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Newsletter Co-Editors
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To The Members of the School Law Section:

First, let me thank Leticia McGowan and Ellen Spalding, co-editors of this outstanding edition of the newsletter. The articles are timely and valuable to all of us as we represent our school clients in 2009 and beyond. If you have ideas for articles that you would like to write, please contact Leticia at lmcgowan@dallasisd.org or Ellen at espalding@feldmanrogers.com.

The Section council and others are planning the 2009 Summer Retreat scheduled for July 17-18, 2009 at the Hill Country Hyatt near San Antonio – mark your calendar! I would like to thank Kaye DeWalt and Michael Currie for their service as program chairs. I know they will bring us an outstanding program.

This year the Section lost a dedicated professional and good friend to all – Eric Schulze of the Walsh Anderson law firm. As we go forth in our personal and professional lives as school attorneys, we should all remember Eric for his contributions over the years to the legal profession and to this Section. Eric's contributions exemplify the underlying purpose of our organization – that together we are greater than the sum of our parts, and we can all gain from helping one another.

"All of us are smarter than one of us."
- Japanese proverb

"Every great man is always being helped by everybody;
for his gift is to get good out of all things
and all persons."
- John Ruskin

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CONGRESS SIGNIFICANTLY EXPANDS THE AMERICANS WITH DISABILITIES ACT

By: Bryan P. Neal and Andrea Hyatt[1]

On January 1, 2009, the ADA Amendments Act of 2008 (ADAAA) took effect, significantly expanding the reach of the Americans with Disabilities Act of 1990 (ADA). The new law reverses what its proponents perceived as overly restrictive judicial interpretations of the ADA, in particular the interpretation of the ADA's definition of "disability" — interpretations they contend have excluded many people who should have been covered by the original Act. The new law promises to have a significant effect on all ADA-covered entities, including school districts.

Almost all of the changes in the ADAAA come in the form of modifications to the definition of, and method for determining whether an individual has, a disability. The ADA's definition of "disability" applies to all of its applicable titles, which govern different types of covered entities and activities. Thus, the changes are equally effective in the employment context (Title I), state and local government (including school districts) context (Title II), and the other areas within the ADA's reach. In addition, the ADAAA includes a provision modifying the Rehabilitation Act of 1973 to provide that the term "disability" is defined under that Act in the same manner as in the amended ADA.

The major changes to the ADA accomplished by the amendments are:

Mitigating measures out. One of the most significant changes is that, when deciding whether an individual is disabled, courts no longer may consider the ameliorative effects of mitigating measures, such as medication, hearing aids, or prosthetic limbs. Thus, if a person has a condition that is fully controlled by medication or the effects of the condition are not substantially limiting because of the use of an assistive device, that person likely was not disabled under the former law but will now be disabled under the amendments. (The only exception is that courts still may consider the ameliorative effects of eyeglasses and contact lenses.)

"Major life activities" defined and expanded. The Act includes a definition for "major life activities," something previously left to agency regulations. The ADAAA definition is broader than the EEOC's definition; it includes a number of activities not listed in the EEOC's regulation, including lifting, reading, and communicating. Moreover, the ADAAA specifically includes "major bodily functions" such as immune system, normal cell growth, respiratory, circulatory, and reproductive functions.

Episodic conditions. Individuals who suffer from impairments that are episodic or in remission are now covered by the ADA even when their medical conditions are not active.

Strict interpretation rejected. With the one exception discussed below, the ADA retains the requirement that an impairment must be "substantially limiting." However, it rejects Supreme Court precedent requiring plaintiffs to meet a high standard to show that their condition is "substantially limiting." The amendment also rejects in particular an EEOC regulation providing that an individual must show that he or she is "significantly restricted" in the performance of a major life activity before the impairment is considered substantially limiting. Congress directs courts to interpret the term "disability" and its components broadly in favor of coverage. In fact, Congress determined the primary focus should be on whether covered entities complied with their duties under the law, not whether the person has a disability.

"Regarded-as" disabilities. Recall that the ADA also covers people who are "regarded" by a covered entity as having a substantially limiting impairment. The purpose of this provision is to prohibit actions based on myth, fear, and stereotype rather than actual medical concerns. Under the former regulations, the test was difficult to meet because it required that a covered entity mistakenly perceive an individual as having an impairment that was substantially limiting. Regarding someone as limited in an insubstantial way — such as believing an employee to be unable to perform a particular job — does not meet the test under the former regulations.

The ADAAA fundamentally changes the regarded-as standard. Now, an individual will meet the test if he or she is subjected to a prohibited act because of an actual or perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." It remains to be seen how the EEOC and the OCR will elaborate on the new standard, but interpreted literally, it seems almost boundless. If a person need not be perceived as limited by the impairment, and the standard covers not only perceived (i.e. mistaken) impairments but also real impairments, then there will be little need for anyone to try to meet even the new, expanded actual-disability standard. The only exception is that the impairment for purposes of the regarded-as provision must be one that is not transitory (lasting six months or less) or "minor" (an undefined term).

Accommodation and regarded-as. One change that is helpful to covered entities is a section specifically providing that the duty of reasonable accommodation does not extend to an individual who is covered only by the regarded-as provision of the ADA. The courts were divided on that issue under the pre-amended ADA.

Net Effect on School Districts. The effect of the ADAAA on school districts is the same as it will be on all other ADA (and Rehabilitation Act) covered entities: more individuals will be considered disabled and therefore entitled to the protections of the statute. But unlike some covered entities, school districts routinely deal with large numbers of individuals who fall into distinct categories of potentially covered disabled individuals. Specifically, schools employ employees to whom ADA obligations apply; schools routinely interact with parents who may qualify as disabled and be entitled to ADA protection; and, of course, schools deal with students who may be entitled to ADA protection.

School districts will need to expend more resources evaluating and providing accommodations. Employees who are

able to control the symptoms of medical conditions and, therefore, were not disabled under the old law may well be disabled and entitled to reasonable accommodations under the new law. Likewise, parents with certain medical conditions may not have been entitled to reasonable accommodation before the amendments but will be under the new law. While many school districts already took a broad view of which students were disabled under the ADA and the Rehabilitation Act, the law likely will necessitate changes even in that broad approach. For example, an issue school districts have had to address in recent years concerns severe food allergies. Under the pre-amened ADA, it was questionable whether a student with a severe food allergy (i.e., an anaphylactic reaction to peanut exposure, egg consumption, etc.) was "disabled" and thus entitled to a reasonable accommodation. It seems clear under the new law that such students are within the definition of disability and legally must be accommodated. Therefore, school districts will need to develop formal policies for dealing with severe food allergies, which may include prohibiting certain foods on campuses and modifying policies concerning students' abilities to carry medication on campus. There are numerous other examples, including modifications that may be required in educating and administering testing to students who have difficulty learning, concentrating, or thinking.

Another consequence of the ADAAA concerns the frequency and cost of litigation. The amendments increase the number of persons who can sue under the Act, making it more likely that the number of lawsuits will increase. Moreover, before the amendments, defendants frequently prevailed in lawsuits on the ground that the plaintiff did not meet the strict definition of disability. The new law makes that result much less likely.

Action Items. What should schools do to reduce their chances of running afoul of these new amendments? The short answer is that, in almost all cases, school districts should assume that an employee, parent, or student with a medical or mental condition may be considered disabled under the ADA (and Rehabilitation Act) and act accordingly. Human resources personnel and other school administrators need to understand that the reach of the ADA and Rehabilitation Act is much broader than before the amendments and what that means in terms of day-to-day handling of health-related issues and Section 504 requests.

ENDNOTE

1 Bryan Neal and Andrea Hyatt are attorneys with the law firm of Thompson & Knight LLP in Dallas. Both practice in the firm's employment law section, and Bryan spends a significant amount of time advising and representing school districts.

NEW FMLA REGULATIONS: THE TEN MOST IMPORTANT CHANGES FOR YOUR SCHOOL DISTRICT

By: Holly Claghorn[1]

On November 17, 2008, fifteen years after the adoption of the Family and Medical Leave Act and its regulations, the Department of Labor (DOL) issued new regulations. The new rules, which took effect January 16, 2009, constitute a major overhaul of the previous rules. The DOL reorganized the existing regulations, deleted obsolete provisions, made substantive changes, and adopted new military leave provisions. The final rules, including commentary, encompass over 700 pages of material.

It would be impossible to provide a fair summary of the new rules and related commentary in this article. Many summaries, charts, discussions, and explanations of the new rules are available on the Internet. The Department of Labor has prepared a fact sheet on the final rule: http://www.dol.gov/esa/whd/fmla/finalrule/factsheet.pdf, as well as an updated fact sheet on the non-military leave provisions: http://www.dol.gov/esa/whd/fmla/finalrule/whdfs28.pdf, and the military leave provisions: http://www.dol.gov/esa/whd/regs/compliance/whdfs28a.pdf. What I have attempted to do below is to summarize the key changes for Texas school districts. After each point, I have provided an example to help the reader start thinking about how these changes will impact his or her district.

Eligibility changes

One of the requirements for FMLA eligibility is that the employee must have worked for a district for 12 months.[2] The new rules make two changes to how this 12-month period is calculated. First, the DOL retained the rule that the 12 months need not be consecutive, but added a provision that an employer need not count past breaks in employment longer than seven years.[3]

> Example: Star of Texas ISD hired Mary Smith as a physical education teacher. During her second year of employment, Mary gave birth to a baby daughter, after which she resigned from the district. Eight years later, Mary returns to the district. Nine months into that school year, Mary requests FMLA leave to take care of her daughter, who has pneumonia.

Under the old rules, Mary would meet the twelve-month employment test because all previous employment had to be considered. Under the new rules, Mary would not meet this test because her break in service was more than seven years.

Notwithstanding this rule, an employer may have to count time before a break longer than seven years if the break was due to military service or pursuant to an agreement to re-employ the employee after the break.

Second, the rules clarify that an employee continues to accrue employment while on non-FMLA leave.[4] In other words, an employee may become eligible for FMLA leave while on another type of leave.

Example: After Mary Smith left to have her baby, the district hired Juan Garza as the new physical education teacher. Six months later, Juan was seriously injured in a car accident. Juan was not eligible for FMLA leave, because he had worked for the district less than twelve months. After six months of temporary disability leave (TDL), Juan is still unable to return to work. However, Juan now meets the twelve-month eligibility test (six months of active employment plus six months of TDL).[5]

Larger increments for intermittent leave

The new rules clear up confusion over the increments in which leave must be recorded. The old rules suggested that employers had to use the smallest increments permitted by their payroll systems. Employers objected that this led to employees' taking leave in increments as small as six minutes and using FMLA leave as an excuse for chronic tardiness. The new rules allow employers to use the increment in which other leave is recorded, provided that increment is no greater than one hour. Accordingly, if a district records state and local leave in increments of one hour, it may record FMLA leave in the same increments. There is a catch, however: An employer may not charge an employee for FMLA leave if the employee is actually working. So, if an employer records FMLA leave in one-hour increments, the employer must require the employee to take FMLA leave in one-hour increments.[7]

Example: Juan Garza has returned to work, but he must attend physical therapy twice a week. He requests FMLA leave for one and one-half hours every Tuesday and Thursday. The district's timekeeping system records time worked in increments of six minutes, but the district records all leave in increments of one hour. Under the old rules, the district would have to permit Juan to take ninety minutes of FMLA leave for each day that he attended therapy. Under the new rules, the district may require Juan to take two full hours of leave each time.

Under many districts' local policies, state leave is recorded in increments of one-half day. This stems from an old State Board rule concerning the former state sick leave statute. The practice of charging leave in half days is perfectly acceptable for non-FMLA leave. For FMLA leave, however, districts may not record leave in increments larger than one hour.

Substitution of compensatory time

The new rules allow a district, or the employee, to substitute compensatory time for FMLA leave. This is a major improvement. Under the old rules, comp time was not considered "paid leave" and so neither the employer nor the employee could choose to run comp time concurrently with FMLA leave. This was a hardship for employees, who had to choose between protected—but unpaid—FMLA leave and paid—but unprotected—comp time. It also created practical difficulties for districts whose employees carried large comp time balances while on unpaid leave. Under the new rules, the district may insist that an employee use comp time while on unpaid FMLA leave or the employee may opt to access the comp time.[7]

Example: Tyrone Jackson is a special education aide at Star of Texas ISD. Tyrone and his wife have just adopted a baby boy. In the spring, Tyrone requests FMLA leave to spend time with his new son. Tyrone has exhausted all of his paid leave, but he has 60 hours of comp time. The district wants Tyrone to use his comp time so it can clear this time off the books before the next fiscal year. The district may require Tyrone to use his comp time while he is on leave.

Disqualification from attendance bonuses

In another major change, the new rules allow employers to disqualify an employee from a bonus if the employee fails to meet requirements due to FMLA leave.[8] There is a catch, however: the employer must disqualify all employees on similar leaves. This sounds straightforward, but in application it can be tricky.

Example: Julie Nguyen, a counselor at the elementary school, has worked for Star of Texas ISD for three years. Julie's husband, who is in the National Guard, was deployed to Iraq, and Julie took three days of FMLA leave to attend to related matters. Julie used her discretionary state leave so that she would be paid. The district gives a $50 attendance bonus to every employee who has perfect attendance. The district wants to disqualify Julie because she was absent for three days. Under the old rules, the district could not consider Julie's FMLA leave in determining her eligibility for the bonus. Under the new rules, the district may consider Julie's FMLA leave if it disqualifies other employees who used their discretionary state leave.

Earlier fitness-for-duty decisions

The rules on fitness-for-duty requests have also changed, requiring employers to make decisions earlier in the process. The old rules merely recognized an employer's right to request a fitness-for-duty certification. Under the new rules, the employer must inform the employee if a fitness-for-duty certification will be required *when the employer issues the designation notice*.[9] If the district has a written policy regarding fitness-for-duty certification, the employer must still inform the employee, at least orally, of the requirement at the time it issues the designation notice.

Moreover, if the employer will require the certification to address the employee's ability to perform essential job functions, the employer must provide the employee with a list of essential job functions *with the designation request*. This will require foresight and planning from human resource staff.

Example: Two years after his accident, Juan Garza must have back surgery to address lingering problems from his

accident. Star of Texas ISD sends him eligibility and designation notices for FMLA leave. At the same time, Star of Texas ISD's human resources director calls Juan and reminds him that Star of Texas ISD's DEC(LOCAL) policy requires all employees returning from FMLA leave to submit a fitness-for-duty certification. When Juan returns to work, he submits a fitness-for-duty certification that does not address his ability to perform his essential job functions. Because Juan teaches physical education, the district is concerned that his injuries may interfere with his job performance. However, because the district did not provide Juan with a list of essential job functions when it sent the designation notice, the district cannot request that the fitness-for-duty certification specifically address them now.

Retroactive designation clearly recognized

The rules recognize an employer's ability to retroactively designate absences as FMLA leave. Under the old rules, an employer had only two business days to inform an employee that an absence would be designated as FMLA leave. If the employer missed this window of opportunity, it lost the ability to designate absences as FMLA leave while the employee retained the right to later request FMLA protections. As a result, an employee was able to exhaust paid leave, then start FMLA leave.

In 2002, the United States Supreme Court struck down the old rule in *Wolverine World Wide, Inc. v. Ragsdale*, 535 U.S. 81 (2002). In deference to the *Ragsdale* decision, the new rules provide that an employer may retroactively designate leave under two circumstances: (1) if the retroactive designation does not cause harm or injury to the employee; or (2) if the employee agrees to retroactive designation, e.g., in order to obtain job protection for absences.[10]

Example: It is the next school year and a new FMLA year. Tyrone Jackson has missed five days of work because his son is sick. On the sixth day, Tyrone calls to state that his son has been admitted to the hospital with appendicitis. The district obtains medical certification and designates Tyrone's absences from the sixth day forward as FMLA leave. Under the old rules, the district could not designate the first five days as FMLA leave because it did not timely notify Tyrone, even though no one realized at the time that the son's condition was serious. Under the new rules, the district may retroactively designate those five days as FMLA leave, provided the late designation does not cause harm or injury to Tyrone.

New procedure for curing certification deficiencies

The new rules set forth a procedure for addressing problems with certifications, which have created some of the biggest headaches in FMLA leave administration. First, the rules define and distinguish between a certification that is *incomplete* (one or more entries have not been completed) and one that is *insufficient* (form is complete, but the information is vague, ambiguous, or nonresponsive).[11] If an employee submits an incomplete certification, the employer may delay or deny FMLA leave. If the employee submits an insufficient certification, the employer must give the employee written notice specifying the problem and seven days to cure the deficiency. If the employee fails to timely cure the deficiency, the employer may delay or deny FMLA leave.

Example: Tyrone Jackson's son has been released from the hospital, but Tyrone would like an additional week of leave to stay home with him until he is fully recovered. Tyrone has provided a medical certification that states he is needed to care for his son. The date on the form is a week before Tyrone's son was admitted to the hospital. The district believes this is a clerical error, but would like to have the paperwork cleared up. The district must provide Tyrone with written notice of the deficiency and seven days to submit a corrected certification.

Second, the rules provide procedures for *authenticating* and *clarifying* a certification that is complete and sufficient.[12] *Authentication* is defined as requesting verification that the information on the form was completed and/or authorized by the third party. The employee's permission is not required for authentication. Clarification is defined as contacting the third party in order to understand handwriting (many providers are doctors) or to understand the meaning of the response. Under the old rules, only another health care practitioner could contact the employee's health care provider on behalf of the employer to discuss a certification. The new rules permit contact to be made on the employer's behalf by a health care practitioner, human resources professional, leave administrator, or management official, but not by the employee's direct supervisor. Contact for clarification purposes must comply with the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), which means the employee must provide written authorization.

Example: Mark Green, a library assistant, strains his back one weekend while installing laminate floors in his house. He provides a certification that states in one place that Mark should be on bed rest and in another place that Mark cannot stand for more than one hour at a time. The district is confused as to whether Mark can perform his job duties, which normally do not require him to stand for long periods of time. Mark provides a HIPAA authorization so the district may call his doctor for clarification. The district's leave administrator may call Mark's doctor, but may not request any information beyond that required by the certification form.

More time to issue leave notices

The time period for an employer to provide individual leave notices has increased from two business days to five business days.[13] Employers also have five days to provide employees with requests for certification.[14]

Example: Julie Nquyen's husband is coming home from Iraq next month for a few days of R&R leave. Julie wants FMLA leave so she can spend some time with him. She submits her request on a Thursday afternoon to the human resources director, but the director is just leaving town for a job fair. Under the old rules, the director would have had to work over the weekend to make sure she replied to Julie's request by the next Monday. With the new rules, the director can take some R&R of her own over the weekend and respond to Julie's request by the next Thursday.

In addition, the notice process has been separated into two steps:

- within five days of the employee's request for leave or the employer's otherwise learning that an absence may be FMLA-qualifying, the employer provides the employee with an eligibility notice (including notice of the employee's rights and responsibilities). If the employer will require a certification of the need to for leave, the employer requests certification at this time;

- within five days of receiving sufficient information (e.g., a medical certification) to determine that an absence is FMLA-qualifying, the employer provides the employee with notice of whether the leave will be designated as FMLA leave.

Example: By the Thursday after receiving Julie's request, the director must provide Julie with a notice stating whether she is eligible for FMLA leave and requesting any supporting certification. Julie has fifteen days to provide the certification. If the certification is complete and sufficient, the director must provide Julie, within five days, with a notice stating whether the leave will be designated as FMLA leave.

New notice and certification forms

The new rules make some other significant changes to the mandatory FMLA notices. There are now four categories of notices: general (posted in the workplace and distributed to employees), eligibility (notifies employee whether he/she is eligible for FMLA leave), rights and responsibilities (issued with eligibility notice), and designation (notifies employee whether absence will be designated as FMLA leave). The DOL has issued new prototypes for all of these notices, as well as new prototypes for certification. The eligibility notice and rights and responsibilities notice are combined in one document. There are now four certification forms: one for the employee's serious health condition, one for the serious health condition of an employee's family member, one for leave to care for an injured service member, and one for qualifying exigency.[15]

Rules for family military leave

Last, but certainly not least, the new FMLA rules include regulations for the two new military family leaves.[16] These leaves are for employees who are related to persons in the armed services. The two types of military family leave are qualifying exigency leave and military caregiver leave. These leaves are summarized in the following chart:

	Reasons for leave	Employees eligible for leave	Length of leave	Offset by other FMLA leave?
Qualifying Exigency	Exclusively for reasons listed in regulation (see below).	Spouse, son, daughter, or parent of members of the National Guard or Reserves.	Up to 12 weeks in the employer's regular 12-month FMLA year.	The 12 weeks is reduced by other FMLA leave taken by the employee in the 12-month period.
Military Caregiver	To care for a service member with a serious injury or illness sustained in the line of duty.	Spouse, son, daughter, parent, or next of kin (see below) of any service member currently serving in support of a contingency operation.	Up to 26 weeks in a single 12-month period that begins when the leave first begins. Available on a per service member, per injury basis.	The employee is limited to a combined total of 26 weeks of military caregiver and other FMLA leave during the single 12-month period.

The rules provide an exclusive list of what constitutes a *qualifying exigency*:

- Short notice deployment (7 days or less)
- Military events and related activities
- Childcare and related activities
- Financial and legal arrangements
- Counseling
- Rest and Recuperation leave
- Post-deployment activities
- Any other reason agreed to by employer

In each case, the exigency must relate to the military service. For example, an employee may take qualifying exigency leave only to deal with changes to childcare arrangements caused by military service. Moreover, the duration of leave is limited to the amount necessary to deal with the exigency.[17]

Example: When Julie's husband returns from Iraq, she requests one week of leave to attend official discharge ceremonies and re-integration programs with him. She asks for another four weeks of leave to "reconnect" with her husband. If Julie can provide documentation of the official events, she is entitled to qualifying exigency leave. Julie may not, however, take FMLA leave to "reconnect" with her husband, unless the district voluntarily agrees to extend the leave for this purpose. She may, however, be entitled to FMLA leave so they can go to counseling together.

Military caregiver leave extends to the *next of kin* of the covered service member. *Next of kin* is defined as the nearest blood relative, other than the covered service member's spouse, parent, son, or daughter, in the following order of priority:

- Blood relatives who have been granted legal custody of the service member by court decree or statutory provisions,
- Brothers and sisters,
- Grandparents,
- Aunts and uncles, and
- First cousins

If the covered service member has designated in writing another blood relative as his or her nearest blood relative, however, that person is the *next of kin*.[18]

Example: Julie's husband suffers from post-traumatic stress disorder. Julie does not have any more paid leave available. Her sister-in-law (her husband's sister) also works for the district and has eight weeks of paid leave. She requests military caregiver leave to provide care for her brother, including driving him to counseling appointments and psychological support. Julie's sister-in-law qualifies as next of kin and may take up to 26 weeks of leave (including her eight weeks of paid leave) to take care for her brother, provided she submits the appropriate certification of his need for care.

TASB's response

The changes to the FMLA rules mesh with a TASB initiative to develop new Starting Points for districts' DEC(LOCAL) policies, as well as a redevelopment of the DEC(LEGAL) reference materials. Currently, the plan is for the FMLA legal reference materials to be updated, reorganized, and separated into a new DECA(LEGAL). The new Starting Points will prompt districts to address various aspects of their local leave programs, including decisions related to the new FMLA rules. Having said that, the new rules require only a handful of local choices. Districts should look for the new DECA(LEGAL) at Update 85, scheduled to be mailed to districts in April and May, and the DEC(LOCAL) Starting Points during the same timeframe.

TASB HR Services has already distributed new FMLA forms to its subscribers. In addition, HR Services is updating its employment posters and the leave guidance materials available in the *HR Library*.

ENDNOTES

1 Holly Claghorn is a Senior Attorney at the Texas Association of School Boards.
2 29 U.S.C. § 2611(2).
3 29 C.F.R. § 825.110.
4 Id.
5 Juan still would not be eligible for FMLA leave, however, because he has not worked 1,250 hours in the 12 months preceding his FMLA leave.
6 29 C.F.R. § 825.205.
7 29 C.F.R. § 825.207.
8 29 C.F.R. § 825.215.
9 29 C.F.R. § 825.312.
10 29 C.F.R. § 825.301.
11 29 C.F.R. § 825.305.
12 29 C.F.R. § 825.307.
13 29 C.F.R. § 825.300.
14 29 C.F.R. § 825.305.
15 29 C.F.R. part 825, Apps. B, C, D, E, G, & H.
16 29 C.F.R. §§ 825.126 & 825.127.
17 29 C.F.R. § 825.126.
18 29 C.F.R. § 825.127.

LOST IN TRANSLATION:
TRANSLATION REQUIREMENTS FOR SCHOOL DISTRICTS

By: Sarah Weber Langlois[1]

Translation requirements on school districts are numerous, and there is little binding explanatory authority to guide districts. Indeed, caselaw is virtually non-existent. This may come as a relief to school districts, as no litigation regarding districts' translation requirements has ensued. Although caselaw interpreting the various requirements is sparse, with the exception of translations required under special education laws,[2] the U.S. Department of Education as well as the Texas Education Agency have issued commentary interpreting and providing guidance on the translation requirements mandated by the No Child Left Behind Act, and those articles are cited heavily herein. While this article attempts to include the vast majority of translation requirements imposed on Texas school districts under state and federal law, it is not exhaustive, and districts concerned about their translation obligations should consult with their school-law attorneys for individualized advice.

I. TRANSLATION REQUIREMENTS RELATED TO STUDENTS AND STUDENT SERVICES

A. NOTICES TO PARENTS OF FERPA RIGHTS

Districts must "effectively" provide annual notice of FERPA rights to parents who have a primary or home language other than English, including parents' right to: (1) inspect and review the student's education records; (2) seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights; (3) consent to disclosures of personally identifiable information contained in the student's education records; and (4) file with the Department a complaint concerning alleged failures by the educational agency or institution to comply with the requirements of the Act.[3] The notice must include specific procedures as well.[4]

Districts may provide this notice by any means that are reasonably likely to inform parents or eligible students of their rights.[5] However, districts must effectively notify parents or eligible students who are disabled as well as "effectively notify parents who have a primary or home language other than English."[6]

B. TEXTBOOKS AND TEACHER'S EDITIONS

Districts must provide textbooks and teachers' editions in Braille, large type, or any other medium or apparatus that conveys information. Tex. Educ. Code § 31.028 authorizes the State Board of Education to "purchase special textbooks for the education of blind and visually impaired students in public schools."[7] "In addition, for a teacher who is blind or visually impaired, the board shall provide a teacher's edition in Braille or large type, as requested by the teacher, for each textbook the teacher uses in the instruction of students. The teacher edition must be available at the same time the student textbooks become available."[8] Although the State Board of Education has set aside money to enable districts to be able to acquire books for visually impaired students,[9] districts bear the responsibility for providing Braille and/or large-type versions of *nonadopted enrichment materials*.[10]

C. NOTICES RE: STUDENT'S FAILURE TO SATISFACTORILY PERFORM ON ASSESSMENT INSTRUMENTS

Districts must notify parents of students' failure to satisfactorily perform on assessment instruments, promotion, and accelerated instruction in English or the parent or guardian's native language. Tex. Educ. Code § 28.0211. Students who, after at least three attempts, fail to perform satisfactorily on an assessment instrument must be retained at the same grade level for the next school year.[11] The school district must inform parents or guardians of their right to appeal the student's retention.[12] In each instance in which the school district communicates with a parent or guardian under Tex. Educ. Code § 28.0211, the district must "ensure that such notice is provided either in person or by regular mail and that the notice is clear and easy to understand and is written in English or the parent or guardian's native language."[13]

D. NOTICES RE: STUDENTS WHO ARE AT-RISK FOR DYSLEXIA

Districts must make a good-faith effort to notify parents of each kindergarten, first, and second grade student "who is determined, on the basis of reading instrument results, to be at risk for dyslexia or other reading difficulties."[14] Districts must make "a good faith effort" to ensure that this notice "is provided either in person or by regular mail and that the notice is clear and easy to understand and is written in English and in the parent or guardian's native language."[15]

E. NOTICES RE: RIGHTS OF HOMELESS STUDENTS

Districts must notify parents of the rights of homeless students. To the extent feasible, the notice must be in the native language of the parent or unaccompanied youth. 42 U.S.C. § 11432. For the State to be eligible to receive federal funding for the education of homeless children and youths, each school must "provide written notice, at the time any child or youth seeks enrollment in such school, and at least twice annually while the child or youth is enrolled in such school, to the parent or guardian of the child or youth (or, in the case of an unaccompanied youth, the youth)" of the general rights provided under the statute and contact information for the local liaison for homeless children and youths and the State Coordinator for Education of Homeless Children and Youths.[16] Schools must ensure that this notice is provided "in a manner and form understandable to such parent or guardian (or youth), including, if necessary and to the extent feasible, in the native language of such parent or guardian (or youth)." [17]

F. NOTICES RE: PREKINDERGARTEN PROGRAM

Districts that operate a prekindergarten program under Tex. Educ. Code § 29.153 must notify the district's population with children who are eligible for enrollment in a prekindergarten

class of the availability of prekindergarten programs. The public notices must be in English and in Spanish. Tex Educ. Code § 29.153.

III. Notices Under Not Child Left Behind

Districts subject to the No Child Left Behind Act of 2001 ("NCLB") must provide most parental communications required under NCLB in an understandable and uniform format and, to the extent practicable, in a language parents can understand. NCLB, P.L. 107-110. What does this mean? The U.S. Department of Education provides the following explanation:

> This means that, whenever practicable, written translations of printed information must be provided to parents with limited English proficiency in a language they understand. However, if written translations are not practicable, it is practicable to provide information to limited English proficient parents orally in a language that they understand. SEAs and LEAs have flexibility in determining what mix of oral and written translation services may be necessary and reasonable for communicating the required information to parents with limited English proficiency. [*Title I, Part A Final Regulations, 67 Fed. Reg. 71749 – 50, Comments and Discussion on Section 200.36; available at ED's website at http://www.ed.gov/legislation/FedRegister/finrule/2002-4/120202a.html.*][18]

The following notices must be in an understandable and uniform format, and, to the extent practicable, in a language parents can understand:

A. Notices Re: Title I - No Child Left Behind

Rights of Parents with Disabilities: Districts must take "the necessary steps to ensure that communications with parents with disabilities are as effective as communications with other parents" and "must furnish appropriate auxiliary aids and services when necessary to afford a parent with a disability an equal opportunity to participate in, and enjoy the benefits of, Title I, Part A programs, services, and activities, including the parental involvement provisions."[19] Primary consideration of the auxiliary aid and/or service must be given to the expressed choice of the parent with disabilities "unless the [district] can demonstrate that another effective means of communication exists, or that use of the means chosen by the parent would result in a fundamental alteration in the service, program, or activity or in an undue financial and administrative burden."[20]

Teachers' and Paraprofessionals' Qualifications: At the beginning of each school year, school districts must inform parents of each student attending a Title I, Part A school of their right to request information about the professional qualifications of both the teachers and the paraprofessionals who teach and work with their children.[21]

Teachers' Status Re: "Highly Qualified": Title I, Part A schools must give each parent timely notice when their child has been assigned, or has been taught for four or more consecutive weeks, by a teacher who is not highly qualified.[22]

Importantly, even for districts that do not receive Title I funding, Tex. Educ. Code § 21.057 requires school districts to provide written notice to parents if their child is assigned an inappropriately certified or uncertified teacher for more than 30 consecutive instructional days during the same school year.[23] Tex. Educ. Code § 21.057's notification requirement is only for teachers who are not covered by the parental notification requirements related to "highly qualified" teachers under NCLB. Under § 21.057, the superintendent of the school district must provide this notice not later than the 30th instructional day after the date of the assignment of the inappropriately certified or uncertified teacher. The district must make a good-faith effort to ensure that the notice is provided in a bilingual form to any parent or guardian whose primary language is not English. The district must also retain a copy of any notice provided under § 21.057 and make information relating to teacher certification available to the public on request.[24]

Schoolwide Program Plan: Districts must ensure "eligible campuses and parents have been informed concerning the statute, rules, and regulations authorizing schoolwide programs."[25]

Campus Identified for School Improvement: If a campus is identified for school improvement, corrective action, or restructuring, the district must notify parents of that fact either by regular mail or email.[26] The district must also "provide information to parents during the school improvement process by broader means of dissemination such as the Internet, media, or public agencies that serve the student population and their families."[27]

Campus-Level Requirements for Involving Parents: "An LEA may receive funds under Title I, Part A only if the LEA implements programs, activities, and procedures for the involvement of parents in Title I, Part A programs that are consistent with the requirements of section 1118. LEAs must plan and implement these programs, activities, and procedures with meaningful consultation with parents of children participating in Title I, Part A programs. [*Section 1118(a), ESEA.*]."[28] Schools served under § 1118(c) must involve parents in meetings and other activities.

Written Parental Involvement Policy and School-Parent Compact: Each Title I, Part A school is required to develop jointly with, agree upon with, and distribute to, parents of participating children a written parent policy involvement policy.[29] Similarly, each campus must jointly develop with parents for all students served under Title I, Part A, a school-parent compact.[30] Each campus served until Title I, Part A must notify parents of the written parental involvement policy and of the school-parent compact.[31]

Information Related to School and Parent Programs, Meetings, Activities: NCLB: Title I, Part A – P.L. 107-110, Section 1118(e) requires that districts and campuses served under Title I, Part A provide assistance, various materials and training, and coordinated programs and activities to parents.[32]

District Report Cards: Each district that receives Title I funds must release annual report cards. P.L. 107-110, § 1111(h)(2)(A). "Individual school report cards are not required, but information about each school must be included in the LEA report card."[33] Report cards must be disseminated "to all schools in the school district served by the local educational agency and to all parents of students attending those schools."[34] The information must also be made "widely avail-

able through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies, except that if a local educational agency issues a report card for all students, the local educational agency may include the information under this section as part of such report."[35]

B. Notices Re: Title III - No Child Left Behind

Title III of NCLB governs language instruction for limited English proficient and immigrant students. P.L. 107-110, Title III.

Information Re: LEP Program: Districts that use Title I or Title III funds to provide language instruction education programs must provide information concerning the reasons for the identification of the student as LEP, the student's level of English proficiency, the methods of instruction used in the LEP program, exit requirements of the program, parental rights, and similar information "to a parent or parents of limited English proficient children identified for participation or participating in such a program."[36, 37]

The information must be provided to parents not later than 30 days after the beginning of the school year for those students who were identified as being limited English proficient before the beginning of the school year.[38] For those students who are identified as limited English proficient after the school year begins, districts must provide the information to parents within the first two weeks of the student being placed in a language instruction educational program.[39]

Failure to Make Progress: Districts must notify parents of children participating in a Title III program if the LEP program has not made progress on the annual measurable achievement objectives under Title I, Part A § 3122, not later than 30 days after the failure occurs.[40, 41]

IV. Requirements for LEP Students Under Texas Law

Home Language Survey: To ascertain the language their students speak at home and whether bilingual education must be provided, individual schools send home with students a Home Language Survey that is in both English and, when possible, a language that the parent can understand.[42] The Home Language Survey Form can be found in approximately 25 languages on TEA's website.[43]

Notices that Student Classified as LEP: Districts must notify the parents of any child who is classified as LEP and request approval to place the student in the required bilingual or ESL program.[44] Because parents' consent is mandatory, the ability of the district to communicate effectively with parents is crucial. The school must inform parents about the "bilingual education or [ESL] program recommended, its benefits to the student, and its being an integral part of the school program to ensure that the parents understand the purposes and content of the program."[45] The notification letter districts are required to use can be found on the TEA's website.

Oral Language Proficiency Test Required in Student's Home Language: Districts that provide a bilingual education program must "administer an oral language proficiency test in the home language of the students who are eligible for being served in the bilingual education program."[46] The TEA has an approved version of the exam that must be administered to any student whose home language is Spanish. However, if the home language is one other than English or Spanish, "the district shall determine the students' level of proficiency using informal oral language assessment measures."[47] The test must be administered within four weeks of the student's enrollment by professionals or paraprofessionals "who are proficient in the language of the test and trained in language proficiency testing."[48]

Notices Re: Progress of LEP Students Participating in Bilingual Education or ESL Programs: All districts required to conduct a bilingual education or ESL program must "conduct periodic assessment and continuous diagnosis in the languages of instruction to determine program impact and student outcomes in all subject areas."[49] Districts must "report to parents the progress of their child as a result of participation in the program offered to limited English proficient students in English and the home language at least annually."[50] These reports must "reflect the academic progress in either language of the limited English proficient students, the extent to which they are becoming proficient in English, the number of students who have been exited from the bilingual education and English as a second language programs, and the number of teachers and aides trained and the frequency, scope, and results of the training."[51]

V. Interpreters Required for Board Proceedings

Texas Government Code §§ 558.001 and 558.003 govern the circumstances under which a board of trustees is required to provide an "interpreter" for a deaf or hearing impaired individual as defined by statute.[52] In a proceeding before the board in which "the legal rights, duties, or privileges of a party are to be determined" by the board after an adjudicative hearing, the board must "supply for a party who is deaf or hearing impaired an interpreter who has qualifications approved by the Texas Commission for the Deaf and Hard of Hearing."[53]

VI. Bilingual Election Materials Required

The Voting Rights Act requires "covered" school districts to provide bilingual education materials. A jurisdiction is "covered" where the number of United States citizens of voting age is a single language group within the jurisdiction:

- Is more than 10,000, or
- Is more than five percent of all voting age citizens, or
- On an Indian reservation, exceeds five percent of all reservation residents; and
- The illiteracy rate of the group is higher than the national illiteracy rate.[55]

Whenever any "covered" district "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language."[56] However, "where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the [school district]…is only required to furnish oral instructions, assistance, or other information relating to registration and voting."[57] According to the U.S. Department of Justice, "[a]ll information that is provided in English also must

be provided in the minority language as well. This covers not only the ballot, but all election information - voter registration, candidate qualifying, polling place notices, sample ballots, instructional forms, voter information pamphlets, and absentee and regular ballots - from details about voter registration through the actual casting of the ballot, and the questions that regularly come up in the polling place."[58]

Districts must accurately translate written materials and must be available to give oral help if needed.[59] Therefore, bilingual poll workers are essential "in at least some precincts on election day," and trained personnel who can answer questions in the minority language should also be available.[60]

These requirements apply to all elections conducted within the bounds of the district's jurisdiction as determined by the Census Bureau[61] and apply to primary and general elections, bond elections and referenda, and to elections of school district within the designated jurisdiction.[62]

VII. Translation Requirements Under the Americans with Disabilities Act

Under the Americans with Disabilities Act ("ADA"),[63] districts are required to "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others."[64] Generally, this means that districts must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by [the school district."[65] In determining what type of auxiliary aid and service is necessary, the school district must "give primary consideration to the requests of the individual with disabilities."[66]

An exception exists to these requirements, however. A district is not required to "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[67] "In those circumstances where personnel of the [district] believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a [district] has the burden of proving that compliance with [these requirements] would result in such alteration or burdens."[68] The decision that compliance would result in such alteration or burdens must be made by the head of the district (presumably the superintendent) or his or her designee "after considering all resources available for use in the funding and operation of the service, program, or activity" and must also be "accompanied by a written statement of the reasons for reaching that conclusion."[69] If an action required to comply with these requirements would result in such an alteration or burden, the school district must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the [district.]"[70]

VIII. Translation Requirements Relating to District Employees

Notices Under FMLA: Districts are considered "covered employers" under the Family and Medical Leave Act ("FMLA") regardless of the number of employees they employ.[71] Therefore, districts are required to put their employees on notice of their rights under the FMLA.[72] This requirement is true whether or not the school district has any employees who are eligible under the FMLA. Specifically, districts are "required to post and keep posted on its premises, in conspicuous places where employees are employed,…a notice explaining the [FMLA's] provisions and providing information concerning the procedures for filing complaints of violations of the [FMLA] with the Wage and Hour Division."[73] If a district's workforce is comprised of a significant portion of workers who are not literate in English," the district must provide the notice in a language in which the employees are literate."[75]

Notices Re: Workers' Compensation: A district must "notify the [workers' compensation] division of the method by which its employees will receive benefits, the approximate number of employees covered, and the estimated amount of payroll."[76] A district must notify "its employees of the method by which the employees will receive benefits and the effective date of the coverage."[77]

Districts must send a copy of the report of injury submitted to their insurance carrier, including a summary of the employee's rights and responsibilities under the Texas Labor Code – "The Notice of Rights and Responsibilities" – to the injured employee at the time the report is filed with the insurance carrier."[78] The report and notice must "be in English and Spanish, or in English and any other language common to the employee."[79]

Districts must also notify their employees of the ombudsman program to assist injured workers and persons claiming death benefits in obtaining benefits under the Texas Workers' Compensation Act.[80] Notice of the Office of Injured Employee Counsel's ("OIEC") Ombudsman Program must "be posted in the personnel office, if the [school district] has a personnel office, and in the workplace where each employee is likely to see the notice on a regular basis."[81] The notice must be "publicly posted in English, Spanish, and any other language that is common to the [school district's] employees."[82]

Similarly, districts must notify its employees of the 24-hour-a-day toll-free telephone system for reporting violations of an occupational health or safety law.[83]

Finally, if the district employs emergency medical service employees, paramedics, fire fighters, law enforcement officers or correctional officers, the district must post the notice regarding work-related exposure to communicable disease/HIV,[84] "in its workplace to inform employees about Health and Safety Code requirements which may affect qualifying for workers' compensation benefits following a work-related exposure to a reportable communicable disease." The notice must be posted in the district's personnel office as well as in the workplace "where employees are likely to read the notice on a regular basis"[85] and must "be printed in English and Spanish or in English and any other language common to the employer's affected employee population."[86]

IX. Concealed Weapon Notice Required in English and Spanish

A concealed handgun license holder commits an offense if he or she carries a handgun "on the property of another

without effective consent" and "received notice that entry on the property by a license holder with a concealed handgun was forbidden or that remaining on the property with a concealed handgun was forbidden and failed to depart.[87] The required notice encompasses "oral or written communication" by the owner of the property or someone with apparent authority to act for the owner.[88] The notice must be provided in English and Spanish.

It is an exception to the application of this law "that the property on which the license holder carries a handgun is owned or leased" by the District and "is not a premises or other place on which the license holder is prohibited from carrying the handgun" under Texas Penal Code Section 46.03 or 46.035.[89]

ENDNOTES

1 Sarah Weber Langlois is an Associate at **McGinnis, Lochridge & Kilgore, LLP**.
2 Translation requirements related to special education are too lengthy to cover in this article. However, if the reader is interested in obtaining more information about these mandates, email the author for a copy of the complete article detailing translation requirements imposed on school districts.
3 34 C.F.R. 99.7(a)(2)(i)-(iv).
4 *See* 34 C.F.R. 99.7(a)(3)(i)-(iii); 20 U.S.C. 1232g(c)
5 34 C.F.R. 99.7(b).
6 34 C.F.R. 99.7(b)(1)-(2).
7 Tex. Educ. Code § 31.028(a).
8 Tex. Educ. Code § 31.028(a).
9 Texas Education Agency, *A Brief Overview of the adoption Process, available at* http://www.tea.state.tx.us/textbooks/adoptprocess/overview.html/.
10 19 Tex. Admin. Code 66.104(d).
11 Tex. Educ. Code § 28.0211(e).
12 *Id*.
13 Tex. Educ. Code § 28.0211(h).
14 Tex. Educ. Code § 28.006(g).
15 Tex. Educ. Code § 28.006(h).
16 42 U.S.C. § 11432(e)(3)(C).
17 42 U.S.C. § 11432(e)(3)(C)(iii).
18 U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004, *available at* http://www.ed.gov/programs/titleiparta/parentinvguid.pdf.
19 *Id*.
20 *Id*.
21 P.L. 107-110, § 1111(h)(6); *see also* Texas Education Agency's *NCLB Program-Specific Provisions and Assurances, available at* http://www.tea.state.tx.us/nclb/PDF/ProgramSpecificProvisions06-07.pdf.; U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004.
22 P.L. 107-110, § 1111(h)(6); *see also* Texas Education Agency's *NCLB Program-Specific Provisions and Assurances. See Title I, Part A Final Regulations*, 34 C.F.R. § 200.56 for the requirements of "highly qualified" status.
23 *See* Tex. Educ. Code § 21.057.
24 Tex. Educ. Code § 21.057.
25 NCLB: P.L. 107-110, Section 1114(b)(2)(B)).
26 NCLB: Section 1116(b)(1)(E); *U.S. Dep't of Educ*., Parental Involvement: Title I, Part A Non-Regulatory Guidance, April 23, 2004.
27 *Id*.
28 U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004.
29 P.L. 107-110 § 1118(b)(1); Texas Education Agency's *NCLB Program-Specific Provisions and Assurances*; U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004.
30 P.L. 107-110, § 118(d); Texas Education Agency's *NCLB Program-Specific Provisions and Assurances*; *see also* U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004
31 P.L. 107-110, § 1118(b)(1); *see also id.*; U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004; P.L. 107-110, § 1118(f); *see also* Texas Education Agency, *NCLB Program-Specific Provisions and Assurances*.
32 P.L. 107-110, Section 1118(e); Texas Education Agency, *NCLB Program-Specific Provisions and Assurances*.
33 U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004. Example charts with all the required assessment data elements at the LEA and school level are provided in Tables 4 and 5 of the Report Cards, Title I, Part A Non-Regulatory Guidance available at: http://www.ed.gov/programs/titleiparta/reportcardsguidance.doc.
34 P.L. 107-110, § 1111(h)(2)(E).
35 *Id*.
36 U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004; P.L. 107-110, § 3302.
37 [*Section 1112(g)(2), ESEA*] U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004 (emphasis added); *see also* P.L. 107-110, §§ 1112(g) and 3302(a).
38 P.L. 107-110, § 1112(g); U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004.
39 *Id*.
40 U.S. Dep't of Educ., *Parental Involvement: Title I, Part A Non-Regulatory Guidance*, April 23, 2004 (citing P.L. 107-110, § 1112(g)(1), (2), and (3)).
41 P.L. 107-110, § 3302(c).
42 Tex. Educ. Code § 29.056; 19 Tex. Admin. Code § 89.1215.
43 *See* Texas Education Agency, Home Language Surveys, *available at* http://www.tea.state.tx.us/curriculum/biling/homelangsurveys.html.
44 Tex. Educ. Code § 29.056; 19 Tex. Admin. Code §§ 89.1220(j); 89.1240.
45 Tex. Admin. Code § 89.1240.
46 19 Tex. Admin. Code. § 89.1225.
47 *Id*.
48 19 Tex. Admin. Code. § 89.1225.
49 19 Tex. Admin. Code § 89.1265.
50 *Id*.
51 *Id*.
52 Tex. Gov't Code § 558.001.
53 Tex. Gov't Code § 558.003(a).
54 *See* 42 U.S.C. 1973aa-1a (hereafter "Section 203 of the Voting Rights Act").
55 U.S. Department of Justice Civil Rights Division, Voting Section, *About Language Minority Voting Rights, available at* http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm; Section 203 of the Voting Rights Act.
56 Section 203 Voting Rights Act, *available at* http://www.usdoj.gov/crt/voting/42usc/subch_ib.htm#anchor_1973aa-1a.
57 *Id*.
58 U.S. Dep't of Justice Civil Rights Division, Voting *Section, Section 203 of the Voting Rights Act, available at* http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm.
59 *Id*.
60 *Id*.
61 Section 203 of Voting Rights Act; U.S. Dep't of Justice Civil Rights Division, Voting Section, *Section 203 of the Voting Rights Act*.
62 *Id*.
63 P.L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611; 28 C.F.R. §§ 35.160; 35.164; 35.104 (ADA regulations).
64 28 C.F.R. § 35.160(a).
65 28 C.F.R. § 35.160(b)(1).
66 28 C.F.R. § 35.160(b)(2). *See* 28 C.F.R. § 35.104 (describing auxiliary aids and services).
67 28 C.F.R. § 35.164.
68 *Id*.
69 *Id*.
70 *Id*.
71 29 C.F.R. § 825.104(a).
72 29 C.F.R. § 825.300(a).
73 *Id*.
74 29 C.F.R. § 825.300(a).
75 29 C.F.R. § 825.300(c).
76 Tex. Labor Code § 504.018(a).
77 Tex. Labor Code § 504.018(b).
78 28 Tex. Admin. Code § 120.2.
79 28 Tex. Admin. Code § 120.2(d).
80 Tex. Labor Code § 404.153; 28 Tex. Admin. Code § 276.5.
81 28 Tex. Admin. Code § 276.5(a).
82 28 Tex. Admin. Code § 276.5(b); 28 Tex. Admin. Code § 276.5(c)
83 Tex. Labor Code §§ 411.081- 411.082.
84 28 Tex. Admin. Code § 110.108(a).
85 *Id*.
86 28 Tex. Admin. Code § 110.108(d).
87 Tex. Penal Code § 30.06.
88 *Id*. See Tex. Penal Code § 30.06(c)(3) (defining "written communication").
89 Tex. Penal Code § 30.06.

Professional Services Contracts, Architectural Involvement and Project Delivery Systems: The Refinement of Architectural Involvement in School Construction

By: Michael Shirk[1]

I. Introduction and Overview

A decision by a school district to embark upon new construction, campus renovations, repairs or rehabilitation (which we will refer to collectively as "construction") brings into play some of the most controversial, highly scrutinized, risk-inducing and expensive decision-making processes known to 21st century humanity.[2] This article will provide school boards and their counsel with resources to assist in navigating a tangle of statutory requirements for obtaining educational facilities. If a grand unifying theme is to be found, it hopefully integrates the following components:

The ***Professional Services Procurement Act*** (PSPA) prohibits a school district from using familiar procurement methods which make use of competitive bids to obtain services at the lowest cost. Instead, the PSPA requires that professional services, including but not limited to, architecture, engineering and landscape architecture, be selected based upon demonstrated competence and qualifications in order to secure the highest quality services available. The chasm separating PSPA from the more traditional competitive bidding process draws a stark distinction between two perennial concerns of school districts: highest quality (PSPA) vs. lowest cost (competitive bidding). The PSPA's prohibitions exist within the context of a more overarching qualifications-based selection processes imposed by Subchapter B of Chapter 44 of the ***Texas Education Code***. This piece will stress the instances during which a school district must use qualifications-based selection processes (often shortened to QBS) under mandate of the PSPA and Chapter 44, Subchapter B of the Texas Education Code.

The ***Architects' Practice Act***, Texas Occupations Code Chapter 1051 *et seq.*, requires that architectural plans and specification be prepared and issued by an architect or a person working under the supervision and control of an architect. The Texas Board of Architectural Examiners (TBAE) issued three companion decisions in late 2008, two of which have direct application to the design and issuance of construction documents for school districts. These decisions, rendered in accordance with the adjudicatory power vested within TBAE as an executive branch agency to interpret and enforce the Architect's Practice Act, should place school districts on notice that facilities construction of any significance will require the professional services of an architect and of an engineer. School districts should never retain only an engineer or only an architect to prepare and issue construction documents for facilities construction for sizable projects and must ensure that the selection of the architect and the engineer satisfy the procedural and substantive requisites of the PSPA.

II. Professional Services: The Role of Architects and Engineers

Policies adopted by independent school districts often restate and describe statutory obligations to retain architectural and engineering services as required by the Texas Occupations Code. However, these restatements do not completely explain a district's obligation to retain both an engineer and an architect.

CV(Legal)(Facilities Construction) properly advises that only an architect registered by the TBAE "shall prepare architectural plans and specifications" for facilities to be built or altered above designated cost thresholds established by ***Tex. Occ. Code §1051.703(a)*** and implementing regulation found at ***22 Tex. Admin. Code 1.212***. The policy concludes by stating that a "District may comply with this requirement [of architectural involvement] by choosing a registered architect or a registered professional engineer as the prime design professional for a building construction, alteration, or addition project." Citations are provided to ***Tex. Occ. Code §1051.703*** and ***22 Tex. Admin. Code 1.21*** but the statutory and regulatory requirements are not fully shown in the policy itself.

There are two essential matters encompassed by this final sentence from CV(Legal)(Facilities Construction): (i) the legal competency of a registered professional engineer to issue *architectural* as opposed to *engineering* plans and specifications and (ii) the extent to which designation as the "prime design professional" may serve to expand the scope-of-services provided by an engineer.

It is the position of the TBAE that a district does not comply with statutory and regulatory duties surrounding the issuance of architectural plans and specifications "by choosing a . . . registered professional engineer as the prime design professional for a building construction, alteration or addition project" if the scope of the work meets the thresholds of section ***1051.703(a)*** of the Architects Practice Act and corresponding regulations. These thresholds are $100,000 for new construction and $50,000 for facilities alteration. ***22 Tex. Admin. Code 1.212***.

On October 16, 2008 the TBAE issued two Final Orders resulting from contested case proceedings which are of significant importance to school districts. A school district must always retain an architect for the preparation and issuance of specific construction documents under provision of ***Texas Occupations Code §1051.703(a)*** (stating that architectural plans and specifications for qualifying construction project "may be prepared only by an architect.") This legal duty is not satisfied simply by the selection of a professional engineer as the "prime design professional."

The TBAE enforcement cases involved two engineers who each issued complete sets of construction documents for school districts (Lorena and Waco Independent School Districts) including many sheets which were found by the Board to be "architectural plans and specifications." ***Texas Board of Architectural Examiners v. John Richard Rogers; and Texas Board of Architectural Examiners v. James Winton.***

No administrative penalties were imposed but the Board did issue cease-and-desist ORDERS against the engineers pro-

hibiting them from engaging in the practice of architecture by issuing architectural plans and specifications or engaging in other actions which constitute the "practice of architecture" unless such practice will be under the effective supervision and control of a Texas architect.

In each of the cases, the TBAE rejected the engineers' argument that they were entitled, as a matter of law, to issue all of the plans and specifications for the districts' construction without architectural involvement. The Final Orders make the Board's position explicit that there are, among the totality of construction documents necessary for a project of any significant size, unique construction documents which constitute "architectural plans and specifications." This subset of construction documents may never be prepared or issued by an engineer unless he or she is working under the supervision and control of an architect.

These decisions are mentioned in order to emphasize two points:

- When cost thresholds meet the requirements of the Architects' Practice Act any facility built or altered by a school district will require the services of both an architect and an engineer. ***Tex. Occ. Code §1051.703(a).***[3]

- Provisions within the Professional Services Procurement Act and Subchapter B of ***Chapter 44*** of the Texas Education Code which require qualifications-based selection processes for professional services must be read and applied recognizing the legal requirement that both professions, engineering and architecture, will be required for any sizable facilities construction.

The TBAE Final Orders are based on numerous expressions of legislative intent which make clear that the practice of architecture, and the issuance of "architectural plans and specifications," were not within the legal competency of an engineer unless he or she is working under the supervision and control of an architect. School districts should now have sufficient guidance to recognize that the retention of an architect and an engineer will be required for facilities which have projected construction costs in excess of $100,000 and for facilities alteration which have projected construction costs exceeding $50,000.

III. The Professional Services Procurement Act and Competitive Procurement Methods

The ***Professional Services Procurement Act*** (PSPA) prohibits a school district from selecting a provider of professional services, or awarding a contract for professional services, on the basis of competitive bids. ***Texas Gov't Code 2254.003***. The PSPA includes, within its listing of "professional services," accounting, architecture, landscape architecture, land surveying and professional engineering. *Id*. ***2254.002***

The Texas Attorney General has consistently held that "under the Professional Services Procurement Act, a contract for the construction of a public work may not be awarded on the basis of competitive bids if architectural or engineering services comprise any part of the contract." Att'y Gen. Op. No. ***JC-0037*** (1999) at 5, *citing*, Att'y Gen. Op. No. ***JM-1189*** (1990) at 4, 5; Tex. Att'y Gen. ***LO-98-060*** and ***LO-96-117*** This is a very significant interpretation inasmuch as it broadly prohibits a school district from entering into any contract which contains or contemplates the provision of professional services even if the professional services are to be provided through a contract to which the district is not a party.

This very broad interpretation was affirmed in Tex. Att'y Gen. Op. No. ***JC-0374*** (2001) which held that if a governmental entity enters into a contract which "either expressly or in fact" requires professional services as a component part, the PSPA will apply regardless of whether the professional services are "integral" to the contract or "merely ancillary," and whether or not the need for professional services was "unforeseen" at the time of contracting. Likewise, application of the PSPA is not dependent upon whether the professional services are "required in the planning and design phase versus the construction phase of a contract." *Id*. In sum, *anytime* architectural, engineering, landscape architecture or any professional services are required, even if sought in conjunction with pre-bond or early programming activities, the professional services must be acquired based on qualifications and not price.[5] A policy adopted by the Ft. Worth Independent School District ***CV(Local)(X)*** and ***CV(Exhibit)(X)*** provides excellent, though certainly not exclusive, criteria for evaluating professional services and arriving at a selection based upon competence and qualifications rather than price. ***Dallas ISD*** uses a preexisting master file from which it then selects architects and engineers based on qualifications rather than price.

Texas, prohibits a governmental entity from requesting or obtaining fee or cost information from a professional until after a determination has been made that the professional is the most qualified based upon "demonstrated competence and qualifications to perform the services." *Id*. ***2254.003(a)(1)*** The federal government also requires that professional services be acquired only after an initial review of "demonstrated competence and qualification" rather than lowest price.[6] Qualifications based selection is a competitive procurement method but, rather than rely on price or cost data, it places competitive scrutiny upon the offeror that is most qualified for the job.

After making an initial selection based upon "demonstrated competence and qualifications to perform the services," a governmental entity will then seek to negotiate a "fair and reasonable price" for the work to be performed. If, however, the negotiations are not successful, a school district must "formally end negotiations" and commence discussions with the "next most highly qualified provider" with the objective of negotiating a "fair and reasonable price" for the professional services. *Id*., ***2254.004***

Both the TBAE and the Texas Board of Professional Engineers prohibit registrants from submitting a competitive bid to a governmental entity in violation of the PSPA and each agency will take disciplinary action against a registrant who submits a competitive bid.[9] Accordingly, any RFQ/RFP or other announcement of facilities work will fail to elicit responses from the most qualified professionals if a district fails to comply with the PSPA by seeking, directly or indirectly, submission of price or cost information.

IV. Qualifications Based Selection Under the Texas Education Code

Once a school district has concluded that it will embark upon the construction of new facilities or engage in the alteration,

renovation or rehabilitation of existing facilities it must, as an initial matter, decide which statutory method it will use to procure and structure its relationship with vendors. This first step, selecting a procurement and project delivery *method* requires careful compliance with ***Subchapter B*** of the Texas Education Code and is to be distinguished from the selection of *vendors* by means of whichever process is chosen.[10]

V. Selecting the Method for Project Delivery

A district must initially select a procurement method which "provides the best value for the district." **Tex. Ed. Code §44.035(a)**. There are seven project delivery methods from which a district may choose for designing and constructing new facilities. Different points throughout the Texas Education Code permit school boards to delegate many of the responsibilities to administrative staff.[11] However, the initial determination of which of the various competitive procurement methods will provide the "best value to the district" may not be delegated and must always result from a vote of the Board itself.

The project delivery methods from which a district may choose to procure construction services subsequent to a Board decision regarding "best value for the district" are set forth in section ***44.031*** of the Texas Education Code.[12]

Despite the "best value" mandate, Texas law provides no guidance on the factors which a district must consider for ascertaining which procurement method will provide the "best value for the district" as contemplated by Tex. Ed. Code § 44.031(a). The Attorney General has suggested that a district may wish to consider the criteria provided in ***Education Code §44.031(b)*** which are used for evaluating those individuals and entities which ultimately respond to a Request for Proposal or other announcement but that, at a minimum, "a school district should establish, by rule, its own procedure and criteria to determine the purchasing method that will provide the best value in a particular instance." ***Tex. Atty Gen Op. JC-0037I (1999)***.[13]

The Texas Education Agency has published "advisory guidelines relating to the fiscal management of a school district[s]" under authority of Tex Ed Code 44.001. In the most recent Financial Accountability System Resource Guide (***FASRG***) the TEA's position is that a school board may adopt a board policy that designates one of the purchasing methods found in section 44.031(a) "as the default 'best value' method. Such a policy should be adopted by resolution describing the board's rationale for selecting the default method and should also provide a mechanism for the board to select another method upon recommendation by district staff."[14] As an example, the Waco ISD has determined that the competitive sealed proposal method of project delivery/contract award provides the best value in most circumstances. ***CV(Local)(X)***

The Texas Education Agency's ***FASRG***, especially the Handbook on Purchasing for Texas Public Schools, Junior Colleges and Community Colleges, which is contained as Appendix 1 to the FASRG Purchasing Module commencing at page 63, are essential reading in this area. Anyone advising districts would do well to become familiar with these resources given the complexity of facilities construction and the numerous overlapping laws. An especially useful section is the Q & A Section for Construction/Real Property which commences at page 127.

VI. Qualifications-Based Selection Requirements within Project Delivery Systems

After a school district has made the "best value" finding and has selected a procurement method in order to award a construction contract, or possibly multiple building contracts depending upon the delivery method, a district remains responsible for ensuring that the contract(s) for professional services are awarded in compliance with the Professional Services Procurement Act and the Texas Education Code, each of which may separately require a qualifications based selection process for professional services.[15]

A. Design/Build Contract
Tex. Education Code 44.036/Policy CVC (Legal)
FASRG - Pages 25, 81 & 190

Design/Build is a project delivery method in which a single entity contracts with a school district to provide both design and construction services. The design/build firm itself coordinates and contracts with subcontractors and is responsible to the District for delivery of a completed project. Despite the apparent simplicity stemming from a single contact, practitioners must remain mindful of the PSPA because, even though the contract is not one directly for performance of professional services, "a contract for the construction of a public work may not be awarded on the basis of competitive bids if architectural or engineering services comprise part of the contract." Therefore, while the Design-Build firm contracts with the professionals, the District remains under a duty to ensure PSPA compliance. In addition, the Education Code also imposes many supplemental duties upon a District which demand strict adherence to PSPA.

There are three points at which professional services become intertwined with a district's design/build contract.

(1) School District Designates A Prime Design Professional

To ensure that a District receives competent professional advice from a professional whose duty flows to the District itself (rather than to the design-build firm), the Education Code requires that the district "designate an engineer or architect independent of the design-build firm to act as its representative for the duration of the work on the facility." Tex. Educ. Code §44.036(c). The selection of the architect or engineer must be made using qualifications-based selection processes in accordance with the PSPA unless the District already has a design professional on staff to act as its representative. The Design-Build firm ultimately selected must submit all construction documents to the District or its designated professional "before or concurrently with construction." ***Tex. Educ. Code §44.036(f)***.

The Architects' Practice Act, Tex. Occ. Code §1051.703(b) permits a school district to select either an engineer or an architect as the prime design professional for purposes of reviewing construction documents, coordinating work and serving as the District's "representative for the duration of the work on the facility" as required by the Education Code. However, "designation as the 'prime design professional' does not expand, limit, or otherwise alter the scope of a design professional's practice . . . ." ***22 Tex. Admin. Code §1.212(c)***

The "prime design professional" language was analyzed in both the ***Rogers*** and ***Winton*** decisions. The Board held that designation as the "prime design professional" does not expand the legal (much less technical) competencies of an engineer to permit the practice of architecture by an engineer unless the practice is under the active supervision and control of an architect. This conclusion conflicts with **CV(Legal)(Facilities Construction)** which indicates that a district complies with the requirements of the Architects' Practice Act "by choosing a registered architect or a registered professional engineer as the prime design professional for a building construction, alteration, or addition project." If an architect is required by ***Tex. Occ. Code §1051.703(a)*** to prepare and issue the architectural plans and specifications for facilities construction or alteration, a district does not satisfy legal obligations by permitting an engineer to issue such plans and specifications simply by designating the engineer as the "prime design professional."

Apart from the general prohibition against awarding a contract for professional services on the basis of competitive bids, the PSPA provides, at best, cursory direction for identifying the most qualified professional. Fortunately Attorney General Abbott has provided some guidance by noting that that "the most reasonable way to assure that such service providers are selected on the basis of demonstrated competence and qualification . . . is through a request for qualifications or similar competitive process." Tex. Att. Gen Op. No. GA-0494(2006)

(2) Issuance of RFQ/Design Criteria Package

Another junction at which the PSPA imposes statutory duties upon school districts within the context of a design-build construction model is to be found in issuance of the Request for Proposal or other project announcements. Districts must prepare sufficiently detailed materials to allow design-build firms to respond to a request for qualifications and the accompanying design criteria package. Well written RFQs will invariably require Districts to develop precise, technical projections and recitals which, among other things, may contain detailed programming analysis, a determination of the scope and spatial relationship of functional elements for expected work and preliminary planning for intended purposes and scope-of-services rendition. This combination of activities may constitute the "practice of architecture" and therefore require professional services. *See,* 22 Tex. Admin. Code §1.5(49) (defining "practice of architecture") These services may also, of course, constitute the practice of engineering.

The Education Code anticipates just such a situation: "If the preparation of the design criteria package requires engineering within the meaning of Chapter 1001, Occupations Code, or the practice of architecture within the meaning of Chapter 1051, Texas Occupations Code, those services shall be provided in accordance with applicable law." Tex. Educ. Code §44.036(d). "Applicable law" requires that these activities are provided only by registered architects and engineers who have been selected in accordance with the PSPA.

(3) Phase One — Certification for Architect and Engineer

The selection of a design-build firm occurs in two phases. In Phase One a District reviews responses which it has received to the request for qualifications and "shall qualify a maximum of five offerrors to submit additional information and, if the district chooses, to interview for final selection." Tex. Educ. Code § 44.036(e)(1). This ranking may not be founded upon "cost-related or price-related evaluation factors" but must, instead, be based upon demonstrated competence and qualifications as gleaned by a review of information submitted to a District "in response to the request for qualifications." *Id*.

A design/build firm which responds to a District's RFQ or other announcement "must certify to the district that each engineer or architect that is a member of its team was selected based on demonstrated competence and qualifications, in the manner provided by [the PSPA]." *Id*.

In light of the TBAE's Final Orders in ***Rogers*** and ***Winton*** it is clear that a school district electing design-build for a project above the thresholds of the ***Architects' Practice Act, section 1051.703*** ($100,000 for new construction / $50,000 for renovations or repairs) should demand two certificates of PSPA compliance from a Design/Build firm at Phase One – one for the architect(s) and one for the engineer(s).

(4) Phase Two — Costing Methodology But Not Cost

During Phase Two of the selection process a District "may request additional information regarding demonstrated competence and qualifications" along with other information and "shall rank each proposal submitted on the basis of the criteria set forth in the request for qualifications [in order to] select the design-build firm that submits the proposal offering the best value for the district on the basis of the published selection criteria and on its ranking evaluations." Tex. Educ. Code § 44.036(e)(2). This, once again, implements a qualifications-based selection process which prohibits a district from requesting or considering cost or price information from architects and engineers.

As part of the additional information a District may acquire during the Phase Two ranking it may request a design-build firm's "costing methodology;" this, however, must not be used as a subterfuge to seek prohibited "cost-related or price-related evaluation factors" in derogation of the qualifications based selection process envisioned by Tex. Educ. Code §44.036. [16] *See*, ***JC-0037***, *supra*., (ISD which uses design/build model bound by statutory "mechanism for competitive procurement - but not competitive bidding - of design/build contracts . . . .")

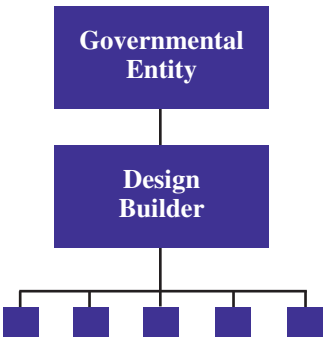
In language that is even more demanding than the Professional Services Procurement Act, the Education Code requires a District not only to negotiate a contract with the most highly ranked of the five offerrors but also, if unable to reach agreement, to "formally and in writing, end negotiations with that offerror and proceed to negotiate with the next offerror in the order of the selection ranking until a contract is reached or negotiations with all ranked offerrors end." ***Tex. Educ. Code §44.036(e)(2)***

(5) Inspection and Testing Services For Facility Acceptance

Finally, the Texas Education Code, once again in supplementation of PSPA requirements, requires that a District contract for various inspection, testing and verification services (if not done by a competent employee) "necessary for acceptance of

the facility by the district" using the qualifications based selection procedures of the PSPA. Tex. Educ. Code §44.036(h). The design/build firm is required to provide signed and sealed construction documents to the district at the conclusion of construction. Id. §44.036(i) *See also*, ***22 T.A.C. 1.103*** (establishing sealing requisites).

Design/build is commonly depicted as indicated:



B. Construction Manager – Agent
Tex. Educ. Code §44.037 / Policy CVD(Legal)
FASRG – PAGE 79

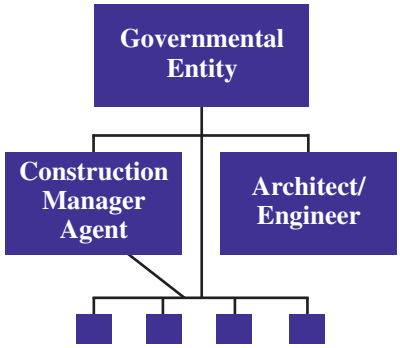
Unlike the single point-of-contact anticipated by the Design/Build model, the Construction Manager-Agent (CMA) serves as a fiduciary for the District to provide "consultation to the school district regarding construction, rehabilitation, alteration, or repair of the facility." Tex. Educ. Code §44.037(b) While a District may, by contract with the CMA, "require [it] to provide administrative personnel, equipment necessary to perform duties . . . on-site management and services specified in the contract" the CMA holds no subcontracts and, therefore, a District must enter into multiple contracts for construction services. The District may provide or acquire the administrative services on its own as well. *Id*.

While the CMA is not necessarily a statutory "professional" within the ambit of the **PSPA**, Section 44.037(d) of the Education Code nonetheless requires that the CMA be selected "on the basis of demonstrated competence and qualifications in the same manner as provided for the selection of engineers and architects under Section ***2254.004***, Government Code."

Professional services, including but not limited to architecture, landscape architecture and engineering must, if not provided by full-time employees of the District, be acquired by the District in compliance with the PSPA prior to or at the same time that a CMA is selected. ***Section 44.037(c)*** of the Texas Education Code and ***CVD-Legal*** refer to a District's selection of an the engineer or architect but, as should be clear by now, any project having construction costs in excess of $100,000 and any rehabilitation, alteration or repair of District facilities having construction costs in excess of $50,000 require <u>both</u> an architect's and an engineer's involvement. The word "or" is not always disjunctive and cannot be read to be so since engineers <u>and</u> architects are not interchangeable and may only perform services within each of their lawful scope of practice. Of course, each professional must be selected through the qualifications-based standards of PSPA.

In addition to "a general contractor, trade contractors, or subcontractors who will serve as the prime contractor for their specified portion of the work" and which may or may not be subject to competitive procurement, a District or the CMA "shall procure" the various inspection, testing and verification services "necessary for acceptance of the facility by the district" using the qualifications-based selection procedures of the PSPA. TEX. EDUC. CODE §44.037(e)&(f).

The Construction Manager-Agent is commonly depicted in the following manner; the line between the CMA and the various prime contractors serves to emphasize that while the CMA provides consultation to the district as a fiduciary it neither holds construction subcontracts nor provides project bonding or accepts other project risk.



Multiple Prime Contractors

C. CONSTRUCTION MANAGER - AT - RISK
TEXAS EDUCATION CODE §44.038 / POLICY CVE(LEGAL)
FASRG – PAGES 80 & 187

Construction Manger-at-Risk (CMR) is superficially similar to the CMA model but is more properly understood as a completely distinct project delivery method which may prove more attractive to a District. The CMR not only "provides consultation to the school district regarding construction during and after the design of the facility" but also "assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor." TEX. EDUC. CODE § 44.038(b). Accordingly the CMR contracts directly with the multiple subcontractors and serves as the single point of responsibility for construction while also providing pre-construction and construction services. However, the process of selecting a CMR is more complicated than the process of selecting a CMA.

The District, "[b]efore or concurrently with selecting a construction manager-at-risk . . . shall select or designate an engineer or architect who shall prepare the construction documents for the project." *Id*. §44.038(c) It cannot be stressed too often (and it is one of the recurring themes of this piece) that a District will likely need to select or designate an architect **<u>and</u>** an engineer since neither is legally competent to issue all of the construction documents for projects of any significant size. The TBAE Final Orders in the ***Winton*** and ***Rogers*** cases made this point abundantly clear.[17] Districts must take this into account when using a construction manager-at-risk project delivery system given the language found in standard District policy; *See, e.g.* CVE(Legal) (indicating that District "shall select or designate an engineer <u>or</u> architect who shall prepare the construction documents for the proj-

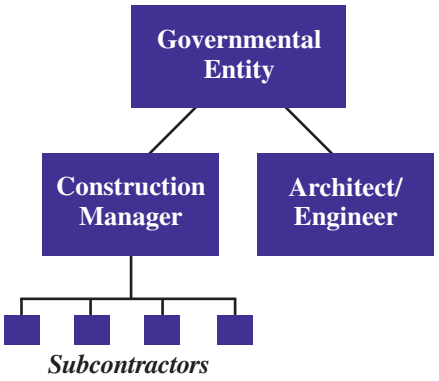
ect.")(underline added)

If the architect and the engineer are not full-time employees of the district they must be selected "on the basis of demonstrated competence and qualifications to perform the services" using the procedures specified in the **PSPA**. *Id*. §44.038(c).

A District may use either a one step or a two step process to select its CMR. TEX. EDUC. CODE §44.038(e). If the one step process is used a District will issue a Request for Proposals and may request that those seeking the contract for CMR provide "proposed fees and prices for fulfilling the general conditions." If the two-step process is used, a District will issue a Request for Qualifications and may not request fee and price information during the first phase of the selection process but must, instead, use a qualifications-based selection process to rank the top five most-qualified offerrors. These five finalists may then be asked to "provide additional information, including the construction manager-at-risk's proposed fee and its price for fulfilling the general conditions." *Id*.

Whichever method is used, a District commences its negotiations with "the offerror that submits the proposal that offers the best value for the district . . . [and] shall first attempt to negotiate with the selected offerror a contract." *Id*., §***44.038(g)*** If negotiations are unsuccessful, a District must "formally and in writing" end negotiations and commence negotiations with the next highest ranked."

The CMR method of procurement and delivery is graphically depicted as set forth below. A prong which is missing, however, would indicate the District's duty to "provide or contract for, independently of the construction manager-at-risk, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility by the district." Tex. Educ. Code §44.038(d) Contracts for these services must be awarded in compliance with the substantive and procedural requirements of the PSPA whether or not the services are rendered under a contract for "professional services" as defined by PSPA. ***Id***.



D. Competitive Sealed Proposals
TEXAS EDUCATION CODE §44.039/CVB (LOCAL(X)) CVB (LEGAL)
FASRG – Page 77 & 165

As with the other project delivery methods the Education Code and standard District policy describe a District's responsibility to "select or designate an engineer or architect to prepare construction documents for the project." Tex. Educ. Code §***44.039(b)*** However, this provision must be read in the context of laws regulating the practice of architecture and engineering. A District may not designate an architect to prepare engineering plans or vice versa. Each must be designated to prepare construction documents within the scope of their respective professions. Recent interpretations of the Architects' Practice Act from the TBAE, *supra*., make it clear that a District will be required to select or procure both an architect and an engineer for project(s) which involve architectural design and engineering. If the design professionals are not full-time employees of the District, the PSPA's competitive procurement method must be used to ensure that the District retains the most competent and qualified design professionals. *Id*.

Construction documents must be 100% complete in order to be included with the request for sealed proposals and, therefore, the documents must be sealed as required by the Architects' Practice Act and ***implementing regulations***.

A District must, as with all project delivery models, provide or contract for inspection, testing and verification services "necessary for acceptance of the facility by the district" through the competitive procurement methods set forth in PSPA whether or not the services are otherwise within the scope of the PSPA. ***TEX. EDUC. CODE §44.039(c).***

The District's Request for Sealed Proposals may seek price and cost information and use this information as a stated selection criteria. However, in recognition of the fact that lowest cost is not always the "best value for the district," Section 44.039(g) expressly notes that "the district is not restricted to considering price alone, but may consider any other factor stated in the selection criteria."

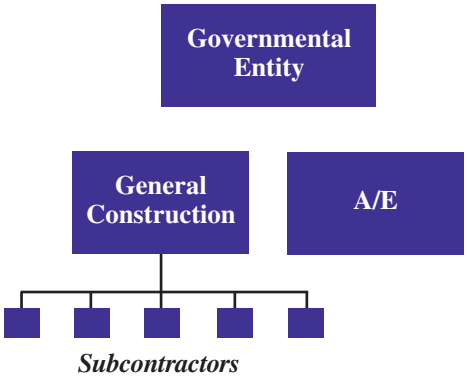
E. COMPETITIVE BIDDING
TEXAS EDUCATION CODE §44.040/CVA(LEGAL)
FASRG – PAGER 75

Application of PSPA and qualifications-based selection processes to competitive bidding are very similar to those existing under the competitive sealed proposals method of TEXAS EDUCATION CODE §44.039 but are limited to the District's retention of an architect and an engineer to prepare construction documents.

There is no specific requirement found in section 44.040 for the inspection, testing and verification services common to other project delivery methods. The competitive procurement and delivery vehicles permitted by Texas Education Code §44.039 (Competitive Sealed Proposals) and Texas Education Code §44.040 (Competitive Bidding) are schematically represented by the following diagram. Practitioners should be aware, however, that despite similarities between the two methods, and the limited (but legally required) application of PSPA principles, there are substantive distinctions which include the requirement that a district award a section 44.040 contract "at the bid amount to the bidder offering the best value to the district according to the selection criteria that were established by the district." TEX. EDUC. CODE §44.040(d).

An excellent review of the distinctions between, and requirements attached to, competitive bidding for construction

services commences on page 20 of the TEA's ***Financial Accountability System Resource Guide***.



F. JOB ORDER CONTRACTS
TEXAS EDUCATION CODE §44.041 / CVF(LEGAL)
FASRG – PAGES 82 & 197

Apart from restating the legal requirements that architects and engineers be selected in accordance with the PSPA, this delivery method has no supplemental or overlapping duties which may require special attention to qualifications based selection practices.

VII. CONCLUSION

The point must always be borne in mind that the specific construction documents which must be prepared and issued by an architect for school facilities construction or alteration differ from those which must be prepared and issued by an engineer.[18] As the TBAE's recent interpretations have made clear, structures which are built by school districts and exceed statutory cost thresholds must – by express legislative mandate – have the architectural plans and specifications prepared and issued by an architect or one who has been working under the effective supervision and control of an architect.

The recognition that engineers and architects possess unique and distinct legal and technical competencies will require that school districts obtain professional services from each. Such services must be obtained in compliance with the qualifications-based selection processes established in the Professional Services Procurement Act.

In addition to the PSPA, Chapter 44 of the Education Code also recognizes that best value for facilities construction may be obtained through qualifications-based selection criteria rather than lowest cost and requires qualification-based selection methods supplemental to those imposed by the PSPA.

A District which requests cost or price information while seeking professional services will sabotage its facilities construction project because engineers, architects, landscape architects and other professionals will not be permitted to respond or otherwise offer services. In addition, a contact entered into in violation of the PSPA is "void as against public policy." ***Tex. Gov't Code §2254.005***. *See also*, ***Tex. Educ. Code §44.032(f)*** (permitting "any interested party" to enjoin performance of contact made in violation of Texas Education Code, Chapter 44, and to obtain attorney's fees); ***Att'y Gen. Op. No. JC-0266 (2000)***, p.7 (discussing enforcement obligations of PSPA as well as provisions of Chapter 44 of the Texas Education Code which, in many ways, are broader than those provided under PSPA).[19]

Facilities construction and alteration by school districts is a highly scrutinized and public activity. It is hoped that this primer will allow the tough decisions and complex interplay of laws to be comprehensible.

The comments contained in this article do not necessarily reflect the formal policy interpretations of the TBAE. Only the Board may formulate policy. The following links will take readers to three Final Orders issued by the TBAE on October 16, 2008 which discuss the statutory mandate requiring a registered architect to prepare and issue architectural plans and specifications unless a nonregistrants, working under the effective supervision and control of a registered architect, prepares the plans. Two decisions (***James R. Winton*** and ***John Rogers***) arise directly from engineers who issued complete plans and specifications for school facilities and thereby engaged in the unauthorized practice of architecture. The third Order, issued against ***Burl R. Richardson***, arose from his preparation and issuance of architectural plans and specifications for an institutional residential facility (Cole Law Enforcement Center in Jasper, Texas). Such a structure must also have its architectural plans and specifications prepared and issued by an architect or one working under the effective supervision and control of an architect: ***22 Tex. Admin. Code §1.214***

In late December 2008, each of the three engineers filed suit in Travis County District Court seeking judicial review of the Final Orders entered each of their contested case proceedings under provision of the Administrative Procedure Act.

ENDNOTES

1 Michael Shirk is the Managing Litigator at the Texas Board of Architectural Examiners. Invaluable assistance was provided by Yvonne Castillo (TSA), Rita Chase (TEA), Glen Gary & Scott Gibson (TBAE) and Paul Hand (TASB) all of whom possess much greater knowledge in these areas than the author's and without whose assistance primer would never have been possible. The use of footnotes has been avoided by the use of links which should take readers directly to the source document.

2 School districts are defined by statute to include independent school districts, community colleges and junior college districts; ***Loc. Gov't Code*** 271.003(9). Footnotes are avoided by making use of hyperlinks, a wonderful device for electronic publications such as the ***School Law Journal***. Because statutory sources can not be linked as precisely as regulatory sources, this article will often cite more to regulations implementing enabling legislation, if similar.

3 Implementing regulations for TEX. OCC. CODE ANN. §1051.703 are published at ***22 Tex. Admin. Code §1.212***.

4 Board rule ***1.212(c)***, above, expressly notes that "designation as the 'prime design professional' does not expand, limit, or otherwise alter the scope of a design professional's practice nor does it allow a design professional to fulfill the requirements of §1051.703(a) of the Texas Occupations Code."

5 The Education Code recognizes that professional services may be required at almost any stage of facilities construction; *See*, ***TEX. EDUC. CODE §44.036(d)*** (drafting RFQ/design criteria package may require professional services)

6 The Brooks Act, 40 USCA §1101, announces that it is the policy of the Federal Government to "negotiate contracts for architectural and

engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

7 In discounting the merits of competitive bidding for professional services involving engineering, Chief Justice Fly noted that selection based upon the lowest bid "would probably be the best that could be conceived for obtaining the services of the least competent man, and would be most disastrous to the material interests of a county. Civil engineering is a profession, requiring years of education and service to obtain perfection in it, and calling, in its application, for a high order of intelligence and extraordinary skill and learning, and it was never contemplated by the Legislature that the money of the citizens of a county . . . should be expended upon the advice of a civil engineer who had obtained his employment by underbidding his competitors, and without regard to his ability to fill the position." *Hunter v. Whiteaker*, 230 SW 1096, 1098 (Tex. Civ. App. – San Antonio 1921, writ ref'd).

8 The American Bar Association has endorsed qualifications based section in its MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS with the following explanation:

The principal reasons supporting this selection procedure for architect-engineer and land surveying services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best qualified firm. In general, the architect-engineer or land surveyor is engaged to represent the (state's) interest and is, therefore, in a different relationship with the (state) from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the most qualified . . . firm is considered initially, and price negotiated later. Reprinted at: Imwalle: *To Bid or Not to Bid*, page 743. See also, American Bar Association, *2007 Model Code for Public Infrastructure Procurement*, §5-104, pages 37-38 (commentary discussing merits of qualifications-based procurement methods.)

The American Public Works Association has also firmly endorsed qualifications-based selection for architects, engineers and related professional services over the use of price. "Basing selections on qualifications and competence, rather than price, fosters greater creativity and flexibility, and minimizes the potential for disputes and litigation."

9 See, 22 Tex. Admin. Code §1.147 (architects); 22 Tex. Admin. Code §137.53 (engineers).

10 In language which possibly makes this distinction clearer the Office of the Attorney General has written that Texas Education Code Section 44.031 (listing competitive procurement methods ISDs may use in awarding contracts valued at $25,000 or more) "establishes a bifurcated process for letting a contract, separating the selection of a purchasing method from the ultimate award of a contract using the chosen method." Atty. Gen. Op. JC-0037 (1999).

11 Delegation of authority by a board, when permitted, is fraught with dangers and should never be lightly undertaken. *See*, TEX. ED. CODE §44.0312. The Texas Attorney General has recently noted that enactment of Section 11.051(a-1) of the Texas Education Code "does not alter the common-law standard for determining the number of votes necessary for a school district board of trustees to act in its official capacity. Tex. Atty. Gen. Op. ***GA-0689*** (2009).

12 The Public Property Finance Act (TEX. LOC. GOV'T. CODE, Ch. 271) will come into play if a district determines that the best value for a project is obtained through the use of a Job Order Contract. The Interlocal Cooperation Act (TEX. LOC. GOV'T. CODE CH. 791) must be complied with if a district elects to use job order contracts for construction services. The Interlocal Cooperation Act, however, prohibits the use of interlocal agreements for the purchase of architectural and engineering services.

13 Tex. Educ. Code §44.031(b) lists the following criteria for selecting among bidders. The Texas Attorney General has, as noted, indicated that these criteria "may be relevant to determining the purchase method that will provide the best value and could inform a district's decision in choosing one type of contract over another." (1) purchase price; (2) the reputation of the vendor and of the vendor's goods or services; (3) the quality of the vendor's goods or services; (4) the extent to which the goods or services meet the district's needs; (5) the vendor's past relationship with the district; (6) the impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses; (7) the total long-term cost to the district to acquire the vendor's goods or services; and(8) any other relevant factor specifically listed in the request for bids or proposals. See also, ***FASRG: Q & A Construction/Real Property No. 14 (p.129-130)*** (discussing acceptable factors for determining best value).

14 ***FASRG: Q & A Construction/Real Property; No.3 (p.127).***

15 For more elaborate discussion of the available project delivery systems, I have included nonexclusive references to the TEA's Financial Accountability System Resource Guide throughout this primer. The section on "Competitive Procurement Options begins at §3.2.3.

16 Section 44.036(e)(2) also prohibits a district from "require[ing] offerrors to submit detailed engineering or architectural designs as part of the proposal." This is consistent with TBAE rules **1.144(c)** and **3.144(c)** which prohibit architects and landscape architects from giving "plans, design services, pre-bond referendum services, or any other goods or services to a governmental entity in response to a request for qualifications, a request for proposals, or otherwise during the process to select an architect [or landscape architect] to render publicly funded [landscape] architectural work."

17 22 Tex. Admin. Code 1.212 (tracking statutory thresholds contained within TEX. OCC. CODE §1051.703(a))

18 The construction documents which may be drawn by either an engineer or an architect are set out at 22 Tex. Admin. Code §1.210(c)(1-4):
(1) Site plans depicting the location and orientation of the building on the site based upon a determination of the interrelationship of the intended use with the environment, topography, vegetation, climate, geographic aspects, and the legal aspects of site development, including setback requirements, zoning and other legal restrictions as well as surface drainage;
(2) The depiction of the building systems such as structural, mechanical, electrical, and plumbing systems in plan views, in cross sections depicting building components from a hypothetical cut line through a building, and in details of components and assemblies specifically including any part of a building exposed to water infiltration or fire-spread considerations;
(3) Life safety plans and sheets with code analyses; and
(4) Plans for a building that is not intended for human use or occupancy.

19 Litigation does arise out of PSPA compliance questions; *see, e.g., Westar Construction, Inc. v. Texas Local Government Statewide Purchasing Cooperative, Texas Association of School Boards, Inc. and Grape Creek ISD*; In The District Court of Travis County, 200th Judicial District Court – No. D-1-GN-08-001749 (filed May 21, 2008 challenging contracts to install synthetic turf fields or tracks "because the construction agreements include the use of professional services . . . which can not be hired through an interlocal contract agreement such as BUYBOARD.")

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