social Security and payment of state pension – results in tens of thousands of Texas school employees being subject to two controversial amendments to the Social Security Act, the Government Pension Offset ("GPO") and the Windfall Elimination Provision ("WEP"). Under each of these provisions education employees forfeit the receipt of Social Security benefits which they would otherwise be entitled to receive but for their employment by a school district which does not participate in Social Security.

Government Pension Offset

In 1977 Congress amended the Social Security Act to bring state pensions (such as TRS annuities) within the definition of Social Security benefits subject to the Act's "dual entitlement" rule prohibiting the receipt of Social Security benefits and full survivor or spousal benefits. As the result of this amendment – referred to as the Government Pension Offset – a retiree who receives TRS benefits will have his or her Social Security spousal or survivor benefits reduced by two-thirds of what he or she receives from TRS. Under the offset it is possible for an employee who retires from employment with a nonparticipating district to lose his or her entire spousal or survivor's benefit even though the employee's spouse paid Social Security taxes all his or her life. There is no similar pension offset for spouses receiving pensions from private sector employers.

Though the GPO applies to any retiree who receives a pension as well as Social Security benefits through a participating spouse, it primarily affects widows and widowers eligible for survivor benefits.

Windfall Elimination Provision

In 1983 Congress again amended the Social Security Act to reduce benefits for employees of nonparticipating districts by passage of the Windfall Elimination Provision. Similar to the GPO, the WEP alters the formula (lowers the "indexing factor") used to calculate earned Social Security benefits of persons who retire from nonparticipating districts. It affects persons who worked in jobs not covered by Social Security **and** in jobs in which they earned Social Security benefits – such as educators who do not earn Social Security but who work part-time or during the summer in jobs covered by Social Security.[3] The WEP also affects people who move from a job in which they earned Social Security to work for a nonparticipating district.

A person's receipt of Social Security benefits can be reduced – if not altogether eliminated – by the combined application of both amendments.

The Debate

By reducing the Social Security entitlements, either through an offset against spousal/survivor benefits or by lowering the indexing factor for calculating earned Social Security benefits, Congress assured itself of a continued debate which pits deeply held interests against one another. Critics of the amendments characterize them as penalties which unfairly result in forfeiture of earned benefits targeting the most vulnerable members of our nation. Furthermore, the amendments serve as powerful disincentives which discourage creative and talented individuals presently working in other fields from considering public education as a career.

Conversely, supporters are quick to note that a district's choice not to participate in Social Security allows salary pass-through to district staff and that the TRS trust fund is more capable of meeting the future needs of school employees. There is also the issue of fiscal constraint; allowing teachers to obtain full Social Security benefits would, according to one estimate, cost 38 billion dollars over ten years.[4]

Congressional Response

Congressional action was anticipated this session, if for no other purpose than to address the "last day rule." Presently, an employee who works in a nonparticipating district may avoid the offset against his or her receipt of full spousal/survivor benefits simply by going to work at a participating district for as little as one day prior to retirement. Because Texas school districts were permitted to individually decide whether or not they would participate in Social Security, and in light of the large number of districts in Texas, use of the "last day rule" by education retirees to avoid the loss of federal benefits is as uniquely Texan as Bluebonnets and the Alamo. Understandably the device of single day employment with a participating district to skirt the GPO has generated some discussion and is often referred to as a "loophole."[5]

Both houses of Congress acted this session to pass legislation eliminating the "last day rule." Under the terms of HR 743, school employees will only be able to avoid the effects of the Government Pension Offset by working for districts which pay into both systems (Social Security and TRS) for at least the last 60 consecutive months of employment.

The effective date closing the one-day exemption from the GPO will be June 30, 2004; a school district employee who wishes to avoid loss of Social Security spousal/survivor benefits due to the GPO must, under the Senate bill, avail him or herself of the "last day rule" by working in a Social Security district on or before June 30, 2004. Thereafter the only avoidance of the GPO is by five years' consecutive employment in a district that pays into both retirement programs. Indications are that the House will accept this effective date rather than send the bills to Conference committee.

The Senate version – expected to be adopted by the House - contains a transitional provision which allows an employee who has worked in a Texas school district which has paid into both TRS and Social Security prior to enactment of HR 743 to count those years toward the qualifying five years. the employee must, however, work the last month in a district that pays into social Security; this transitional exception expires in June, 2009.

There has been an effort to bring forward a competing set of amendments. The Coalition to Assure Retirement Equity, a coalition of unions, education associations and senior citizens' groups is actively seeking to repeal the Government Pension Offset/Windfall Elimination Provision and supports Congressional passage of the Social Security Fairness Act of 2003 (S. 349/HR 594) which presently has 261 House cosponsors and 24 Senate cosponsors. Whether it will make it to a floor vote this session is an open question in light of recent Congressional activity. Presently HR 594 remains in the House Ways and Means Subcommittee on Social Security with Representative Clay Shay (R-FL) showing little interest in allowing it out of the Subcommittee.

ENDNOTES

1 Statement by the President – On the 2003 Report of the Social Security Trustees.
http://www.whitehouse.gov/news/releases/2003/03/20030317-2.html

2 Texas was unique among the states in allowing school districts to individually elect to participate or not participate in Social Security rather than imposing a state-wide rule. Only Georgia permitted such a localized process. The following school districts participate in Social Security for all employees: Anahuac, Austin, Banquete, Belton, Brookeland, Brownwood, Evant, Ft. Davis, Hudson, Iraan-Sheffield, Lackland, La Gloria, Port Arthur, Premont, Randolph Field, San Antonio, Somerville, Tidehaven, and West Rusk. Additionally there are a score of districts that cover some, though not all, employees through Social Security. The remaining districts (1000+) are nonparticipating districts whose employees pay only into TRS.

3 Over 25% of Texas teachers work for entities in addition to their employment with school districts. The teachers earn, on average, an additional $3,250.00 a year from moonlighting, but suffer the Social Security consequences of the WEP. *Moonlighting: the 2002 Report*, Ignacio Salinas, Jr.
http://www.tsta.org/news/Public%20Relations/newsrelease_moonlighting2002.shtml

4 New York Times, April 28, 2002; *Can You Afford to Be a Teacher?*, James Schembari. http://www.nea.org/lac/schembari.html

5 The Facts, July 8, 2003; *Social Security Loophole Needs a Look*, Kelly Hawes. http://thefacts.com/printstory.lasso?WCD=8936

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