State Bar
Section Report
School Law

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Dear School Law Section Members,

What an exciting year to be a school lawyer! One of my favorite things about being a school attorney is the wide variety of issues I deal with on a day-to-day basis. Education law is every kind of law – employment, constitutional, real estate, administrative, litigation, family, criminal, non-profit, environmental, special education, legislative, juvenile, contract, and even construction. This year has seen developments in each of the very diverse areas of our practice. That practice diversity is especially evident in the wide variety of top quality articles that your newsletter co-editors and editorial board have put together for this year's issues of the School Law Section Report. Please join me in thanking them for a job very well done.

Still to come are two exciting events. For the State Bar of Texas annual meeting in San Antonio June 24-25, 2004, the School Law Section has been working with a number of other sections to co-sponsor programs highlighting the 50th anniversary of the *Brown v. Board of Education* Supreme Court school desegregation decision. Sign up to attend a panel discussion on Thursday. Tour the exhibit hall to view an excellent video of the Kansas struggle that triggered the Brown decision and a display of the Brown Foundation's traveling exhibit regarding the history of the desegregation struggle and the significance of the decision, both of which will be shown throughout the convention. Second, the President's Gala will be held Thursday evening, in honor of long-time school attorney Kelly Frels. Third, the School Law Section will conduct a business meeting/social time on Friday morning, June 25, 2004, where we will elect next year's officers. Finally, Mr. Frels will take the oath as State Bar President on Friday, June 25 at the 11:30 a.m. General Session Litigation Luncheon, becoming the first school attorney to be elected to that role. Elneita Hutchins-Taylor and Ann Manning have done great work in coordinating these events at the Bar Convention.

In July, we will hold our always-popular State Bar of Texas School Law Section Retreat, to be held at the San Luis in Galveston on July 16-17, 2004. Joy Baskin and Miles Bradshaw are already hard at work developing an excellent program. The Retreat provides excellent CLE opportunities. Seminar topics will include: FLSA litigation, the Pledge of Allegiance case, teachers' First Amendment rights, the *Brown v. Board of Education* decision, Commissioner of Education decisions, attorneys as investigators, responding to SBEC investigations, educating students with medical conditions, school construction, special education discipline, and late-breaking topics. The Retreat also gives all school attorneys many chances to get to know each other better and to spend some quality vacation time with their own families. We will have the popular family dinner on Friday night. If you have not received your brochure, please call me and I will make sure to get one to you.

Please feel free to contact me or any of the School Law Section Directors or Officers if you have suggestions on how we can better meet your needs.

Lynn Rossi Scott
Chair

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REFLECTIONS ON BROWN V. BOARD OF EDUCATION

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A Personal Reflection on *Brown v. Board of Education*

During my first year of law school at The Ohio State University, my wife and I decided to move our family to a suburb of Columbus, Ohio. We had been warned by concerned friends about moving to the area because of its reputation as being a "hick town." "As African-Americans," we were told, "you'll likely experience discrimination." "They don't like Blacks out there, so it's best you stay in Columbus," we were advised. But my wife and I were both from the South, where, believe it or not, we had both experienced our fair share of discrimination, unfair treatment, and staring eyes. We thought to ourselves: "The Midwest can't be as bad as the South. So, whatever they throw at us, we can handle." We forgot to consider one thing, though.

My older son was slated to start kindergarten that same year. Because the kindergarten program in that school district was a "half-day" program, my wife and I were forced to enroll our son in a child-care facility for the other half of the day. We found one in the vicinity and proceeded to enroll him there. While sitting attentively in my civil procedure class, I received a call on my cellular phone. It was from my son's day care. The young lady on the other end of the phone began to explain to me, with an unmistakably nervous voice, that I would need to come to the center as soon as possible to discuss a "small issue" that had occurred with my son and some other students. I immediately left to find out what had happened. I was not at all prepared for what I was to be told.

It appeared that, during lunchtime, my son had carried his tray to a table, intent on sitting with the other children at that table and eat his lunch. Upon arriving at the table, he was quickly informed by one of the other three children already seated at the table that he couldn't sit there. "You can't sit with us." He was told. "Why?" my son asked. The child responded, "Because we don't sit with Black people." According to the center director, the two other children at the table appeared to tacitly approve of the answer. The three young children seated at that table were all Caucasian. And at age five (5), my son was suddenly introduced to the issue of racism, more specifically, separation of the races.

I discussed the issue with the center director, who swore to me that the child's remarks were not at all indicative of what the center felt or espoused. The director attempted to assure me further that the child's comments were not the result of any teachings of the center. Perplexed, I resolved in my own mind that the child was not a racist. After all, he was only five years old. What could *he* know about race? Rather, he had to have been repeating something that he had heard or had been taught somewhere else. I didn't find much solace in this explanation, however, especially since my son had already asked me, "Daddy, why won't my friends let me sit with them."

So, I found myself in a circumstance where I had to address with my five-year-old son a situation that involved what Gunnar Myrdal has called: the American dilemma.[1] My wife and I certainly could have handled the situation had either of us experienced it. Indeed, we had already prepared ourselves for such a circumstance. But this was *our* son being introduced to the issue. To be honest, I thought a conversation about race was grossly premature. But in light of my son's question, I felt obligated to offer some sort of explanation. After all, it was the first year of my young son's academic career, and although what he experienced occurred in a day care center, rather than in a public school, my son's educational environment would likely be affected, since the child refusing to sit with my son at the day care center also attended my son's elementary school.

The effect the experience might have on my son's schooling caused me great concern. In a day where state-sponsored segregation of schools did not exist—and, indeed, had not existed for 44 years—it was surprising to me to find remnants of attitudes supporting segregation continuing to persist, especially in children so young as those involved in my son's case. So, in my mind, I not only had to explain to my son, in a general sense, how race mattered to some, but I also had to specifically explain how race certainly should not matter in schools.

Brown v. Board of Education

In reflecting on my son's experience of six years ago, I am reminded of just how far we have to go until the goals of the plaintiffs in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*[2] are fully realized. This year marks the 50th anniversary of the United States Supreme Court's decision in that case. Most people are familiar with the decision, which declared unconstitutional the application of *Plessy v. Ferguson's*[3] "separate but equal" doctrine in public schools. What many people do not know, however, is that *Brown* was only one of five cases involving school segregation decided on May 17, 1954. The other cases were: *Bolling v. Sharpe*,[4] a case on appeal from the District of Columbia; *Briggs v. Elliott*, a case on appeal from South Carolina; *Davis v. County School Board*, a case on appeal from Virginia; *Gebhart v. Belton*, a case on appeal from Delaware.[5]

Each of the cases involved black students seeking admission to all-white schools. *Briggs, Davis*, and *Gebhart* involved challenges to state constitutional and/or statutory provisions requiring racial segregation in public schools.[6] *Brown* challenged a Kansas statute that allowed, but did not require, certain cities to maintain separate school facilities for African American and white students.[7] *Bolling* concerned the validity of segregation in the public schools of the District of Columbia.[8]

In *Brown, Bolling, Briggs* and *Davis*, federal district courts upheld segregation under the "separate but equal" doctrine and denied relief to the plaintiffs. In *Gebhart*, however, the Delaware Supreme Court, although adhering to the "separate but equal" doctrine, granted relief to the plaintiffs, ordering that they be admitted to white schools because of their superiority to the schools for blacks.[9]

Acknowledging that "education is perhaps the most important function of state and local governments,"[10] the Supreme Court held that, in the cases of *Brown, Briggs, Davis*, and *Gebhart*, the doctrine of "separate but equal" had no place in the field of public education, specifically because such a practice violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[11] In *Bolling*, the Supreme Court concluded that the practice of segregating schools among the races also violated the Due Process Clause of the Fifth Amendment by arbitrarily depriving students of their liberty.[12]

Judicial Reflections on *Brown v. Board of Education*

As is apparent from my son's experience, some vestiges of the segregationist mentality continue to persist. In an effort to better understand reasons why such mentalities exist in present day, I spoke with the Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit Court of Appeals, and the Honorable Sam A. Lindsay, United States District Judge for the Northern District of Texas to gain some historical perspective on *Brown*, as well as, from their perspective, how *Brown's* ideals might be further carried out.

My Interview with Judge Higginbotham

The legal implementation of *Brown* occurred early in Judge Higginbotham's life. Born in McCalla, Alabama in 1938, Judge Higginbotham grew up in the deeply segregated South, attending Alabama's segregated primary and secondary schools. In the fall of 1956, Judge Higginbotham matriculated into a still-segregated University of Alabama, graduating in 1960. A year later, Judge Higginbotham graduated from law school at the University of Alabama.

Since Judge Higginbotham was in high school when the *Brown* decision was announced, I asked him to describe the pre- *Brown* environment and compare it to the post-*Brown* environment, as he experienced them. It was at that time that he shared with me an assignment in which he participated in 1953. At the age of 15, Judge Higginbotham participated in the Alabama Youth Legislature in Montgomery and was elected Floor Leader of the House. During his tenure as Floor Leader, he introduced a Bill to desegregate Alabama schools utilizing a "stair-step" approach. The premise of his Bill was that, since children know little about race, integration should begin at the 1st grade. This would allow black and white children to interact with no preconceived notions or ideas about race. The goal was that, in twelve years time, Alabama schools would be fully integrated.

Suffice it to say, Judge Higginbotham's Bill was not well received by faculty advisors, and he never was successful in getting the Bill passed. He attributed the Bill's failure to the fact that the "moral imperative" of integration had not yet taken root and had not yet found support in the courts. More on this later.

Judge Higginbotham next noted that *Brown* was not a "sudden decision"; rather, it was a well-planned attack on the institution of state-sponsored segregation, which, by virtue of *Plessy v. Ferguson*, had existed for 58 years at the time *Brown* was decided. At this juncture, Judge Higginbotham shared with me a fact that, admittedly, I had not known: civil rights lawyers also planned *Plessy v. Ferguson*, but intended to address an entirely different issue.

The *real* issue Mr. Plessy sought to have addressed was whether he, having 7/8 Caucasian blood and only 1/8 African blood, was "entitled to every right, privilege, and immunity secured to citizens of the United States of the white race."[13] However, the Supreme Court refused to address this question, concluding that the issue was one to be addressed by each State.[14] Instead, the Supreme Court approved the future use of the "separate but equal" doctrine.

Civil rights lawyers soon began formulating a plan to attack the "separate but equal" doctrine, beginning in the educational arena.[15] Judge Higginbotham noted that several of the attacks on the "separate but equal" doctrine focused primarily on graduate schools employing the practice. Judge Higginbotham pointed to the United States Supreme Court decisions of *State of Missouri ex rel. Gaines v. Canada*,[16] decided in 1938, and *Sweatt v. Painter*,[17] decided in 1950, as examples.[18] In both of these cases, the Supreme Court required the respective institutions to admit the African American students seeking admission.

Judge Higginbotham believes that *Brown's* main import was that it ratified the "moral imperative" of integration and equality by removing the state's support from segregation. In so doing, *Brown* "pushed the mindset to say that you have individual freedom to choose to discriminate, but it's still wrong." Judge Higginbotham notes, however, that adoption of the "moral imperative" did not come by *Brown* alone, because *Brown's* success is simply the "culmination of the work of several generations of lawyers." He further noted that leaders of the Black Civil Rights Movements such as Julian Bond, Charles Hamilton Houston, Ralph Abernathy, and Jack Greenberg, should not go unmentioned. In Judge Higginbotham's opinion, these individuals worked tirelessly to propel the "moral imperative" into America's reality. I couldn't agree more.

As a final observation, Judge Higginbotham noted that, unfortunately, we are now experiencing the "resegregation" of schools. When asked why, Judge Higginbotham listed residential housing patterns as the current culprit. Interestingly, this issue was also noted by Judge Lindsay as the primary impediment to the full realization of *Brown's* ideals.

My Interview with Judge Lindsay

Judge Sam A. Lindsey was born in San Antonio, Texas in 1951, and grew up on a farm in Beeville, Texas. Judge Lindsay stated that he first learned of *Brown v. Board of Education* in the fall of 1958, when he noticed a "change" in the school patterns of his community. Judge Lindsay remembers that his older brothers attended the all "colored" school in Beeville, while, by the time Judge Lindsay started school, members from his community were being bused to nearby Skidmore schools.

Though the busing system was not "forced" on the community, Judge Lindsay recalls that several of his classmates often made comments, which, in retrospect, he contends could have only reflected their parents' mentality. For example, Caucasian students would often ask Judge Lindsay: "Did

you know your ancestors were slaves?" "Why do you go to school with us now when you used to could not?" Students would also comment that Blacks had a hard time learning.

Judge Lindsay also vividly remembers being taunted about his race, often times being called "nigger." In Judge Lindsay's opinion, however, the most offensive racial slur was borrowed from the title of the infamous book by Helen Bannerman entitled: *Little Black Sambo*, first published *circa* 1899. "Those were fighting words," Judge Lindsay recounted.

Judge Lindsay also recognized *Brown's* import through an encounter he experienced when he was 16 years old. There was a dance to be held at a local Country and Western Club called the "Round-Up" one night; Judge Lindsay and one of his Hispanic friends intended to attend. Upon arrival, Judge Lindsay and his friend were turned away at the door by the parent of one of Judge Lindsay's classmates—minorities were not allowed. Interestingly, the parent at the door was the principal of the local elementary school.

According to Judge Lindsay, that experience was a "wake-up call" for him. He realized more than ever that, although he was a star football player and was competing for valedictorian of his class, he would only be accepted when his acceptance benefited the system. He would not, however, be accepted in a social setting.

Judge Lindsay noted that, thirty years later, some of the same individuals who refused to accept him and considered him a "social pariah" call on him to speak at community events, because they now see him as a "home-town guy who did good." In retrospect, Judge Lindsay believes that his experiences made him mentally stronger by requiring him to depend on himself.

Judge Lindsay also shared with me some of his experiences in law school at the University of Texas. Interestingly, he found himself addressing some of the same misconceptions about the ability of African Americans to learn and contribute to the educational environment. Of the 525 students at the University of Texas, 11 were African American. Judge Lindsay remembers that none of the Caucasian students wanted to have him, or any of the other African Americans, in their study group. Judge Lindsay recalls that the predominate reason for his exclusion from study groups was because "he had nothing to offer the group."

At this point, Judge Lindsay expressed his views on affirmative action, stating that he supported such programs. He explained his rationale as follows: "Affirmative action does not advocate, encourage or foster the advancement, promotion, or inclusion of anyone who is not qualified. State-sponsored affirmative action programs are necessary to provide a vehicle to address the present lingering effects of racial discrimination." Judge Lindsay further explained: "Affirmative action should be temporary in nature, but the timeframe should be relative to the remedial effects of discrimination."

In Judge Lindsay's view, "*Brown* was monumental because it did away with the constitutionally approved doctrine of 'separate but equal,' which was fundamentally and inherently flawed on its face. The doctrine of 'separate but equal' is an oxymoron and a contradiction in terms, because equal means getting the same thing, at the same time, and in the same place."

Judge Lindsay continued: "*Plessy v. Ferguson* underscores what happens when those entrusted to uphold the law abdicate their responsibility and seek solely to preserve the status quo. Separate but equal was a farce intended to continue vestiges of slavery and to ensure segregation of the races."

As mentioned earlier, Judge Lindsay believes that, to move beyond *Brown*, residential housing patterns must be examined. Specifically mentioning "white flight" as a phenomenon leading to the "resegregation" of public schools, Judge Lindsay questioned whether *Brown* will ever reach its full potential. In his opinion, "resegregation" is a reflection of human conduct and human values.

In his concluding remarks, Judge Lindsay opined that we must first recognize and acknowledge race as an issue in our country. We must then have frank discussions about the issue with the intent of developing concrete solutions to address it. Only in this way might the ideals of *Brown* be fully realized.

Final Reflections on Brown

My discussions with Judges Higginbotham and Lindsay concerning the historical underpinnings of *Brown* reinforced my opinion regarding how far we have to go until *Brown* is fully implemented. To this day, I can't say that my son understood what I had to say about the refusal of his "friend" to allow him to sit at the same table with him. But he certainly remembers that experience of six years ago—as do my wife and I. It appears that Julian Barnes was correct when he wrote the following in the March 29, 2004 edition of U.S. News and World Report: "This, then, is the tragedy of American Education. Fifty years after *Brown*, the nation still has not figured out how to educate all of its children."[19] Until this occurs, *Brown* is incomplete.

ENDNOTES

1 Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944).

2 347 U.S. 483 (1954).

3 163 U.S. 537 (1896).

4 347 U.S. 497 (1954).

5 *Brown*, 347 U.S. at 486 n.1.

6 *Id.*

7 *Id.*

8 347 U.S. at 498.

9 *Id.* at 487.

10 *Id.* at 493.

11 *Id.* at 494.

12 *Bolling*, 347 U.S. at 694-95.

13 *See Plessy*, 163 U.S. at 541.

14 *See id*. at 552 ("It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. But these are questions to be determined under the laws of each state, and are not properly put in issue in this case." (internal citations omitted)).

15 *See Cumming v. Bd. of Educ. of Richmond County*, 175 U.S. 528 (1899).

16 305 U.S. 337 (1938). In *Gaines*, the Supreme Court held the State of Missouri violated the Equal Protection Clause by affording white residents with a legal education within the State, but requiring similarly-situated African American residents to go outside the State to obtain such an education, notwithstanding the limited demand for the legal education of African Americans, and notwithstanding the fact that the state had made provisions for the payment of tuition outside the State for African-Americans desiring legal training. *Id*. at 349.

17 339 U.S. 629 (1950). In the case of *Sweatt v. Painter*, an African American sought and was denied admission to the University of Texas School of Law based, in part, on the State's creation of a "separate but equal" law school for African Americans in Texas. *See id*. The Supreme Court ultimately disagreed with the State's contention that the school created for African Americans was substantially equal to the University of Texas and required the State to admit Mr. Sweatt. *Id*. at 635-36.

18 *See also Sipuel v. Bd. of Regents of Univ. of Okla*., 332 U.S. 631 (1948) (requiring admission of African American to law school); *McLaurin v. Okla. St. Regents*, 339 U.S. 637 (1950) (requiring admission of African American to doctoral program in education).

19 Julian E. Barnes, *Unequal Education*, U.S. News & World Report, March 29, 2004, at 67.

A GUIDE TO ADMINISTRATIVE LAW PRACTICE IN AN SBEC ENFORCEMENT PROCEEDING

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I. Introduction

Most school law practitioners have encountered the State Board for Educator Certification ("SBEC") and its investigation and enforcement process. However, many are unfamiliar with some of the nuances of the law that govern that process. This is particularly true in matters in which SBEC's rules are silent, but case law or an alternate statutory provision applies. This article will examine the investigation and enforcement process, beginning with the filing of a complaint and a discussion of tips for negotiating with SBEC staff. We will then examine some of the specific challenges that are presented when representing a party to a Code of Ethics complaint and discuss the hearing process before the State Office of Administrative Hearings ("SOAH"). The article will conclude with an examination of an educator's right to judicial review of an SBEC order. Along the way, we will attempt to identify some of the misconceptions that surround that process and provide some practice points for the school law attorney who represents educators before SBEC.

II. Investigation and pre-hearing matters pertaining to disciplinary complaints that do not allege a violation of the Code of Ethics

Upon receiving a complaint regarding a certified educator that suggests that the educator may have violated SBEC's enforcement rules[1], SBEC staff will initiate an investigation into the events that form the basis of that complaint. At the conclusion of the investigation, the educator will ordinarily be invited to submit a statement or attend an informal conference with an SBEC investigator or attorney. The purpose of this statement or conference is to give the educator an opportunity to show compliance with SBEC's rules. SBEC staff is required by law to give the educator this opportunity prior to the imposition of sanctions.[2] However, it is not specifically required by law to hold a conference.[3] A conference is held in the majority of cases in order to facilitate an agreed-upon resolution of the complaint prior to the initiation of a contested case proceeding before the State Office of Administrative Hearings ("SOAH"). After considering the information presented by the educator, SBEC staff will determine whether sufficient evidence exists to support a finding that the educator has failed to comply with SBEC's rules. If sufficient evidence is found, SBEC staff will typically propose a sanction that it will accept to resolve the complaint without the necessity of a hearing. All such proposed sanctions must first be approved by the Director of Professional Discipline.

It is difficult to predict with any amount of certainty what sanction SBEC staff will propose to resolve a case in any given situation. This lack of certainty stems in part from the fact that SBEC enjoys considerable discretion in determining what comprises sanctionable conduct. However, SBEC also does not publish its decisions or otherwise offer its rationale for imposing sanctions to the public in an easily accessible format. This makes consistency all but impossible.

SBEC is authorized to take disciplinary action against an educator for several reasons, but perhaps the most commonly cited basis for disciplinary action is that the educator is "unworthy to instruct or supervise the youth of the state."[4] This standard was held to be constitutionally acceptable in *Marrs v. Matthews,*[5] but even while holding that this language was sufficient to provide notice of what constitutes acceptable conduct for educators, the court noted:

> There are many characteristics which may and should be considered in passing upon the issue of unworthiness in a teacher in the public schools. Different minds might reach different conclusions as to what qualities of character should render one unworthy to hold a certificate to teach. But there can be no difference of opinion about the fact that an unworthy person should not be permitted to teach in the public schools. What qualities, or lack of qualities, should render one unworthy would be difficult for legislative enumeration. They are so numerous, and their combinations so varied in different individuals, that a statute which undertakes to be more specific would either be incomplete, or so inflexible as to defeat the ends sought. In the very nature of the subject there must be lodged somewhere a personal discretion for determining who are the "unworthy."[6]

This language confers a great deal of discretion on a state agency that takes its enforcement authority from the holding of this case. This discretion posed a minimal problem when the Commissioner of Education decided certification issues, because the Commissioner publishes its decisions and, when it determined that certain conduct rendered an educator "unworthy," that determination was published and potential litigants could rely on that determination. It is more problematic now that SBEC is charged with this duty, because SBEC does not publish its decisions and therefore does not publish or disseminate the interpretations of its standards to anyone except as required by the Public Information Act. The only check in place to ensure consistency during the negotiation process are the memories of SBEC staff regarding what types of sanctions have been imposed in the past.

In some instances, SBEC's own rules or statements specify what sanctions the agency should impose. For instance, 19 TAC § 249.16(a) "the board may suspend or revoke an existing valid certificate* because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the education profession." The rule then goes on to specify what types of crimes are considered to relate directly to the duties and responsibilities of the education profession. For those who have been convicted of such a crime, the rule is relatively explicit - SBEC will seek certificate suspension or revocation and will most likely prevail before SOAH in this endeavor, regardless of mitigating circumstances that may be present.

The other instance in which SBEC maintains consistency of sanctions is in cases in which the Commissioner of Education established a clear precedent prior to SBEC's creation. For example, SBEC has largely continued the practice, originally established by the Commissioner, of imposing a one-year suspension on the credentials of an educator who has been found to have abandoned his or her employment contract without good cause.

Generally speaking, SBEC staff prefers to reach negotiated settlements of complaints against educators and is often creative in order to reach a mutually agreeable resolution. This can work to the advantage of an educator who is willing to negotiate. For example, in cases in which an educator who has been convicted of a crime that directly relates to the duties or responsibilities of the education profession, but has partially completed the probationary term imposed by the criminal courts, SBEC staff might be willing to begin the period of suspension on the date the sentence was imposed and allow the suspension to run concurrently with the criminal conditions. Staff has also been willing to occasionally negotiate probation of suspensions. During the period of probation, the educator agrees to abide by certain terms and restrictions in exchange for the ability to remain in the classroom and avoid an outright suspension. Negotiation of probation in an SBEC case is never a sure thing, because probation is not one of the sanctions explicitly authorized by SBEC's rules. Additionally, SBEC has no ability to effectively monitor an educator during the course of the probationary period to determine whether he or she is complying with the terms to which he or she agreed. Traditionally, SBEC staff has been most likely to agree to a probationary period when the educator appears to be a good candidate for rehabilitation, does not pose a current threat to students or colleagues, and is likely to comply with the terms of the probation without the need for monitoring.

So how does an educator evaluate the fairness of a settlement offer or calculate the probability of success before SOAH? Ideally, the educator or his counsel would have the ability to research existing precedent on a particular issue. Currently, there is no such research tool available. However, there are other options available. Previously negotiated SBEC cases that have a similar fact pattern can be cited as persuasive authority with SBEC staff.[7] This is particularly effective in cases in which there has been turnover of SBEC staff and the staff member assigned to the case may be unaware that SBEC has taken a certain position in the past. SBEC could also be persuaded to follow the example of the commissioner of education if certification cases decided by the commissioner of education prior to the creation of SBEC exist that are on point. Those cases may be presented to staff as persuasive authority that SBEC should follow the precedent established by the Commissioner.

III. Complaints that allege a violation of the Code of Ethics

In addition to its general authority to regulate standards of conduct of certified educators, SBEC has established a procedural framework to investigate and prosecute complaints alleging a violation of the Educators' Code of Ethics.[8] Those complaints are treated in a completely separate and distinct manner from the rest of SBEC's disciplinary proceedings.[9] Contained within the procedural framework that governs the processing of Code of Ethics complaints are numerous technical requirements that apply to all parties to the complaint. Both the complainant and the educator named in a Code of Ethics complaint must be mindful of the need for strict compliance with these requirements if they wish to ensure SBEC's full consideration of their position.[10]

A. Representing the complainant

A prospective Code of Ethics complainant needs to ensure that he or she complies with the many specific pleading requirements set forth at 19 TAC § 249.49 that govern the form and service of a Code of Ethics complaint. The complainant should also be aware that the timeframe to file a Code of Ethics complaint is short. Specifically, the complaint must be filed within 90 days after the last act taken by the accused educator.[11] A complainant wishing to file a Code of Ethics complaint needs to be mindful of this deadline if the local grievance process is being simultaneously pursued, as many complainants attempt to treat SBEC as a sort of "Level IV," believing that they can begin counting their 90-day timeframe from the date their Level III grievance is denied. In fact, SBEC will begin to calculate the deadline at approximately the same moment that the act occurred that triggered the filing of the Level I grievance.

Practical information about how to file a complaint is made readily available to the public. SBEC maintains a website at www.sbec.state.tx.us that provides information, including a complaint form, a checklist of items that are required for the completion of the complaint, and the answers to some frequently asked questions that the complainant may consult prior to submitting the complaint.

The bad news for a prospective complainant is that the dismissal rate of Code of Ethics complaints is very high. SBEC's rules provide that a complaint may be dismissed only for fail-

ure to comply with applicable pleading requirements or for failure to state a violation of the Code of Ethics after, for purposes of determining jurisdiction only, accepting as true the facts relating to the alleged acts or omissions of the accused educator as stated on the face of the complaint.[12] Although this seems like a standard that could be met fairly easily, the numbers say otherwise. On August 31, 2002, SBEC reported that, out of a total of 556 Code of Ethics complaints filed within that fiscal year, it had assumed jurisdiction over only 87 complaints. The remainder had been dismissed, either due to a technical defect or for failure to state a claim.

A complainant whose Code of Ethics complaint has been dismissed does have the right to appeal that dismissal by filing a notice of appeal within 30 days from the date the notice of dismissal is received.[13] A Review Committee consisting of three SBEC board members will then consider the appeal at the next board meeting.[14] However, the vast majority of Code of Ethics complaints filed with SBEC do not proceed to a hearing.

If the complaint is accepted for jurisdictional purposes, SBEC will assume responsibility for the investigation and litigation of the complaint. A prospective complainant should be aware of the fact that, although they are filing the complaint and will most likely be asked to serve as a witness in the event that the complaint proceeds to a hearing, the complainant is not a party to the proceeding. SBEC staff can and does resolve Code of Ethics complaints by entering into an agreement with the educator named in the complaint without consulting the complainant.

B. Representing an educator named in a Code of Ethics complaint

The single most important opportunity available for an educator to resolve a Code of Ethics complaint filed against him or her is to respond to that complaint before SBEC determines whether or not they will assume jurisdiction over the complaint. SBEC's rules provide that not later than 60 days after being notified that a complaint has been filed, the accused educator or his or her representative may file with the executive director a single submission responding to the complaint.[15] The response is significant because it is the only information that the accused educator may provide to SBEC prior to its determination about whether the agency will accept jurisdiction over the complaint.[16] Since SBEC is required to accept that everything the complainant alleges is true, this is the accused educator's only opportunity to clarify the allegations and present them in a more favorable context to the decision-making authority.

When responding to the complaint, the educator should identify any areas in which the complainant has failed to comply with SBEC's pleading and service requirements, as these are specifically set forth as grounds for dismissal in 19 TAC § 249.50. The educator should also ask for dismissal if the complaint does not comply with the 90-day filing requirement. However, even if the procedural defects in the complaint justify dismissal, the response should also address the substantive issues presented in the complaint. This is because, in the event that the complaint is dismissed, the complainant has the right to appeal that dismissal. If that occurs, the complaint and the response submitted by the accused educator will both be considered by the Review Committee when it makes its decision regarding the appeal. A response that reassures the Review Committee that dismissal is appropriate both because of technical deficiencies and because of lack of substantive merit has historically been more likely to be upheld on appeal.[17]

If the complaint is accepted for jurisdictional purposes and a complaint filed with SOAH, the settlement negotiations and litigation of the complaint proceed as with any other complaint received by SBEC.

C. SBEC's requirements to comply with the timeframe established in the Code of Ethics procedural rules

The procedural regulations pertaining to the processing of Code of Ethics complaints are laden with deadlines imposed on SBEC. The purpose of these deadlines is to provide for the prompt and orderly consideration of a Code of Ethics complaint. Therefore, a party to such a complaint might reasonably expect that he or she would have an available remedy at law in the event that SBEC fails to comply with its own rules and observe these deadlines. A party in such a situation might even believe that he or she could require the dismissal of the case for such a transgression. However, whether dismissal is an available remedy depends upon whether the violated deadlines are mandatory or directory in nature. The difference between a mandatory and a directory provision is that failure to comply with a directory provision does not invalidate the underlying proceeding unless the complaining party can show that he was harmed by that failure.[18] In contrast, a mandatory provision requires at least substantial compliance with its provisions in order to uphold the proceedings to which the statute is applicable.[19]

Texas courts have held that administrative rules or regulations which do not go to the essence of the act to be performed, but rather are for the purpose of promoting the proper, orderly and prompt conduct of business, are not ordinarily regarded as mandatory.[20] This is the case even if the rule itself contains language that is generally considered to be mandatory, such as "shall."[21] If an administrative rule or regulation directs the doing of a thing in a certain time without any negative words restraining it afterwards, that provision as to time is usually directory.[22] The administrative rules governing Code of Ethics complaints contain many provisions that require SBEC to take certain actions within a certain time frame, but they are notably silent about what consequences would result for failure to comply with that time frame. Therefore, when faced with a motion at SOAH that a Code of Ethics complaint should be dismissed for failure to comply with one of the deadlines set forth in its rules, SBEC staff has argued successfully in the past that these deadlines are directory in nature and that dismissal is therefore inappropriate.

When faced with a situation in which SBEC is failing to comply with its own deadlines pertaining to Code of Ethics complaints in a currently pending case, the most successful approach to take would probably be to argue that, regardless of whether these deadlines are directory or mandatory, SBEC is not free to ignore them. The Attorney General has stated that "the question of whether such a provision is mandatory or directory arises when it is necessary to determine the effect of a past failure to comply with the provision. The determination that a duty imposed on public officials is directory does not

mean that public officials can ignore the duty."[23] However, in order to argue that SBEC's failure to comply with its deadlines has voided the underlying proceedings, a party would most likely have to proceed under the assumption that the deadline is directory in nature and therefore be required to show harm. According to the Attorney General, the question of whether a party is harmed by an agency's failure to comply with a directory deadline is a fact question to be determined on a case by case basis.[24]

IV. The Hearing

If a complaint against a certified educator results in a finding that sanctions are warranted and the matter cannot be resolved by agreement, the educator is entitled to a hearing before SOAH. SOAH is a state agency created to serve as an independent forum for the conduct of adjudicative hearings in the executive branch of state government. Its purpose is to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions of the executive branch in relation to hearings.[25] A SOAH hearing is considered to be a "contested case proceeding" as that term is defined by section 2001.003 of the Government Code, which simply means that it is a proceeding in which the legal rights, duties, or privileges of a party are determined by a state agency after an opportunity for adjudicative hearing. In such a proceeding, the SBEC board performs in a quasi-judicial function.[26]

The hearing itself is governed by SOAH's rules of procedure, which are found at 1 TAC Ch. 155. Generally speaking, each party must have the opportunity to respond and to present evidence and argument on each issue involved in the case.[27] In fact, Texas courts have held that constitutional due process requires an administrative agency to accord a full and fair hearing on all disputed fact issues critical to the rights of the parties on the question before the agency.[28] The SOAH rules of procedure were drafted with the intent of insuring that this due process requirement is satisfied.

Prior to the hearing, both parties have the opportunity to engage in discovery. SOAH's rules provide that parties may obtain discovery on any matters not privileged or exempted by the Texas Rules of Civil Procedure, the Texas Rules of Evidence, or other rule or law that is relevant to the subject matter of the proceeding.[29] The specific discovery tools that are allowed by SOAH's rules are requests for disclosure, as described by Tex. R. Civ. P. 194; oral or written depositions; written interrogatories to a party; requests of a party for admission of facts and the genuineness or identity of documents or things; requests and motions for production, examination, and copying of documents and other tangible materials; motions for mental or physical examinations; and requests and motions for entry upon and examination of real property.[30]

SOAH's rules of procedure also require SBEC to file a Notice of Hearing not less than 10 days prior to the hearing. This time requirement is mandatory and jurisdictional in nature.[31] The notice of hearing must include:

* A statement of the time, place, and nature of the hearing;
* A statement of the legal authority and jurisdiction under which the hearing is to be held;
* A reference to the particular sections of the statutes and rules involved; and
* A short, plain statement of the matters asserted.[32]

Although this law was presumably put in place to protect the respondent to an agency action, it ironically serves to grant SBEC staff a strategic advantage in a contested case proceeding before SOAH. Because SBEC is required to serve the Notice of Hearing on all parties, SOAH does not routinely notify educators of the hearing date when the hearing is set. Therefore, staff might become aware of a hearing date on the day after the complaint is filed at SOAH. But they are not required to notify the educator of that date until ten days prior to the hearing. As a practical matter, SBEC staff does make an effort to provide notice of a hearing setting well in advance of the date set for the hearing. But if you don't want to rely on SBEC to notify you of the hearing date at their convenience and would like to confirm the hearing date that has been set, simply call the SOAH docket clerk. The docket clerk will confirm a hearing setting over the phone if given the parties' names.[33]

At a contested case before SOAH, the rules of evidence as applied in nonjury civil cases in the district courts will apply, including the rule against the admissibility of hearsay evidence.[34] However, evidence that is otherwise inadmissible under the civil rules may be admitted if it is:

* Necessary to ascertain facts not reasonably susceptible of proof;
* Not precluded by statute; and
* Of a type commonly relied on by reasonably prudent persons in the conduct of their affairs.[35]

In SBEC cases, for example, SOAH administrative law judges will routinely admit letters of reference and recommendation into the record, even if the writers of the letters are not available to provide testimony or be cross examined regarding the letters.

SBEC also has the authority to issue subpoenas and commissions. That authority does not come from its own rules, but rather from the Government Code, which provides that on its own motion or on the written request of a party to a contested case pending before it, on a showing of good cause, a state agency must issue a subpoena to require the attendance of witnesses and secure the production of items necessary and proper for the purposes of the proceeding.[36] SBEC has examined the possibility of revising its rules to allow for the issuance of investigative subpoenas, but has not yet done so. This is an important issue for SBEC, because during the course of its investigations, SBEC will often attempt to obtain student statements from a school district. Many school districts are reluctant to release this information due to concerns related to The Family Educational Rights and Privacy Act (FERPA).[37] However, FERPA contains an exception that states that student records may be released in response to a lawfully issued subpoena.[38] SBEC would like to rely on the subpoena power granted to it in the Government Code in order to take advantage of this exception, but the applicable provision applies to a "contested case." SBEC's rules state that a contested case commences when a request for hearing is timely filed with the agency's hearings coordinator.[39] However, SBEC does not currently have a "hearings coordinator" on staff, and the rule does not clarify what is meant by a "request for hearing." This rule is most reasonably interpreted to mean

that a contested case commences when a complaint is filed at SOAH. However, this interpretation would deprive SBEC of the opportunity to claim that it has the ability to issue subpoenas prior to the filing of a complaint at SOAH. Therefore, the issue remains unresolved.

At the conclusion of the contested case proceeding, the SOAH Administrative Law Judge ("ALJ") will issue a proposal for decision and each adversely affected party has the opportunity to file exceptions and present briefs.[40] The proposal for decision must be rendered no later than the 60th day after the date on which the hearing is closed.[41] The SBEC board will then consider the proposal for decision in accordance with its rules and the Administrative Procedure Act ("APA").

V. Licensee's right to appeal

One of the most widely-held misconceptions about SBEC is that a certificate holder who has had his or her credentials sanctioned following a SOAH hearing may seek judicial review of that sanction. Access to judicial review may be more limited than most practitioners assume, because there is no provision in the Education Code or SBEC's rules that allows for judicial review of an SBEC order. The Texas Supreme Court held in 1967 that no right of judicial review of an agency action exists unless a statute provides for such review, the action violates a constitutional right, or the action adversely affects a vested property right.[42] Since that time, litigants have argued that the APA grants that statutory right to review in a provision which states that "a person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" under the APA.[43] But a line of cases out of the Third Court of Appeals has held that this provision is procedural in nature and does not convey subject-matter jurisdiction to entertain a petition for judicial review filed under the APA absent authorization under the agency's enabling legislation or another statutory provision.[44] The effect of the absence of a right to judicial review in either the Education Code or SBEC's rules is that the educator whose certification has been sanctioned by SBEC has limited opportunity for judicial review of the agency's action. Most educators must, in fact, rely on a violation of constitutional due process in seeking judicial review. Given the fact that the administrative process provides for a hearing before an impartial ALJ, it seems unlikely that many educators would be able to successfully argue that they were deprived of due process prior to the imposition of sanctions on their certification. However, the prospective litigant could look for an alternative statutory right to judicial review.

One statutory provision that could benefit some educators who have had their certificates suspended or revoked is section 53.052 of the Occupations Code. That statute provides that "a person whose license has been suspended or revoked under Section 53.021… may file an action in the district court in the county in which the licensing authority is located for review of the evidence presented to the licensing authority and the decision of the licensing authority." SBEC routinely cites to section 53.021 of the Occupations Code when seeking suspension or revocation of the certificates held by educators who have been convicted of a misdemeanor or felony that SBEC believes directly relates to the duties and responsibilities of the education profession. Therefore, educators who have had their certificates sanctioned pursuant to that authority may presumably take advantage of the right to judicial review offered by the Occupations Code. However, that right is only offered to those few educators who have had sanctions imposed against them by virtue of their criminal history. Such educators comprise a small percentage of all those sanctioned.

Educators who do not have the option to proceed under the provisions of the Occupations Code might choose to seek judicial review of an SBEC decision by filing an appeal with the Commissioner of Education. The commissioner has authority to hear appeals by a person aggrieved by the school laws of the state and, in theory, could assume jurisdiction over an SBEC decision under this provision.[45] The educator would then have a right to judicial review of the commissioner's order pursuant to section 7.057(d) of the Education Code. The problem with this scenario, of course, is that the commissioner must assume jurisdiction over such an appeal. As of the date of this article, no such appeal has been filed and therefore the question of whether or not the commissioner would accept jurisdiction over this issue remains unanswered.

The only other option to address this lack of access to judicial review is to change the law, either legislatively or through the courts. That latter option may come to fruition in the near future, as a lawsuit dealing with this precise issue is currently pending before the Texas Supreme Court. In *Mega Child Care, Inc. v. Texas Dept. of Protective and Regulatory Services*, 81 S.W.3d 470 (Tex.App.-Houston [1st Dist.] June 28, 2002), Mega Child Care, Inc. sought judicial review of a decision issued by an ALJ at SOAH to revoke its license to operate a child-care facility.[46] At the trial court, TDPRS filed a plea to the jurisdiction, arguing that Mega did not have a statutory right to judicial review. The district court agreed and dismissed the case. The 14th Court of Appeals reversed and remanded, holding that a party may generally seek judicial review of an agency's findings once the party has exhausted all administrative remedies.[47] The appeals court then went on to find that Mega Child Care is subject to Chapter 42 of the Human Resources Code, which provides, in relevant part, that "Proceedings for disciplinary action are governed by the administrative procedure law, Chapter 2001, Government Code.*"[48] Section 2001.171 of that statute provides that "A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."[49] The court determined that these statutory provisions were sufficient to entitle Mega to judicial review of the revocation of its license.

This holding is in direct contradiction to the previously noted line of cases out of the Third Court of Appeals, and this contradiction forms the basis for the dissent that was published in the *Mega* case. The dissent points out that the legislature intended the judicial review provisions of the APA to be procedural only and states that it believes that the court should find that Mega did not have a statutory right to judicial review.[50]

The Mega case has been appealed to the Texas Supreme Court and is currently pending on the court's docket. As of the writing of this article, briefs have been submitted and oral argument has been made, but the court has not yet handed down a decision. The outcome of this case is potentially significant

for educators who wish to appeal an SBEC sanction but are not entitled to judicial review under the Occupations Code.

IV. Conclusion

Representing a party to an SBEC complaint is not an easy task. Emotions frequently run high and the stakes are nothing less than an educator's right to continue to work in his or her chosen profession. The difficulty of practicing before SBEC is compounded by the fact that SBEC has published little information over the years regarding its practices. But knowledge of the applicable law can enable the attorney to effectively present the educator's version of the events that form the basis of a complaint and can help ensure that the ultimate outcome is fair and appropriate.

ENDNOTES

1 *See* 19 TAC Ch. 249, et.seq.

2 TEX. GOV'T CODE ANN. § 2001.054(c)(2) (Vernon 2002).

3 *Guerrero-Ramirez v. Texas State Bd. of Medical Examiners* (App. 3 Dist. 1993) 867 S.W.2d 911 (Requirement under the Administrative Procedure Act that agency give notice and provide licensee opportunity to be heard at a disciplinary hearing, means notice of facts or conduct that allegedly warrant license suspension or revocation, opportunity to participate in hearing, and opportunity to show that no requirement of law for retention of license were ever violated; it is not required that notice be given before complaint is filed, but only that complaint itself adequately inform licensee of such adjudicative hearing.).

4 19 TAC. § 249.15(c)(2).

5 *Marrs v. Matthews*, 270 S.W. 586 (Tex.Civ.App.-Texarkana 1925).

6 *Marrs* at 588.

7 All strategies and tips for dealing with SBEC staff that appear in this article are developed from the author's experience as an SBEC Staff Attorney. Their effectiveness could vary depending on staff turnover and the specific details of each case.

8 *See* 19 TAC Ch. 249 Subchapter E

9 See generally, 19 TAC Ch. 249, Subchapter E, et. seq.

10 *Id*.

11 19 TAC § 249.48.

12 19 TAC § 249.50(3).

13 19 TAC § 249.52(a).

14 19 TAC § 249.52(c).

15 19 TAC § 249.51(b).

16 19 TAC § 249.51(a).

17 As previously discussed, SBEC does not publish its decisions. Therefore, all references to specific outcomes in cases discussed in this article are based on the author's personal observations while employed as a Staff Attorney at SBEC.

18 *State v. Boren*, 654 S.W.2d 547 (Tex.Civ.App.-Waco 1983, no writ).

19 *Toyah Independent School District v. Pecos-Barstow Independent School District*, 466 S.W.2d 377, 380 (Tex.Civ.App.-San Antonio, 1971, no writ) citing 3 Sutherland Statutory Construction, s 5815, p. 90 (3d ed. 1943).

20 *Lewis v. Jacksonville Bldg. And Loan Ass'n*, 540 S.W.2d 307 (Tex.1976)

.21 *Id*. at 310.

22 *Id*.

23 Op. Tex. Att'y Gen. No. JM-496, 1986., pg. 2.

24 *Id*. at 3.

25 TEX. GOV'T CODE ANN. § 2003.021(a)(Vernon 2002).

26 *State v .Thomas*, 766 S.W.2d 217 (Tex. 1989).

27 TEX. GOV'T CODE ANN. § 2001.051(2) (Vernon 2002).

28 *Texas Employment Commission v. Johnnie Dodd Automotive Enterprises, Inc*., 551 S.W.2d 171 (Tex. Civ. App. Waco 1977), writ refused n.r.e., (Oct. 12, 1977).

29 1 TAC § 155.31(b).

30 1 TAC § 155.31(d).

31 TEX. GOV'T CODE ANN. §§ 2001.021(a) (Vernon 2002).

32 TEX. GOV'T CODE ANN. §§ 2001.052(a)(1)-2001.052(a)(4) (Vernon 2002).

33 A complainant to a Code of Ethics complaint is also not notified by SOAH of the setting of a hearing date. Since a complainant is not a party to an SBEC complaint, counsel representing an educator can obtain this information by providing the name of the accused educator, who is the Respondent to the complaint.

34 TEX. GOV'T CODE ANN . §§ 2001.059(b)-(c) (Vernon 2002).

35 TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2002).

36 TEX. GOV'T CODE ANN. § 2001.089 (Vernon 2002).

37 20 U.S.C. § 1232g; 34 CFR Part 99.

38 34 CFR § 99.31.

39 19 TAC § 249.18(a).

40 TEX. GOV'T CODE ANN. § 2001.062(a)(2) (Vernon 2002).

41 TEX. GOV'T CODE ANN. § 2001.143(a) (Vernon 2002).

42 *Stone v. Texas Liquor Control Bd*., 417 S.W.2d 385, 385-86 (Tex.1967).

43 TEX. GOV'T CODE ANN § 2001.171(Vernon 2002).

44 *Carrizales v. Texas Department of Protective and Regulatory Services*, 5 S.W.3d 922, 924 (Tex.App.-Austin, 1999); *P.R.I.D.E. v. Texas Worker's Compensation Comm'n*., 950 S.W.2d 175, 180 (Tex.App.-Austin 1997, no writ); *Texas Dep't of Transp. v. T. Brown Constructors, Inc*., 947 S.W.2d 655, 658 (Tex.App.-Austin 1997, writ denied); *Firemen's Pension Comm'n v. Jones*, 939 S.W.2d 730, 732-33 (Tex.App.-Austin 1997, no writ); *Employees Ret. Sys. of Texas v. Foy*, 896 S.W.2d 314, 316 (Tex.App.-Austin 1995, writ denied); *S.C. San Antonio, Inc., v. Texas Dep't of Human Servs*., 891 S.W.2d 773, 776 (Tex.App.-Austin 1996, writ denied).

45 TEX. EDUC CODE ANN. § 7.057(a)(1)(Vernon 2002).

46 *Mega*, 81 S.W.3d 470, 471.

47 *Mega*, 81 S.W.3d 470, 471, citing *Suburu of America, Inc. v. David McDavid Nissan, Inc. d/b/a David McDavid Suburu*, No. 00-0292, slip op. at 8-9 —- S.W.3d——,—— ——, 2001 WL 189454 (Tex. June 27, 2002)[later published as 84 S.W.3d 212]; *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex.2000); TEX. GOV'T CODE ANN. § 2001.171 (Vernon 2000).

48 *Mega*, 81 S.W.3d 470, 473, citing TEX. HUM. RES. CODE ANN. §§ 42.072(a),(b)(Vernon Supp.2002).

49 TEX. GOV'T CODE ANN. § 2001.171(Vernon 2004).

50 *Mega*, 81 S.W.3d 470, 476-477.

STRATEGY FOR TOUGH FINANCIAL TIMES—EDUCATION FOUNDATIONS

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Is the district you represent supported by an education foundation? Is your district thinking of getting one established? If so, you are not alone. Education foundations are springing up in school districts across the state. Currently, there are more than 175 of these community-based, nonprofit entities serving Texas school districts. Certainly the appeal of an education foundation is clear: it can aid a district by channeling private funds into the public school system. These dollars are often used to fund projects that a district would otherwise not be able to afford, including student scholarships, teacher grants, or supplemental curriculum.

It is no surprise, then, that a successful education foundation often works closely with the district it supports. In fact, this relationship may be so close that the district, in turn, provides the education foundation with staff, office space, supplies, and direct financial assistance. Whether your school district is already supported by an education foundation or is thinking about encouraging supporters to start one, you need to be aware of the legal impact that this type of support may have.

I. Organizing or Creating a Supporting Education Foundation

The education foundation will not be the school district or a division or department of the school district. Instead, the education foundation will be a separate legal entity, a charitable, nonprofit corporation, under Texas law. Technically, most education *foundations* are not organized as foundations as that word is defined by the IRS. Rather, most are organized as public charities. Public-charity status may be preferable to private-foundation status because private foundations are often subject to greater tax obligations, greater restrictions on expenditures, greater restrictions on deductibility of donor gifts, and greater record-keeping and reporting requirements.

Who will control the education foundation, how it will be related to the school district, and other similar governance issues will need to be decided in the Articles of Incorporation and the Bylaws of the corporation. Usually, these documents provide that the education foundation will solely support the mission or goals of the school district.

Approval from the Internal Revenue Service will be essential for tax deductibility of contributions to the foundation. IRS approval takes the form of approval of an application for recognition of tax-exempt status.

In order to file the application, the basic legal steps are as follows:

1. Prepare and file Articles of Incorporation with the Secretary of State.

2. Obtain employer ID number from the Internal Revenue Service.

3. Hold an organizational meeting of the board of directors, at which officers are elected and bylaws are adopted.

4. File an Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code (Form 1023). For this application the education foundation will need a budget for three years and an outline of its current and proposed activities and all of the other information required in the application. The application can be found at www.irs.gov.

Be prepared for the IRS to take around three months to review and, hopefully, approve the Application for Recognition. The education foundation should not accept contributions until it receives approval.

Most importantly, the education foundation should consult a tax lawyer early in the process when deciding the governance issues because these issues might affect the manner in which tax-exempt status as a public charity is determined. At this point, the school district should consider the degree of control it will exert over the education foundation.

II. Operating an Education Foundation

As founders of an education foundation work through the initial paperwork and tax questions, they should also consider another aspect of the education foundation—the relationship it will have with the school district. Even though the education foundation is a separate legal entity, it can work closely with the school district it supports. But the closeness of this relationship should be deliberately defined as the education foundation is established because, according to the attorney general, the relationship between the education foundation and the school district has legal implications.

Specifically, two attorney general opinions and one open-records ruling provide legal guidance about (1) when school district employees may work on education foundation business; (2) when a school district may provide an education foundation with office space, equipment, or other items of value; and (3) when an education foundation is subject to a public-information request made to the school district it supports.

A. May school district employees work on education foundation business?

School district employees can probably work on education foundation business, but there are risks. In Opinion MW-373 (1981) the attorney general addressed this issue in a matter concerning the University of Texas Law School and UT Law School Foundation. In that case, employees of the law school agreed to permit "reasonable use of University . . . personnel as needed to coordinate the activities of the

Foundation" and agreed that certain administrative officials of the University "may reasonably assist . . . from time to time" with foundation business. It is not clear from the opinion if any law school employees were actually working full time for the law foundation or were only working part time. The agreement between the law school and its foundation provided that "staff personnel working for or serving the Foundation may be paid as Law School employees" but the law school foundation would reimburse the law school for the salaries and the law school's portion of retirement benefits.

The attorney general concluded that this arrangement was not legal because it violated the appropriations statute applicable to the university and law school. An appropriations statute is not an issue with independent school districts. But the attorney general also concluded that the law school foundation employees were not eligible for Teacher Retirement System benefits or statutory group insurance benefits. The attorney general also cautioned about the availability of workers compensation benefits, unemployment compensation benefits for government employees and the immunity the governmental entity may or may not enjoy when an employee of the government is actually working for a private corporation—the foundation.

In summary, both the employees and the school district are taking at least some risk when school district employees spend some portion of their time on the job actually working for the foundation. Nevertheless, assuming that school district employees will spend some time working on education foundation matters—particularly as the foundation gets started—certain limitations should be observed.

In MW-373, the attorney general concluded that if a person is actually spending his or her time working for the law school foundation—a nonprofit corporation and separate legal entity—that person is not a university employee. Thus, that person should not be on the university payroll or eligible for retirement and other benefits provided by the university to its own employees. Although some of the statutes cited in this opinion do not apply to public school districts, the Teacher Retirement System (TRS) statutes, as well as the attorney general's reasoning, do apply.

According to the Texas Government Code, employees of the public school system qualify for participation in TRS.[1] An *employee* is a person "who is employed . . . on other than a temporary basis by an employer for at least one-half time at a regular rate of pay comparable to that of other persons employed in similar positions."[2] The TRS regulations concerning "service eligible for membership" interpret the above statute in this way:

> Persons employed by a TRS covered employer for one-half or more of the standard work load at a rate comparable to the rate of compensation for other persons employed in similar positions is defined as regular, full-time service eligible for membership. Any employee of a public, state-supported educational institution in Texas shall be considered to meet the requirements of the preceding sentence if his or her customary employment is for 20 *hours or more* for each week and *for four and one-half months or more* in one school year."[3]

Based on these rules, only employees of the school district who work for the district for 20 hours or more each week and for 4 months in one school year are entitled to participate in TRS. Conversely, if an employee is not working enough for the district to meet this requirement, that employee is not entitled to participate in TRS. The school district should not support TRS participation for any of its employees who, because they are actually working for a supporting foundation, do not qualify. Criminal penalties may apply for fraudulent, knowing, or intentional violations of the TRS laws.[4]

Further, a district employee who does not qualify for TRS benefits may not be entitled to participate in the school district's insurance or health benefit plans, depending on the requirements of those benefit plans. Some plans may require full-time employment as a condition for participation. Likewise, an employee who does not work enough for the school district to qualify for TRS participation apparently does not qualify for participation in the Texas Public School Employees Group Insurance Program,[5] the Texas Public School Employees Group Long-Term Care Insurance Program,[6] or the Insurance for School District Employees and Retirees Program.[7] Care should be taken by the school district to make sure its employees who do not qualify for these benefits do not, in fact, receive these benefits.

B. May a school district provide its supporting education foundation with office space, equipment or other things of value?

In Attorney General Opinion No. DM-256 (1993), the attorney general addressed whether an independent school district may provide free office space and other items to a private, nonprofit foundation set up for the purpose of financially supporting the school district and its students. The answer appears to be yes—but again, you should be aware of several important issues.

First, in the particular situation addressed in DM-256, the members of the board of directors of the foundation served on the school district's board of trustees at the time the foundation was founded. The school district allowed the foundation to use an office in the school district's administrative offices and provided incidental items such as telephones, copy machines and electricity. However, the foundation reimbursed the school district for such items as long-distance phone calls and copy paper. Presumably, the trustees were not paid or otherwise compensated for serving on the board of the foundation.

The key issue addressed by the attorney general was Article III, Section 52(a), of the Texas Constitution, which prohibits the legislature from authorizing any county or political subdivision of the state to "grant public money or thing of value, in aid of, or to any individual, association" or corporation. The attorney general concluded that, in this instance, he did not have sufficient facts to determine whether the district's actions violated the constitution. But he did state that the following factors should be considered:

(1) whether a public purpose is served appropriate to the function of the governmental entity,

(2) whether adequate consideration or benefits flow to the public from the expenditure of taxpayer money in this fashion, and

(3) whether the trustees maintain sufficient controls over the foundation's activities to ensure that the public purpose is actually achieved.

The attorney general noted that this last determination—sufficient public purpose—is one to be made by the governmental entity's board of trustees in the first instance. That is, the attorney general will ordinarily allow the board of trustees to make this determination, subject to later review if appropriate. Two years after DM-256, the Texas Supreme Court confirmed that "a transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of credit or grant of public funds in violation of article III, section . . . 52."[8]

Second, on the subject of potential conflict of interest, the attorney general concluded that it would be "highly unlikely" that a school board member who served on the board of a foundation had a "significant" interest in the foundation such that the school district would be prohibited from entering into a contract with the foundation. However, there may be a special circumstance that qualifies as a conflict of interest. In that event, any member of both boards should follow the ordinary conflict of interest procedures.

Finally, the attorney general cautioned school district trustees serving as directors of a foundation to avoid situations in which the interests of the school district are at odds with the interest of the foundation. The attorney general warns that a foundation director may be civilly liable if he or she breaches a fiduciary duty to the private, nonprofit foundation. The attorney general stated that "a Trustee would be well advised to avoid engaging in conduct which might give rise to such a cause of action." In other words, directors of the foundation have a legal responsibility to act in the interests of the foundation (even though they may also be school district board members) and may have to abstain from voting as a school board member on school board decisions adverse to the interests of the foundation.

Attorney General Opinion DM-256 appears to confirm that it is not necessarily illegal for school districts to spend money providing office space and other incidental benefits to an education support foundation. Providing employees to help with education foundation work without reimbursing them for the cost of salary and benefits would also appear to be legal if the three-part test described above is met.

C. Is an education foundation subject to a public-information request made to the school district it supports?

In an April 2002 open-records letter ruling, the attorney general addressed whether an education foundation is required to disclose information in response to a Public Information Act (PIA) request.[9] Although this letter ruling is applicable only to the circumstances of its recipient (Carrollton-Farmers Branch ISD), it does serve as a reminder for other education foundations.[10]

The Carrollton-Farmers Branch ISD received a PIA request for the names and addresses of community members who had contributed to a memorial scholarship and the amount of each donation. Because the education foundation managed the scholarship and wanted to protect the privacy of the donors, the attorney general was asked to determine if the education foundation was subject to provisions of the act.

The Public Information Act applies to a government body, which is "defined as an entity that spends or is supported in whole or in part by public funds."[11] Public funds are defined as "funds of the state or of a governmental subdivision of the state."[12]

In determining whether the act applied to the CFBISD Education Foundation, the attorney general's office considered several factors:

- The education foundation's articles of incorporation, which indicated the foundation's purpose. This document states that "'the primary purpose of the Corporation shall be the assistance, development, and maintenance of charitable, educational, or scientific programs and activities for the enhancement of education provided through the public school system of the Carrollton-Farmers Branch Independent School District.'"

- The education foundation's use of district facilities. Although the education foundation did not receive funds from the district, it did receive "free office space within the district's administration building for the storage of foundation financial records, letterhead, brochures, and other supplies."

- The education foundation's use of district personnel and supplies: "[D]istrict personnel perform some clerical support for the foundation, and . . . the district provides support in the form of computer and photocopying to the foundation."

From this information, the attorney general's office concluded that the purpose of this education foundation is to support the district and that the district supports the operation of the foundation. Therefore, the education foundation is subject to the Public Information Act, and must disclose the requested documents.

III. Conclusion

Founders of education foundations need to be aware that the support the district provides the education foundation comes with some legal strings attached. These strings should not discourage the school district from working closely with the education foundation to further the goals of the district. But deliberate steps should be taken—preferably when the initial IRS documents are filed—to ensure that the school district's relationship with its education foundation is carefully and deliberately developed in accord with the rulings of the attorney general.

ENDNOTES

1 Tex. Govt. Code, Sec. 822.001(a)(2).

2 Tex. Govt. Code, Sec. 821.001(6).

3 Tex. Admin. Code, Title 34, Part 3, Chapter 25, Subchapter A, Sec. 25.1 (emphasis added).

4 Tex. Govt. Code, Sec. 821.101.

5 Tex. Ins. Code, Art. 3.50-4, Sec. 2, (1).

6 Tex. Ins. Code, Art. 3.50-4A(a)(2).

7 Tex. Ins. Code, Art. 3.50-4A, Sec. 1 (1).

8 *Edgewood ISD v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995).

9 Texas Attorney General, Open-Records Letter Ruling Number OR2002-2159 (2002).

10 The attorney general's website explains that "[u]nlike Open Records Decisions, these informal letter rulings are applicable only to the specific documents and circumstances surrounding them . . . ." Office of the Attorney General, "Open Government." Online. Available: http://www.oag.state.tx.us/opinopen/opengovt.htm#reclett [last accessed: 2 October 2002].

11 *Id*. (citing Texas Government Code §552.003(1)(A)).

12 *Id*. (citing Texas Government Code §552.003(5)).

THE FIFTH CIRCUIT SPEAKS: ARE YOU LISTENING?

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The Fifth Circuit issued three key rulings in 2003 in cases involving students with disabilities. In this article, we will review those rulings and their implications for attorneys and our clients.

WHITE v. ASCENSION PARISH SCHOOL BOARD, 343 F.3d 373 (5th Cir. 2003).

The primary importance of this case is due to its definition of the term "educational placement." This is a frequent source of disagreement between schools and parents. The case signals the willingness of the courts to allow local school officials to decide where students will be served. In doing so, the Court drew a sharp distinction between a child's "placement" and the school district's "site selection."

The case involved Dylan, a hearing impaired second grader, about to move up to third grade. He had been attending a school which was about five miles further away than his neighborhood school. This is because the school district had decided to centralize services for hearing impaired students. Dylan had the services of a "transliterator" but he was the only elementary aged student who needed this service. Thus, it would have been just as easy for the school to send Dylan and his transliterator to Dylan's neighborhood school as it was to send them to the centralized location.

Everyone agreed that Dylan was doing well in school. The parents' request for the move to the neighborhood school was primarily based on their desire for him to have the social benefit of going to school with the kids in the neighborhood.

Lengthy IEP meetings were held on this issue, but consensus was not achieved. The parents took the matter to a due process hearing, seeking to have Dylan's placement changed to his neighborhood school. The school prevailed at the due process hearing stage, and at the state level appeal (Louisiana, unlike Texas, has two tiers of administrative action before a matter can go to court). However, Dylan's parents appealed to federal district court, and prevailed at that level. Thus it was the school district which took the matter to the 5th Circuit.

At the 5th Circuit, the school prevailed on all issues. In ruling for the school, the Court concluded that "educational placement" is a term that does not have much to do with location. Instead, it refers to the type of classroom the student attends:

"Educational placement", as used in the IDEA, means educational program-not the particular institution where that program is implemented.

One can tell from the Court's decision that the issue was clearly drawn:

The Whites note that "placement" in [the regulations] appears to have a broader meaning than just educational program...and to relate in some way to location.... Ascension responds that "placement" does not mean a particular school, but means a setting (such as regular classes, special education classes, special schools, home-instruction, or hospital or institution-based instruction). It cites 34 CFR 300.551, which describes "placement" options as such. This is the better view.

In Texas, educators use the term "instructional arrangement." Although Louisiana does not use the same term, it is clear that what the Court describes as "placement" equates with what Texas educators call "instructional arrangement." Thus, the decision about "placement" is about whether the student should be in a regular classroom (mainstream) or pulled out for a part of the day (resource) or served in a special education unit for most or all of the day (self-contained). The "placement" decision is one for the ARD Committee, (Admission, Review and Dismissal) and thus parental input is important. If the parent does not agree with the ARD's placement decision, the parent can take the matter to a due process hearing.

However, the Court viewed "site selection" as something quite different. In fact, the Court concluded that parents do not have a right under IDEA to be involved in the site selection. After citing the statute and regulations, the Court concluded:

These statutory provisions do not, however, explicitly require parental participation in site selection.

Thus, contrary to the Whites' position, that parents must be involved in determining "educational placement" does not necessarily mean they must be involved in site selection. Moreover, that the parents are part of the IEP team and that the IEP must include location is not dispositive. The provision that requires the IEP to specify the location is primarily administrative; it requires the IEP to include such

technical details as the projected date for the beginning of services, their anticipated frequency, and their duration.

Furthermore, the Court refused to second guess the school officials about site selection:

Of course, as the Whites point out, neighborhood placement is not possible and the IEP requires another arrangement only because Ascension has elected to provide services at a centralized location. This is a permissible policy choice under the IDEA. Schools have significant authority to determine the school site for providing IDEA services.

Clearly, this decision is designed to give school officials flexibility and discretion in deciding where certain programs should be located. These issues most often come up with students who need very specialized programs. Suppose, for example, that a school district has seven elementary schools, but has just one classroom unit for medically fragile children. The specialized services these children need can be concentrated on one campus. The trade-off, of course, is that some of the students will have to attend a campus that is not the "neighborhood" school. But the 5th Circuit previously dismissed the theory that there was some statutory right to attend the neighborhood school. See Flour Bluff ISD v. Katherine M., 91 F.3d 689 (5th Cir. 1996):

State agencies are afforded much discretion in determining which school a student is to attend.....The regulations, not the statute, provide only that the child be educated "as close as possible to the child's home." However, this is merely one of many factors for the district to take into account in determining the student's proper placement. *It must be emphasized that the proximity preference or factor is not a presumption that a disabled child attend his or her neighborhood school*.

PACE v. BOGALUSA CITY SCHOOL BOARD, 339 F.3d 348 (5th Cir. 2003).

This case is a major pronouncement by the 5th Circuit with regard to 11th Amendment immunity, and the intersection of IDEA with Section 504 and the ADA. Travis Pace, a student with physical disabilities, sued the Bogalusa City School Board, the Louisiana State Board of Elementary and Secondary Education, the Louisiana Department of Education and the State of Louisiana. The state defendants all sought dismissal due to immunity under the 11th Amendment.

After an exhaustive and complicated analysis, the Court held that the state defendants were entitled to immunity under the 11th Amendment. The Court explained that immunity under the 11th Amendment applied to the state unless it was abrogated by Congress, or waived by the state. Although both IDEA and Section 504 expressly state that 11th Amendment immunity does not apply, this was not an "effective" abrogation of immunity. Relying on Supreme Court precedent (see Board of Trustees of the University of Alabama v. Garrett, 121 S.Ct. 955 (2001); and City of Boerne v. Flores, 117 S.Ct. 2157 (1997)) the 5th Circuit held that abrogation was effective only if 1) Congress unequivocally expressed an intent to abrogate state sovereign immunity; 2) Congress identified a pattern of unconstitutional action by the states; and 3) Congress creates rights and remedies that are congruent with and proportional to the injury. Although both Section 504 and IDEA meet the first requirement, neither statute satisfies the other two. Thus, sovereign immunity under the 11th Amendment was not abrogated.

But was it waived? A state can waive its 11th Amendment immunity by accepting funding which is expressly conditioned on such a waiver. The Court again observed that both IDEA and Section 504 make funding available on the condition of a waiver of sovereign immunity. However, the Court held that the waiver must be a knowing waiver, and a waiver is not knowing if the state did not understand that it had something to waive. Here is where the Court's decision gets complex. The Court reasoned that prior to its own 2001 decision in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001), states reasonably assumed that their 11th Amendment immunity had been abrogated by Congress. If immunity had been *abrogated* then there was no immunity to *waive*. So your typical state would reason it out: "we have no immunity anyway*might as well take the money!" Thus when the states accepted federal money under 504 or the IDEA prior to 2001, they could not be *knowingly waiving* 11th Amendment immunity because they believed they had no such immunity. By the Court's logic, 11th Amendment immunity did not even become waivable in the 5th Circuit until after the Reickenbacker decision in 2001. Presumably, then, receipt of federal funds under these statutes after that decision would amount to a knowing and voluntary waiver of sovereign immunity.

The bottom line: 11th Amendment immunity had not been effectively abrogated by Congress, nor had it been knowingly waived by the State of Louisiana. Therefore, sovereign immunity was still in effect and protected state defendants from any liability.

The local school district escaped unharmed as well. The 5th Circuit routinely affirmed the decision in favor of the school district on the IDEA claim which precipitated all this litigation, and then addressed the plaintiff's claims under the ADA and Section 504:

Although an IDEA plaintiff can assert claims under other statutes, including the ADA and Section 504 of the Rehabilitation Act, [cite omitted], we agree with the 6th, 8th and 10th Circuits that when an administrative decision "is upheld on judicial review under IDEA, principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws."

This seems to be the clear trend among the courts. If a case can be brought under IDEA it must be brought under IDEA rather than 504 or the ADA. Moreover, if it can be brought under IDEA, then the plaintiff must exhaust IDEA's administrative scheme before filing in court.

ADAM J. v. KELLER ISD, 358 F.3d 804 (5th Cir. 2003).

In this case, the 5th Circuit adopted the "no harm no foul" principle with regard to parental allegations of procedural errors. A procedural error that did not cause harm cannot be the basis for a claim of denial of a Free Appropriate Public Education (FAPE).

Adam was a very bright high school student making good academic progress in school. However, he had some behav-

ioral problems and was eventually determined to be eligible for special education as a student with a serious emotional disturbance. Later, the district classified Adam as autistic, due to Asperger's Syndrome. In an effort to prove that the district had not provided FAPE, the parents alleged some procedural errors in how the IEP was developed and written. The special education due process hearing officer agreed that the district had made some minor errors, but concluded that he was making progress and had received FAPE.

The 5th Circuit agreed, and in so doing, cleared up some confusion based on its earlier rulings:

We have previously stated that "a school's failure to meet the IDEA's procedural requirements may alone warrant a finding that, as a matter of law, the school has failed to provide a free appropriate public education." The other circuits that have addressed this question head on have consistently held that "procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity," but to date we have never formally adopted or rejected this approach. We do so today.

The Court concluded on the facts of this case that there was no harm:

Given Adam's parents active participation in the crafting of his IEPs, and the absence of any demonstrable "lost educational opportunity," we conclude that the procedural requirements of the IDEA were substantially satisfied, even if some information was omitted from Adam's IEP.

Given the sheer number and complexity of IDEA's procedural requirements, a decision like this one is embraced by educators. At the same time, the decision leaves room for parents to make a case based on those procedural errors that truly amount to a denial of a free appropriate public education.

INDEX OF ARTICLES
STATE BAR SECTION REPORT
SCHOOL LAW

ISSUE	ARTICLE	AUTHOR
	Challenging Conventional Wisdom: Advising School Administrators on How to Handle Requests for Employment References	Fred Hartmeister, J.D., Ed.D.
March 1998 Vol. 3 , No. 3	*Toungate vs. Bastrop ISD*, The Texas Supreme Court Writes Last Chapter on the Regulation of Hair-Length in Texas School Districts	Paul Hunn
	Professional Development And Appraisal System	Dohn Larson
	Delinquency & Discipline: *Everything You Wanted To Know – But Were Afraid To Ask!!* – About the Juvenile Justice System	Sharon McLauchlin
	Enforcement of Professional Standards By The State Board For Educator Certification	Maggie Montelongo
	Searches In The Public Schools: *Jenkins vs. Talledega City Board of Education*	Jana Bowman
July 1998 Vol. 3, No. 1	To Coach or Not to Coach: What Was the Question? A Short History on the Reassignment of Coaching Duties	Christopher B. Gilbert
	When the School Attorney is Called Upon to be a Fact Witness and How They are to React	Stephen W. Stewart
	The Status of Board Member Immunity After the United States Supreme Court's Decision in *Bogan v. Scott-Harris*	Blake Hansen
	Roventini v. Pasadena ISD - An Attempted Expansion of *Doe v. Taylor ISD* Outside of the Sexual Abuse Context	David M. Feldman
January 1999 Vol. 3, No. 2	School Districts: Are They Ready For Year 2000?	Yuri Calderon John Podvin
	A Primer for Developing a Comprehensive Board Policy Governing the Use of Activity Funds	Karen L. Johnson Robert M. Hoffman
	Recent Supreme Court Decision on Sexual Harassment: Legal and Practical Issues For Public Schools and Their Legal Counsel	JoAnn S. Wright
June 1999 Vol. 3, No. 3	Liability Insurance: School Districts Have It, But Are They Covered?	James M. Whitton Elaine S. Morris
	Disciplining Disabled Students: An Analysis of Federal Regulations	Janet Little Horton Christopher P. Borreca
	Hubbard v. Buffalo Independent School District: Affirming the School District's Authority in Academic Matters	Mark C. Goulet
	The Enforcement and Legality of Indemnity Provisions in Contracts	Don M. Dean Stephen W. Stewart
December 1999 Vol. 3, No. 4	A Crash Course in Family Law for School Personnel	Sally Hold Emerson Christopher K. Wrampelmeier

AUTHOR	ARTICLE	AUTHOR
	The School District's Perspective Regarding the Interpretation of Section 7.057 of the Texas Education Code The Teacher's Perspective Regarding the Interpretation of Section 7.057 of the Texas Education Code	Marianna M. McGowan Dianna D. Wojcik Dohn Larson
	Legislative Remodeling of School Construction Law: SB 669	Cindy L. Becker
June 2000 **Vol. 4, No. 1**	The Best of Times/The Worst of Times: Legal Issues Surrounding Graduation	Debra Moritz Esterak
	What Do The Cases Say About ARD Procedures?	Jim Walsh
	Something Old - Something New: SB669 Amends Procedures for Bidding and Awarding Contracts for Goods, Services and Construction	Tom Garner, Jr.
	Practical Guide to Policing Student on Student Sexual Harassment	Christopher L. Tritico
	Index of Articles – State Bar Section Report School Law Newsletter	
July 2000 **Vol. 4, No. 2**	The Public Information Act in 2000: A Primer for the School Law Section	John Cornyn
	The 2000 Census and the New Redistricting	John R. Alford, Ph.D.
	Does the Fifth Circuit Diss Qualified Immunity?	Mark H. Neal
	An Overview of Admissions, Attendance, and Truancy	Marquette M. Maresh
	Of Sausages and Laws: What You May Not Remember or May Have Never Known From the 1999 Legislative Session	Lynn Rossi Scott
December 2000 **Vol. 4, No. 3**	A School District Peace Officer Primer	Andy Ramzel
	Selected Issues in Exclusive School Vending Agreements	Daniel M. "Matt" Burns
	Investigating and Responding to Complaints of Serious Employee Misconduct	David M. Feldman
	Texas Charter School Laws: An Overview	Christi Martin Jim Thompson
Spring 2001 **Vol. 4, No. 4**	Fade to Gray – Suspicionless Drug Testing of Students	Robert J. West
	77th Legislative Session Update	Debra M. Esterak
	A Summary of Proposed Amendments to the Commissioner's Rules Pertaining to Special Education Services	Christopher P. Borreca
	A Refresher on Legal Issues Regarding Corporal Punishment	Chris G. Elizalde
Fall 2001 **Vol. 5, No. 1**	Electrical Power Deregulation: Is Your School District Ready for a Competitive Power Market?	Daniel M. "Matt" Burns

AUTHOR	ARTICLE	AUTHOR
	Contract Issues Related to Certification of Professional Educators	Shellie Hoffman Crow
	Top Ten Things I Want to See in Evidentiary Hearings Post *Davis*	Karen Meinardus Karl R. Quebe Victoria Guerra
	Legislative Update: Education-Related Laws Enacted by the 77th Legislature	John R. Elrod Debra M. Esterak
Spring 2002 **Vol. 5, No 2**	Viewpoint Neutrality in the Courtroom and the Classroom: Questions Raised by *Chiu v. Plano Independent School District*	Joy Baskin
	Retire and Rehire – A School Lawyer's Primer	David Backus
	H1-B Visa Option and Other Immigration Alternatives for Foreign Teachers	Bruce A. Coane Cathy Nguyen
	"If These Walls Could Talk" Mold, Asbestos, and Lead Paint: How to Respond When These Problems Arise in Your Buildings	Michelle R. Herrmann
	Off to School We Go – A Look at the 77th Legislature's Revisions to Student Truancy	Marquette M. Maresh
Fall 2002 **Vol. 5, No. 3**	Liability of Public Employees Under the State Created Danger Doctrine	Michael Shirk
	Administrator Contract Protects More Than A Job	Chris G. Elizalde
	Student Drug Testing: Where Are We Now?	Richard A. Morris
	Basic Guide to Property Tax Foreclosures by Texas School Districts and Other Taxing Units	F. Duane Force
Spring 2003 **Vol. 5, No. 4**	Primer on Financing Options for School Districts in Texas	Nancy Hagquist
	Straight From The Top – Answers to FERPA Questions	Karen Randolph Dorcas Green
	Index of Articles – State Bar Section Report School Law	
Fall 2003 **Vol. 5, No. 5**	2003 Legislative Update For School Attorneys	Texas Association of School Boards – Legal Services Division
	2003 Legislative Update – Community Colleges	Myra McDaniel
	2003 Legislative Update – Election Bills	David Mendez
	Do I Have To Get Between Mom And Dad?	Jeanna Lungwitz
	Coggin v. Longview Independent School District: Due Process And Other Lessons From The En Banc Court	Michael Shirk
	Social Security Update	Michael Shirk

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Section Report
School Law