State Bar
Section Report
School Law

Newsletter Editor
Leticia McGowan

Fall 2007
Vol.8, No. 1

To the Members of the School Law Section:

I have a confession to make. There were many times in law school I was not sure I really wanted to be an attorney. It was only when I found out that school law existed that I started to believe I really could enjoy this profession we share. From the time I discovered school law, it has been the only kind of law I have ever wanted to practice. I enjoy the variety, the work, and the fact that ultimately we are all trying to work for the good of public education. But what I enjoy most is the people. I often tell family and friends that school law is a "kinder, gentler area of law." The clients, for both sides of the bar, are good and decent people who share a commitment to educating children. The attorneys, on both sides of the bar, are the kind of people you can oppose vigorously most days of the year but with whom you can also share a drink or a meal during those times of the year when we come together. One of those times is the annual school law retreat, which many of us attended in July in Galveston. In addition to the great program we enjoy each year, it is a great opportunity to spend time together in a more relaxed setting - many of us have watched each others children grow up through the years. Next summer, the retreat will again be held at the San Luis Resort in Galveston. If you are planning ahead, the dates of the retreat will be July 11-12, 2008.

One of the lawyers in the section who I feel particularly lucky to have worked with is Kevin Lungwitz, our outgoing Section Chair. Even during a year of starting his own firm, he has been committed to his work on behalf of our Section and has continued the tradition of excellence begun by those who have served before him. I have appreciated working with him more than I can say.

Finally, I would like to ask each of you to consider how you might get more involved in the Section this year. Perhaps you might be able to write an article for our Section newsletter. Perhaps you might have a topic idea for our retreat or even be willing to do a presentation at the retreat. If you would like to be more involved, please do not hesitate to contact me. If you have an idea for a newsletter, our wonderful newsletter editor Leticia McGowan would welcome your submissions. You can contact her at **lmcgowan@dallasisd.org**.

I hope all of you have a great school year.

Shellie Hoffman Crow
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LOCATION, LOCATION, LOCATION: WHERE DO COMMISSIONER'S HEARINGS TAKE PLACE?

By: Dennis J. Eichelbaum and Sharon S. Gilmore
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For years now school law practitioners have gone about their business filing administrative appeals from school boards to the Commissioner of Education. An appeal under Texas Education Code § 7.057 or even a detachment and annexation appeal under Texas Education Code § 13.051(j) has meant traveling to Austin for that all-so-rare these days, de novo hearing, or possibly non-telephonic oral argument. The question posed in this article, however, is this: Have we been doing it wrong since 1995?

Prior to 1995, termination hearings were held by local trustees, then appealed to the Commissioner of Education, who held another *de novo* hearing.[1] The Commissioner of Education appointed an administrative law judge to hear the case and propose a decision, after which the Commissioner would issue a decision. The unsuccessful party was then required to file a motion for rehearing before appealing to Travis County District Court.

Nonrenewals have not significantly changed over the years. The Commissioner's review has continued to be a "substantial evidence" review. However, in those limited circumstances when the Commissioner may conduct a hearing related to a nonrenewal appeal,[2] the 1995 Education Code gives the Commissioner of Education "the same authority relating to discovery and conduct of a hearing as a hearing examiner has under Subchapter F."[3]

In 1995, the Texas legislature changed the termination landscape by mandating the use of independent hearing examiners, appointed by the Commissioner of Education, for the conduct of the actual termination hearings. Local trustees were removed from the role of actually hearing the evidence.[4] Local trustees receive a recommendation for decision from the hearing examiner, which must include findings of facts and conclusions of law and may include a proposal for relief.[5] Local trustees then make a determination whether to accept, reject or modify that recommendation.[6] If the board votes to terminate, the employee may then appeal to the Commissioner of Education.[7] Again, when reviewing an appeal of a termination and conducting any limited hearing that may be necessary, "the commissioner has the same authority relating to discovery and conduct of a hearing as a hearing examiner has under Subchapter F."[8]

Since 1995 these "hearings" conducted by the Commissioner of Education have continued to take place at the Texas Education Agency, 1701 North Congress Avenue, Austin. But a more careful examination of the statute indicates that practice very well may be incorrect; the Commissioner of Education may not have been following state law.

Texas Education Code § 21.301(d) points the Commissioner to Texas Education Code § 21.255.[9] That section says, "[t]*he hearing must be held within the geographical boundaries of the school district or at the regional education service center that serves the district*." In the past twelve years, this author is unaware of the Commissioner of Education's ever holding a single Chapter 21 hearing outside of the Texas Education Agency facility itself.

The Commissioner of Education is also required to hold appeal hearings for persons aggrieved under Title I or Title II of the Texas Education Code.[10] In conducting the appeal hearings under Texas Education Code § 7.057, the Commissioner "has the same authority relating to discovery and conduct of a hearing as a hearing examiner has under Subchapter F, Chapter 21."[11] Again, the Commissioner's hearings, according to § 21.255(a), must be held "within the geographical boundaries of the school district or at the regional education service center that serves the district."

The Commissioner's right to issue subpoenas for hearings, a right certainly exercised during the past twelve years, comes from Texas Education Code § 21.255(a). Other powers utilized by the Commissioner of Education in hearings that are derived from Texas Education Code § 21.255(a) include: administering oaths; ruling on motions and the admissibility of evidence; maintaining decorum by closing the hearing or taking other appropriate action; scheduling and recessing the proceedings, and making any other orders as provided by rules adopted by the commissioner." One would be hard pressed to argue that the legislature intended the Commissioner of Education to ignore the sentence in § 21.255(a) about holding the hearings "within the geographical boundaries of the school district…" while giving the Commissioner of Education the rights preceded by it in the same subsection. Clearly the conduct of the hearing was meant to take place not at the Agency, but rather the *situs* of the local district.

Detachment and annexation appeals may give clearer insight as to the legislature's reasoning for the requirement to hold hearings within the geographical boundaries of a school district. Texas Education Code § 13.051 makes the Commissioner of Education the arbiter when the decision about a detachment/annexation petition is not unanimous among the boards that are involved, i.e., one grants and another denies. According to Texas Education Code § 13.051(j), "an aggrieved party to the proceedings in either district may appeal the board's decision to the commissioner under Section 7.057." As noted above, under Texas Education Code § 7.057, the Commissioner of Education "has the same authority relating to discovery and conduct of a hearing as a hearing examiner has under Subchapter F, Chapter 21."[12] Thus, a detachment and annexation hearing, like the other hearings discussed above, must be held within the geographical boundaries of a school district.

In a detachment and annexation case, residents are seeking to detach designated territory from one school district to another. The Commissioner of Education "shall consider the educational interests of the students in the affected territory and the affected districts and the social, economic, and educational effects of the proposed boundary change."[13] The appeal before the Commissioner of Education is de novo.[14] Clearly the "social, economic and educational effects" are fact intensive. A group of residents bringing the appeal to the Commissioner would have the costs of travel to Austin if the hearing were required to be held in Austin.[15] Often these appeals include twenty to thirty or more residents all vying to

move the boundaries, but not all able to afford to travel to Austin. The legislature understood the overwhelming odds against residents that go up against a school district trying to detach their property and annex it to another district; the added cost of bringing witnesses and a lawyer to Austin could make the right to seek detachment an illusory opportunity for all but the wealthy. It makes sense that the legislature wanted the hearings to take place locally for the convenience of the community.

This issue has been raised twice before the Commissioner of Education, first in *Ray v. Canutillo Independent School District* and more recently in *Keel v. Marble Falls Independent School District*.[16] In *Ray*, the petitioners raised the issue of location of the hearing as it relates to Texas Education Code § 7.057. The Commissioner of Education addressed the issue by noting that:

> [T]he Commissioner's authority as to the conduct of a hearing is primarily a reference to the Texas Education Code section 21.256(e), which specifies, 'The hearing shall be conducted in the same manner as a trial without a jury in a district court of this state.' The caption or Texas Education Code section 21.256 is 'Conduct of Hearing.' However, even if Petitioners were correct as to the law, they waived this argument by not raising it before or during the hearing before the Commissioner.[17]

In *Ray*'s conclusions of law, the Commissioner of Education held:

> The grant of authority in Texas Education Code section 7.057(b) that provides the Commissioner has the same authority to conduct a hearing, as does a certified hearing examiner under Subchapter F of Chapter 21, means that the Commissioner has the authority to conduct a hearing in the same manner as a trial without jury in a Texas district court. It does not require the Commissioner to hold a hearing within the geographical boundaries of a school district or at the regional service center that serves the district. Tex. Educ. Code §§ 7.057, 21.256(e).[18]

It is unclear as to why the "same manner as a trial without jury" is relevant to the location of the trial. In support of this position, the Commissioner of Education cited provisions that do not place the hearing in Austin. The Commissioner of Education failed to explain why Texas Education Code § 21.255 is not applicable to the appeals hearings. Instead, the Commissioner of Education simply concluded that it is not, without analysis or citation. For good measure the Commissioner of Education also noted that the issue was raised untimely.

In *Keel*[19], the Commissioner of Education cited to *Ray* as support, rationalizing that:

> In *Ray*, the Commissioner determined that the hearing in a detachment and annexation case does not need to be held within the territory of a school district that is a party to the case or at a regional service center. The Commissioner also determined that the district's contention is not a jurisdictional argument, since the argument can be waived. By not raising its argument until the second day of the hearing, Respondent waived its argument.[20]

Basically, the Commissioner of Education in *Keel* avoided addressing the legality of holding the hearing in Austin and made waiver the issue. Without addressing whether or not this is a jurisdictional issue, and whether or not the Commissioner of Education can claim waiver gives the Agency the right to violate the law (presuming it is the law), the Commissioner of Education sheds no further light on why hearings can be held in Austin at the Texas Education Agency.

If these appeals have to take place locally, the parties may save a significant amount of money, and be able to let their trustees all attend appeals at no additional cost to the district. Communities may be permitted to witness the state in action deciding local controversies similar to the way a local court decides something (in the "same manner as a trial without a jury").

As school law practitioners, how does this benefit us? At least we will no longer have the traffic headaches of Austin, and parking will probably be easier to come by.

ENDNOTES

1 *But see, Ysleta Independent School Dist. v. Meno*, 933 S.W.2d 748 (Tex.App.-Austin 1996, writ denied)(holding that the Commissioner should not have held de novo termination hearings and that the Commissioner was always only authorized to conduct a substantial evidence review of the termination).

2 Tex. Educ. Code § 21.302 permits a hearing to take evidence on "procedural irregularities that are not reflected in the local record" that allegedly occurred at the hearing before the hearing examiner.

3 Tex. Educ. Code § 21.301

4 Tex. Educ. Code § 21.254.

5 Tex. Educ. Code § 21.257.

6 Tex. Educ. Code §§ 21.258-259.

7 Tex. Educ. Code § 21.301.

8 Tex. Educ. Code § 21.301(d).

9 § 21.255. HEARINGS BEFORE HEARING EXAMINER. (a) The hearing examiner may issue subpoenas at the request of either party for the attendance of witnesses and the production of documents at the hearing and may administer oaths, rule on motions and the admissibility of evidence, maintain decorum by closing the hearing or taking other appropriate action, schedule and recess the proceedings, and make any other orders as provided by rules adopted by the commissioner. The hearing examiner may issue a subpoena for the attendance of a person who is not an employee of the district only if the party requesting the issuance of the subpoena shows good cause for the subpoena. The hearing must be held within the geographical boundaries of the school district or at the regional education service center that serves the district.

(b) A hearing examiner may allow either party to take one or more depositions or to use other means of discovery before the hearing. The hearing examiner, at the request of either party, may issue subpoenas for the attendance of witnesses and the production of documents at the deposition. The hearing examiner may issue a subpoena for the deposition of any person who is not an employee of the district only if the party requesting the issuance of the subpoena shows good cause for the subpoena. The deposition must be held within the geographical boundaries of the school district or at the regional education service center that serves the district.

(c) A procedure specified in this section may be changed or eliminated by written agreement of the teacher and the school district after the teacher receives the written notice of the proposed action.

(d) If the hearing examiner is unable to continue presiding over a case at any time before issuing a recommendation or decision, the parties shall request the assignment of another hearing examiner under Section 21.254 who, after a review of the record, shall perform any remaining functions without the necessity of repeating any previous proceedings.

(e) The school district shall bear the cost of the services of the hearing examiner and certified shorthand reporter at the hearing and the production of any original hearing transcript.

Each party shall bear its respective costs, including the cost of discovery, if any, and attorney's fees.

Added by Acts 1995, 74th Leg., ch. 260, § 1, eff. May 30, 1995.

10 *See* Tex. Educ. Code § 7.057.

11 Tex. Educ. Code § 7.057(b).

12 Tex. Educ. Code § 7.057(b).

13 Tex. Educ. Code § 13.051(j).

14 *Id.*

15 Which is currently the practice before the Commissioner of Education.

16 *Ray v. Canutillo Indep. Sch. Dist.*, Docket No. 115-R6-800 (Tex. Comm'r Educ. 2001); *Keel v. Marble Falls Indep. Sch. Dist.*, Docket No. 053-R6-0506 (Tex. Comm'r Educ. 2007).

17 *Ray v. Canutillo Indep. Sch. Dist.*, Docket No. 115-R6-800 (Tex. Comm'r Educ. 2001).

18 *Id.*

19 *Keel v. Marble Falls Indep. Sch. Dist.*, Docket No. 053-R6-0506 (Tex. Comm'r Educ. 2007).

20 *Id.*

REPRESENTATION OF MULTIPLE DEFENDANTS IN SCHOOL DISTRICT LITIGATION: A STEP BY STEP GUIDE

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Many lawsuits filed against school districts involve claims asserted against multiple defendants, typically the school district itself and one or several individual employees involved in the underlying incident or transaction. This article will examine several issues affecting the representation of such defendants by the same attorney.

As an illustration of the issues discussed here, I will offer the following fictional[1] scenario: Paul Plaintiff is a student at Fake City High School in the Madeup County Independent School District. Plaintiff alleges that Timothy Teacher and Patty Principal failed to provide a safe environment, failed to provide adequate medical attention to him and otherwise violated his right to bodily integrity relative to an injury sustained during the high school's spring talent show, the Fake City Spring Spectacular. Paul Plaintiff's talent allegedly involved a balance beam, Heelys[2], and a blindfold. The nature of his injuries is unspecified in the Complaint now filed in the United States District Court for the Northeastern District of Texas, Fake City Division.

Paul Plaintiff has asserted claims against the Madeup County I.S.D., as well as Patty Principal and Timothy Teacher in both their individual and official capacities. From initial interviews with Teacher and Principal, it appears that neither had prior knowledge of the details of Plaintiff's talent act. In his audition for the show, Plaintiff simply walked on the balance beam while performing scenes from *A Long Day's Journey Into Night* and *Cat on a Hot Tin Roof*. During the first performance of the show when the injury occurred, Teacher, who was the faculty advisor for the talent show, called 911 immediately. No one could recall any injuries of this nature ever happening relative to the spring talent show or any other school production prior to this incident. Fake City High School's procedures, in keeping with District policy, has been to require the principal's review and approval of content for school performances, to ensure appropriate content and student safety.

Step One: Are There Really Multiple Defendants?

The first inquiry in determining whether all defendants may be represented by the same counsel is to ascertain in what capacity the individual defendants are being sued. This inquiry will also drive the defenses available to those defendants. A claim asserted against a defendant in his individual capacity is different from a claim asserted in his official or representative capacity. The capacity (or capacities) in which a defendant is sued will determine whether there really are multiple defendants or only a single defendant– usually the school district.

Both Texas and Federal law are clear that a suit against a governmental employee or official in his official capacity is a suit against the governmental entity itself. The United States Supreme Court has held that suing a governmental official in his official capacity is tantamount to pleading an action against an entity of which the officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). An award of damages against an official in his or her official capacity will be satisfied by the governmental entity itself and not from the official's personal assets. *Id*. at 163. Consequently, the defendants sued in their official capacity suit may assert defenses the governmental entity itself could assert. *Hafer v. Melo*, 502 U.S. 21 (1991). In the context of suits involving school districts, this means that a defendant may assert the lack of a custom or policy giving rise to Section 1983 liability, or governmental immunity pursuant to the Texas Tort Claims Act.

Similarly, under Texas law, a suit against the Trustees in their respective representative capacities is the same as a suit against the entity itself. *E.g., Friona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 661 n.[3] (Tex. App.– Amarillo 2000, no pet.); *Smith v. Davis*, 999 S.W.2d 409, 416 (Tex. App.–Dallas 1999, no pet.).

Where individual defendants are sued, along with a school district, solely in their representative or official capac-

ities, the suit has only one defendant. Of course, depending upon litigation strategy, an attorney may want to raise this issue to opposing counsel or even in a pleading to the Court early in litigation so that there are no misunderstandings about the claims being asserted against the defendants. This inquiry may be made informally to opposing counsel or through the discovery process. Depending on how the claims are pled, it may be appropriate to file an early dispositive motion on the pleadings. Some attorneys inexperienced in suing school districts or other governmental entities may not be familiar with the differences between and among claims against an individual, an individual in his official capacity, and the school district itself.

In this scenario, since both of the individual defendants have been sued in both their individual and official capacities, there are indeed three separate defendants– Madeup County I.S.D., Patty Principal, and Timothy Teacher.

Step Two: Is There a Conflict Between the District and the Individual Defendants?

Counsel must next determine whether the District and any of the individual defendants may be represented together. This requires a review of the known facts of the case. While it is not always possible for counsel to conduct an exhaustive investigation of the facts of the case prior to the time an answer must be filed, counsel must carefully review the facts and evidence available at that time in order to determine whether a conflict exists.

> Rule 1.06 of the Texas Rules of Professional Conduct provides, in part:
>
> (b) In other situations and except to the extent permitted by paragraph c, a lawyer shall not represent a person if the representation of that person:
>
> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> TEX. R. PROF. COND. 1.06 (b).

Where one defendant must take legal or factual positions adverse to other defendants, a conflict exists. If it is in one defendant's interest to prove or even suggest the liability of one of the other defendants, these defendants may not be served by the same lawyer. Where an individual defendant has clearly violated the school district's policies or procedures regarding the matter at hand, it is most likely that the District and that defendant will have to take positions adverse to each other, precluding common representation.

Another layer of inquiry, even where the District and the individuals do not appear to have conflicting interests in the substantive litigation, is the issue of indemnification from a possible judgment. In the possible eventuality of a judgment against an individual defendant, that individual might seek indemnification from the school district.3 If it appears that there may be a judgment taken against an individual, and if the district would oppose indemnification, the best course is to have these parties represented by separate counsel. If these issues arise later on, Rule 1.06 provides as follows:

> (d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
>
> TEX. R. PROF. COND. 1.06 (d). Thus, counsel for the district and individuals may not continue to represent the district, or the individuals, in a later proceeding or negotiations regarding indemnification unless all parties consent. A lawyer's intention to represent one certain client if and when a conflict may arise may also be addressed in a client's initial engagement letter.

In our sample scenario, it appears from the known facts that both employees fully complied with Madeup I.S.D. policies, procedures, and guidelines with regard to student safety. It appears that the Madeup I.S.D.'s interests do not conflict with either those of Teacher or Principal. Thus, there is no apparent impediment to the District being represented by the same counsel as the individuals.

Step Three: Is There a Conflict Between or Among any of the Individuals?

This analysis is similar to that of whether the District can be represented by the same counsel– a determination of whether these individuals will necessarily take positions adverse to each other during the course of litigation. At the outset here, it appears that neither Principal nor Teacher will take positions adverse to the other.

Step Four: Has a Conflict Arisen or Become Apparent During Litigation?

It is not always possible to determine at the outset of litigation that a conflict exists among the defendants. However, as discovery progresses and counsel has greater opportunities to discern both the facts and the legal positions to be taken by the defendants, it is not uncommon for a conflict to arise or to reveal itself. In this situation, the attorney who is currently representing all of the defendants may not continue to do so. Rule 1.06 of the Texas Rules of Professional Conduct gives guidance here:

> (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
>
> TEX. R. PROF. COND. 1.06 (e).

Rule 1.06(c)(2) provides that such partial representation may be undertaken with consent of all parties but after full disclosure of the nature of the conflict, the current situation presents "circumstances where it is impossible to make the

full disclosure necessary to obtain informed consent" from any of the clients. *See id.*, Comment 7.

While in our fictional scenario it appeared at the outset that our three defendants were not at all adverse, some different facts began to emerge during the discovery process. Paul Plaintiff produced copies of numerous e-mails between Plaintiff and Teacher. Some excerpts:

From: *Paul Plaintiff* ***pplaintiff1700@hotmail.com***
To: *Timothy Teacher* ***tteacher@madeupcountyisd.com***
Date: *February 1, 2007 7:55 p.m.*
Subject: *Talent Show audition*

Hi Mr. Teacher– so what did you think about my audition today? I thought I killed! Did you get the symbolism of the balance beam and man's tenuous grip on reality in the context of these two plays? I hope I get into the show! When are you posting results?

From: *Timothy Teacher* ***tteacher@madeupcountyisd.com***
To: *Paul Plaintiff* ***pplaintiff1700@hotmail.com***
Date: *February 2, 2007 1:46 a.m.*
Subject: *Re: Talent Show audition*

Paul, I thought you did a great job but I am sure you saw that there were many other talented acts as well. Let me ask you, have you thought about incorporating some other symbolic elements in your act? In particular, some things that could really add to the drama? I am really trying to put together a spectacular show this year, one that everyone will be talking about. Walking on the balance beam is good, but what else can you do? Wear a blindfold, for starters?

From: *Paul Plaintiff pplaintiff1700@hotmail.com*
To: *Timothy Teacher* ***tteacher@madeupcountyisd.com***
Date: *February 4, 2007 3:12 p.m.*
Subject: *Ideas for show*

I am totally open to changing up my act if it means I get into the show. I love the blindfold idea. Also, what if I wore my Heelys on the balance beam? I know Mrs. Principal would probably have a heart attack, but that would rock.

From: *Timothy Teacher* ***tteacher@madeupcountyisd.com***
To: *Paul Plaintiff pplaintiff1700@hotmail.com*
Date: *February 5, 2007 6:33 p.m.*
Subject: *Re: Ideas for show*

Heelys are a great idea. You are right about Mrs. Principal, but let me handle her. Talk to me after lunch period tomorrow. You are in the show!

From: *Timothy Teacher* ***tteacher@madeupcountyisd.com***
To: *Paul Plaintiff pplaintiff1700@hotmail.com*
Date: *February 19, 2007 8:43 p.m.*
Subject: *Rehearsal*

Just a reminder, DON'T wear your Heelys to rehearsal tomorrow; this whole act has to be a surprise to be effective. Just wear your normal sneakers and don't bring the Heelys until the actual show. Also, if you wear your helmet or knee pads on the beam, people will be expecting something, so just leave them off. Don't worry, I've seen you do this and you're great. You'll be fine. Don't wuss out on me– I am counting on you!

Further discussions with Mrs. Principal and Mr. Teacher confirmed that indeed, Mr. Teacher had encouraged Paul Plaintiff to engage in highly dangerous conduct and had concealed all plans in this regard from his supervisor, Mrs. Principal. Mrs. Principal had asked Mr. Teacher for a description of each talent show act and had spoken with him to ensure that all content was appropriate and safe, but Mr. Teacher did not tell her about the "surprise" elements of Paul Plaintiff's act. Mrs. Principal stated that on the several occasions she watched parts of the show rehearsals, she saw no dangerous activity on the part of any student, and she had no reason to doubt Mr. Teacher's judgment and capability in supervising the students.

Due to these circumstances, it is apparent that Mr. Teacher's interests are adverse to both Mrs. Principal and Madeup County I.S.D. One lawyer will not be able to effectively serve the interests of Mr. Teacher and the other defendants. It does appear that Mrs. Principal's interests are not adverse to those of the District itself, so these two defendants may be represented by the same counsel. In this case, the lawyer representing the three defendants currently may continue to represent Madeup County I.S.D. as well as Mrs. Principal, but only if each client consents after full disclosure of the circumstances. Here, that full disclosure is possible. The facts and circumstances requiring partial withdrawal have emerged, or will emerge, during the discovery process, and are not privileged information.

In cases where the reason requiring withdrawal or partial withdrawal may not be disclosed to all clients without revealing confidential or privileged information, then the full disclosure necessary for a client's consent is not possible. In these cases, it is necessary for the attorney to withdraw from representation of all three defendants. Counsel should file a Motion to Withdraw with the Court outlining the reasons requiring withdrawal. In Texas state court, see Rule 10 of the Texas Rules of Civil Procedure. In federal court, most district courts have local rules governing with withdrawal of attorneys which must be complied with. *See, e.g.*, United States District Court for the Northern District of Texas, Local Rule 83.12.

In sum, each case involving multiple defendants in a school district context presents unique issues and challenges. Where all defendants' interests are aligned, representation of multiple defendants by the same counsel is possible. Where one or more defendants may have differing or conflicting

interests, such representation is not possible. These issues must be examined not only at the inception of litigation, but throughout the course of the case so that any conflicts may be recognized and eliminated immediately. When there is any doubt as to whether one attorney may represent more than one defendant, it is of course best to err on the side of independent representation for all defendants.

ENDNOTES

1. This scenario is entirely fictional, created by the addled brain of a school law attorney. Any similarity between these fictional characters and any actual person, or school board, or school district, is entirely coincidental. Please don't sue me– I'm just a school lawyer!
2. Campus-based school personnel, or anyone else who spends time with children and young adults know that Heelys are athletic shoes with a single removable "stealth" wheel built into the heel of the shoe, allowing the wearer to "roll" on his or her heels instead of walking when desirable. It goes without saying– but we are lawyers, so we must say it anyway– that when used appropriately with practice and proper safety equipment, these shoes can be perfectly safe and entertaining. Please don't sue me– I'm just a school lawyer!
3. This article will not address the many contours of indemnification of employees by governmental entities. Such an analysis will turn on the nature of the allegations asserted against the employee as well as the district's particular policies in this regard. Districts must take care not to run afoul of the Texas Constitution, Chapter 102 of the Civil Practice and Remedies Code, or any other law regarding gifts of public funds or other indemnification issues. However, those issues are not addressed in this article.

TEN NEW LAWS YOU NEED TO KNOW

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The 80th Regular Session of the Texas Legislature began on January 9, 2007 and adjourned on May 28, 2007. There were a total of 6,745 bills and resolutions filed during the session. The House filed 4,140 bills and resolutions, while the Senate filed 2,050. Of the 6,745 bills and resolutions filed, approximately 1,500 passed. Included were changes that substantially impact Texas school districts, trustees, employees, teachers, parents, and students in the 2007-08 school year and beyond.

This legislative summary discusses ten important education-related issues from the 80th Regular Session. This is not an exclusive list; as always, there were many changes from the session, so a careful reading of all the bills is encouraged. Bills can be accessed at Texas Legislature Online: **www.capitol.state.tx.us**.

1. Safety: Numerous bills were filed regarding student safety, most notably in the areas of transportation and extracurricular activities.

A. School Bus Safety

Bus drivers: The Department of Public Safety (DPS) must provide that a person is not eligible to be a bus driver if the person has been convicted of DWI, DWI with a child passenger, intoxication assault, or intoxication manslaughter within the preceding 10 years. (House Bill 3190)

Bus operation: A bus cannot be operated if the door is open or if the number of passengers on the bus is greater than the manufacturer's design capacity for the bus. The driver must prohibit passengers from standing or sitting anywhere other than a seat. (House Bill 3190)

Seat belts: A bus operated by or contracted for use by a school district to transport schoolchildren must have a three-point seat belt for each passenger including the driver. The term *bus* includes school buses and school activity buses. The requirement for seat belts will not apply unless the Legislature specifically appropriates funds for that purpose. At any time, at its own expense, a district may equip its existing buses with seat belts. Persons may offer, and districts must consider and may accept, financial gifts to purchase seat belts. Districts may acknowledge such gifts with discrete signs that cannot serve as advertising. These new requirements apply to buses purchased after September 1, 2010 and buses chartered after September 1, 2011. (House Bill 323)

The State Board of Education (SBOE) is charged with developing a program on the proper use of seat belts. SBOE will be a clearinghouse for best practices regarding school bus safety. (House Bill 323)

A school district shall require a student riding a bus operated by or contracted for operation by the district to wear a seat belt if the bus is equipped with seat belts for all passengers on the bus. A school district may implement a disciplinary policy to enforce the use of seat belts by students. (House Bill 323)

A person commits an offense if he or she operates a school bus equipped with seat belts and the person does not wear the seat belt. (House Bill 3190)

Bus evacuation training: At least twice each school year, in fall and spring, every district must train students and teachers on school bus evacuation according to DPS standards. The training must last for at least one hour, and a portion must occur on a bus. The training must be based on a national school transportation safety manual. Within 30 days after completing the training, the district shall provide DPS a record certifying completion. DPS may adopt rules necessary to implement this training. (House Bill 3190)

Accident reports: Districts will make annual reports to the Texas Education Agency (TEA) on the number of accidents involving district buses. TEA will develop the content of the report, which will include information about seat belt use and injuries. TEA will publish the reports on its website. (House Bill 323)

B. CPR and Automated External Defibrillators—Senate Bill 7

CPR and Automated External Defibrillator (AED) training: A school district shall annually make available to district employees and volunteers instruction in CPR and training on the use of an AED that complies with the training requirements in the Health and Safety Code. The commissioner shall adopt rules to implement this requirement.

Each school nurse, assistant school nurse, athletic coach or sponsor, physical education instructor, marching band director, cheerleading coach, and any other school employee specified by the commissioner and each student who serves as an athletic trainer must participate in instruction in the use of an AED. These employees and students must receive and maintain certification in AED use from the American Heart Association, the American Red Cross, or a similar nationally recognized association.

Availability and Location of AEDs: A school district shall make at least one AED available at each campus in the district. A campus defibrillator must be readily available during any UIL athletic competition held on the campus. In determining where an AED will be stored, the principal of the campus shall consider the primary location on campus where students engage in athletic activities.

To the extent practicable, each school district, in cooperation with the UIL, shall make reasonable efforts to ensure that an AED is available at each UIL athletic practice held at a district campus and at each UIL athletic competition held off-campus.

At each location where an AED is required, the school district shall ensure the presence of at least one campus or district employee trained in the proper use of the defibrillator at any time a substantial number of district students are present at the location.

Funding for AEDs: A school district may seek and accept gifts, grants, or other donations to pay the district's cost of purchasing AEDs required in this bill. If a school district receives funding from TEA to purchase or lease AEDs, the district shall ensure that the AED meets Food and Drug Administration standards.

Procedures for responding to cardiac arrest: A school district must develop safety procedures for a district employee or student to follow in responding to a medical emergency involving cardiac arrest. The procedures must include the appropriate response time in administering CPR, using an AED, or calling a local emergency medical services provider.

C. Safety Regulations for Extracurricular Activities—Senate Bill 82

Extracurricular activity safety training program: The commissioner shall develop and adopt an extracurricular activity safety training program. The safety training program must be completed by a coach, trainer, or sponsor for an extracurricular athletic activity, certain physicians employed by a school district or who volunteer to assist with an extracurricular athletic activity, and a director responsible for a school marching band.

At least once each school year, the safety program must require each school district to perform a safety drill that incorporates the safety training program elements.

A district must provide training to students participating in extracurricular athletic activities related to recognizing symptoms of potential catastrophic injuries and the risks of using dietary supplements designed to enhance or marketed as enhancing athletic performance.

Prohibition on certain "unsafe athletic activities": A coach, trainer or sponsor for an extracurricular athletic activity may not encourage or permit a student participating in the activity to engage in any unreasonably dangerous athletic technique that unnecessarily endangers the health of a student, including "using a helmet or any other sports equipment as a weapon."

Safety precautions required: At each athletic practice or competition, a coach, trainer, or sponsor for an extracurricular athletic activity must ensure that:

- Each student participating in the activity is adequately hydrated;
- Any prescribed asthma medication for a student participating in the activity is readily available to the student;
- Emergency lanes providing access to the practice or competition area are open and clear; and
- Heatstroke prevention materials are readily available.

If a student participating in an extracurricular athletic activity (including a practice or competition) becomes unconscious during the activity, the student may not return to the practice or competition or participate in any extracurricular athletic activity until the student receives written authorization for such participation from a physician.

Compliance and penalties: A school campus that is determined by the superintendent to be out of compliance with these new rules with regard to UIL activities shall be subject to UIL penalties.

The commissioner shall maintain a telephone number and email address to allow a person to report a violation. A school that offers an extracurricular activity shall prominently display the commissioner's contact information at the administrative offices of the school.

Notice required: A school that offers an extracurricular athletic activity shall provide to each student participating in an extracurricular athletic activity and to the student's parent or guardian a copy of the Education Code sections 33.201-33.207 and a copy of the UIL's parent information manual. This information may be provided in an electronic format unless otherwise requested by a student, parent, or guardian.

Immunity: This bill does not create or waive any liability or immunity of a school district or its officers or employees. Furthermore, a person who volunteers to assist with an extracurricular activity is not liable for civil damages arising from an act or omission relating to these requirements unless the act or omission is willfully or wantonly negligent.

2. <u>Steroid Testing</u>: In the 79th Regular Session in 2005, the legislature mandated UIL to conduct a survey regarding the extent of illegal steroid use by high school students. UIL was also directed to develop a plan for testing students involved in UIL activities for illegal steroids. Depending on the results of the survey, the legislature reserved the right to institute the plan for steroid testing. During the 80th Session, a random drug testing program was approved in Senate Bill 8.

Senate Bill 8: Beginning with the 2007-08 school year, the UIL shall prohibit a high school student from participating in a UIL athletic competition unless the student agrees

to submit to random testing for illegal steroids, and provides a statement signed by the student's parent acknowledging that the student may be subject to random steroid testing.

A school district shall require that each district employee who serves as an athletic coach at or above the seventh grade level for a UIL athletic activity completes an educational program developed by the UIL or a comparable program.

Steroid Testing Program requirements: The testing program must:

- Require the random testing of a statistically significant number of high school students participating in UIL athletic competitions multiple times throughout the year;
- Provide for the random selection of students from a single pool of all eligible students;
- Be administered at approximately 30 percent of the high schools that participate in UIL athletic competitions;
- Provide for a process for confirming any initial positive test result through a subsequent test conducted as soon as practicable after the initial test, using a sample that was obtained at the same time as the initial test;
- Require the testing to be performed only by an anabolic steroid testing laboratory with a current certification from certain entities; and
- Provide for a period of ineligibility from participation in UIL athletic competitions for a confirmed positive test result or a student's refusal to submit to random testing.

Confidentiality: The results of a steroid test conducted under this program are confidential and, unless required by court order, may be released only to the student, the student's parent, and the activity director, principal, and assistant principal of the student's school.

Funding: From funds already appropriated, TEA shall pay the costs of the steroid testing program. UIL will study potential mechanisms for future funding of the program and will submit a report of findings and funding recommendations to the legislature by December 1, 2008.

3. <u>Financial Disclosures</u>: New conflict of interest disclosure requirements for public officers and government vendors were added to Chapter 176 of the Local Government Code in 2005. Attorney General opinion GA-446 (2006) made some of the questions surrounding the new requirements clearer, but numerous issues remained. The law was substantially clarified during the 80th Regular Session.

House Bill 1491: The bill includes numerous new definitions for terms used throughout the chapter, including definitions for *agent, business relationship, contract, investment income, and services*.

Disclosure requirements for public officers and employees: In addition to numerous other changes to the reporting procedures, HB 1491 clarifies that an officer must disclose a conflict if the officer has an employment or other business relationship with such a person that yields taxable income *exceeding $2,500* in the 12 months preceding the date the officer learned of the contract or prospective contract. Taxable income now excludes *investment income*.

Additionally, an officer must disclose a conflict if the officer or a first-degree family member has *accepted* gifts with an aggregate value over $250 from such a person in the 12 months preceding the date the officer learned of the contract or prospective contract. Gifts exclude gifts *given by a family member, political contributions*, and food, lodging, transportation, or entertainment accepted as a guest.

An officer does not commit an offense if he or she files a required conflicts disclosure statement not later than seven business days after receiving notice of an alleged violation *from the local government entity*.

Disclosure requirements for vendors: Instead of requiring all current and potential vendors to file conflict of interest questionnaires, Chapter 176 now requires vendors to file if the person *has a business relationship with a local government entity, and has an employment or other business relationship with an officer or officer's family member*, as described, or *has given an officer or the officer's family member gifts*.

A person commits an offense if he or she knowingly fails to comply. A person does not commit an offense if he or she files a required questionnaire not later than seven business days after receiving notice of an alleged violation *from the local government entity*.

Validity of contracts: A local government entity has no obligation to ensure that a vendor files a questionnaire, and the validity of a contract is not affected by a person's failure to file a questionnaire.

Maintenance and disclosure of records: Statements and questionnaires should be maintained in accordance with an entity's local retention schedule. Additionally, the chapter does not require an entity to disclose information that is excepted from disclosure under the Public Information Act (PIA).

No filing required until October 9, 2007: From the effective date through September 30, 2007, statements and questionnaires are not required. Persons otherwise required to file statements and questionnaires during this period are required to file by October 9, 2007, or the seventh day after receiving notice from an entity that the statement or questionnaire was required.

4. <u>Nepotism</u>: Per Attorney General Opinion GA-123 (2003), board members are not subject to the nepotism prohibitions if they delegate final hiring authority to the superintendent. HB 2563 amended this nepotism rule (in addition to making other governance changes).

House Bill 2563: Under this bill, board members are subject to nepotism laws regardless of whether hiring authority has been delegated to the superintendent. However, there is an exception for school districts located:

- Wholly in a county with a population of less than 35,000; or
- In more than one county, if the county in which the largest portion of the district territory is located has a population of less than 35,000.

School district employees hired before September 1, 2007 are grandfathered under the continuous employment exception.

5. Public Information Act: Because of the amount of time spent by local government entities and employees in responding to PIA requests, the legislature considered changes to the rules regarding responding to and charging for PIA requests.

House Bill 2564: The PIA allows a governmental body to charge a requestor for costs of providing copies of documents. A governmental body can charge for the labor involved in production only in certain circumstances, and, generally, a governmental body cannot charge for making public information available for inspection only.

HB 2564 allows a governmental body to establish a reasonable limit on the amount of time personnel are required to spend producing information for inspection or duplication or providing copies. The reasonable time limit cannot be less than 36 hours per requestor per fiscal year. Once this time limit is met, the governmental body can recover its costs associated with the personnel time.

If the governmental body sets up a time limit, it must provide a requestor a written statement of the time it took to comply with each request and a cumulative total of time during the applicable twelve-month period. The time it takes to prepare this report cannot be included in the calculation.

If the amount of time spent responding to requests for the same requestor meets or exceeds the limit set by the governmental body, it must provide the requestor a written estimate of the total costs (labor and materials) necessary to comply with the request on or before the 10th day after the request was made. The requestor must respond in writing within 10 days and commit to pay either the actual costs or the amount in the estimate, whichever is less. If the requestor does not respond on or before the 10th day, the request is considered to be withdrawn.

If a request is submitted in the name of a minor, the amount of time spent complying with public information requests shall be the sum of time spent responding to requests by a parent, guardian, or person a minor lives with who has control by court order. The time is not cumulative if the parent/guardian/person with control "establishes that another person submitted that request in the name of the minor."

These new provisions do not apply to certain requestors, including FCC-licensed radio or television stations, certain newspapers, elected officials, and a representative of a tax-exempt publicly funded legal services organization.

6. Elections: The legislature passed a relatively small number of elections bills. However, several will allow for more local control over school district election dates and costs.

A. Handicap-accessible voting machines— House Bill 556: This bill amends the provisions in the Election Code that require the use of handicap-accessible voting systems (DRE machines). For elections in which a federal office does not appear on the ballot (generally May elections), certain political subdivisions may not be required to provide at least one voting station that is handicap-accessible at each polling place.

The exemption would be applied based on population criteria or on proof that providing the voting system would create an undue burden on the political subdivision (the bill sets out details on eligibility). Before using the exemption, a political subdivision will be required to provide notice to the Secretary of State (SOS), and certain political subdivisions will be required to provide newspaper notice of the location of DRE machines.

To show an undue burden, a county or political subdivision must file an application with the SOS not later than the 90th day before the date of the election. The application must state the reasons that compliance would constitute an undue burden. A showing of an undue burden may be satisfied by proof that the election costs associated with compliance "constitute a significant expense for the county or political subdivision and reflect an increase of at least 25 percent in the costs of holding an election as compared to the costs of the last general election held by the county or political subdivision before January 1, 2006." SOS must rule on the application within 20 days.

B. Joint elections for certain school districts—House Bill 945: Under current law, certain border cities are allowed to have elections on any Saturday in April on odd-numbered years. This bill authorizes an independent school district located wholly or partly in one of these cities to also utilize this April election date to hold trustee elections as a joint election with the city.

This bill also amends the joint election provisions in Education Code Section 11.0581 to allow certain school districts to hold a joint election with a hospital district.

C. Countywide Voting Pilot Program—House Bill 3105: This bill directs the SOS to continue a previously enacted pilot program to permit a county to eliminate county election precincts and use countywide polling places for November elections in even-numbered years, each countywide election held on the May uniform election date, and each election of a political subdivision located within the county that is held jointly on these dates. The bill contains details on eligible counties and selection and notice of polling places.

D. Joint elections administrator—Senate Bill 493: This bill amends the Government Code to authorize the creation of a joint elections administrator to serve more than one political subdivision. SB 493 contains details on creation of the position and the appointment and authority of the administrator.

E. Changing the length of trustee terms—Senate Bill 670: By December 31, 2007, a board of trustees may adopt a resolution changing the length of the terms of its trustees. The resolution must provide for a term of either three or four years and specify the manner in which the transition from the length of the former term to the modified term is made. The transition must begin with the first regular election for trustees that occurs after January 1, 2008. A trustee who serves on that date shall serve the remainder of that term.

7. Background checks: Senate Bill 9 requires a review of the criminal history information of school district employees and other persons who have contact with students. Affected employees include: certified and noncertified employees of the district, substitute teachers, student teachers, volunteers, employees of shared services arrangements whose duties are performed on school property or at another location where students are regularly present, and employees of contractors who have continuing duties related to contracted services and direct contact with students.

The bill contains detailed provisions on the authority to obtain both local criminal history information and national criminal history information, timelines for obtaining such information, DPS' establishment of a criminal history clearinghouse, and funding for these activities.

8. Religion in schools: Religion was a hot topic in the education community in the 80th Session. Most notably, attention was given to the rights of students to express religious viewpoints at school activities and in class assignments, and the study of religion in public school.

A. Religious Viewpoint Antidiscrimination Act—House Bill 3678

Student expression: A school district shall not discriminate against voluntary student expression of a religious viewpoint on an otherwise permissible topic.

Limited public forum: Requires school districts to adopt a limited public forum for student speakers at all school events at which a student is to publicly speak. The policy must prohibit viewpoint discrimination, provide a method based on "neutral criteria" for the selection of student speakers, ensure that speech is not obscene or lewd, and disclaim school sponsorship of the speech.

Religious expression in class assignments: Students may express religious beliefs in homework, artwork, and other oral or written assignments. Class assignments must be judged by legitimate pedagogical standards, and students cannot be penalized based on the religious content of their work.

Formation of religious groups: Students may organize religious groups or gatherings to the same extent students are permitted to organize other noncurricular groups or gatherings. Such groups must be permitted the same access to facilities and means of communication as other groups.

Required local policy: Requires every school district to adopt a local policy regarding limited public forum and voluntary student expression of religious viewpoints. A district is in compliance with this law if the district adopts and follows a policy that is "substantially identical" to the model policy.

Model policy: Adds Education Code Section 25.156, which contains the model policy. In the model policy:

- The district must create a limited public forum for student speakers to introduce football games, other athletic events designated by the district, daily announcements for the school day, and other events designated by the district (which may include assemblies and pep rallies).
- Only the top two (2) grades at a school are eligible to be student speakers. Student speakers may only be students that hold one of the following honorary positions: student council officers, Senior class officers, captains of the football team, and other positions of honor designated by the district.
- Eligible students must be notified and given at least three (3) days to submit their names to the student council or other designated body. Submitted names will be drawn randomly until all are drawn, then will be assigned chronologically to the speaking events. The district may do the selection process once a year or once each semester.
- Remarks must be related to the subject matter of opening the event and bringing the audience to order, and must not be obscene or offensively lewd. Religious viewpoint discrimination is not allowed.
- The district must publish a stated disclaimer "for as long as there is a need to dispel confusion over the nonsponsorship of the student's speech."
- Students of any grade that are allowed to address school audiences by virtue of having obtained a school honor (including team captains, student council officers, homecoming and prom kings and queens) must be permitted to speak in a limited public forum.
- Similarly specific provisions govern the selection of student speakers for opening and closing graduation ceremonies and require the creation of a limited public forum for all student speakers (including the valedictory address).
- Repeats statutory language on religious viewpoints in class assignments and on the right to form religious groups.

B. Elective Courses on Religious Literature—House Bill 1287: A district may offer students in grades nine (9) or above an elective course on the impact of the Old and New Testaments. Students may earn up to one (1) credit, depending on the structure of the course. The district is not required to offer the course at a campus during a semester in which less than 15 students at the campus register for the course.

The purpose of the course is to teach students about aspects of the Bible that are prerequisites to understanding contemporary society and culture, and familiarize students with the Bible's content, history, literary style, and influence on society. The course shall be neutral toward all religions and accommodate diversity.

A student may use any translation of the text as the basic textbook, even if different from the one chosen by the board or the teacher. The statute does appear to allow the district to require another translation as a supplementary text.

A district may also offer an elective course on the books of a religion other than Christianity based on various factors, including parent and student demand and the historical and cultural impact of the books. A district may also offer a different course from the one authorized by this section on the academic study of the Old and New Testaments.

Before adopting rules, the SBOE shall submit the TEKS for such a course to the AG, who will ensure that the course complies with the First Amendment.

Required staff development: Teachers of the course must meet certain certification requirements and must complete required staff development. In consultation with higher education faculty, the commissioner shall develop training materials for teacher in-services.

Required instruction on religious literature: The bill also amends Education Code Section 28.002, Required Curriculum, to state that each school district that offers K-12 shall offer an enrichment curriculum that includes . . . "religious literature, including the Hebrew Scriptures (Old Testament) and New Testament, and its impact on history and literature."

C. Pledge of Allegiance to the State Flag—House Bill 1034: The bill adds add the phrase "one state under God" to the pledge of allegiance to the state flag, making the pledge, "Honor the Texas flag; I pledge allegiance to thee Texas, one state under God, one and indivisible."

9. Student Discipline: During the 80th Session, a rewrite of Education Code Chapter 37 was introduced and considered by the legislature. While that bill was not successful, several other discipline-related bills did pass, with notable new provisions on expulsion and the placement of registered sex offenders in House Bill 2532.

House Bill 2532: Current law permits a district, after following certain procedures, to place in a disciplinary alternative education program (DAEP) a student who has received deferred prosecution for conduct or been found to have engaged in delinquent conduct defined as a Title 5 felony, regardless of when and where the conduct occurred. This bill permits the district to expel the student for that conduct, but the student must be placed in either a DAEP or a juvenile justice alternative education program (JJAEP).

In addition, the district may expel a student charged with engaging in conduct or referred to a juvenile court for engaging in delinquent conduct defined as a Title 5 felony. The district may also expel a student who has received probation or deferred adjudication for, been convicted of, or been arrested for or charged with a Title 5 felony offense.

As under current law, before such a placement, the board must determine that the student's presence in the regular classroom threatens the safety of other students or teachers, will be detrimental to the educational process, or is not in students' best interests.

Under the bill, the expulsion must last until the student graduates, the charges are dismissed or reduced to a misdemeanor, or the student completes the placement term or is assigned to another program. This provision applies even if the student transfers.

Placement of student registered sex offenders: After receiving notice that a student is required to register as a sex offender, the district must remove the student from the regular classroom. The subsequent placement depends on whether the student is under court supervision.

Student under court supervision: The district must place the student in the appropriate alternative education program for one semester. If the student transfers during that period, the new district may require the student to complete an additional semester without reviewing the placement, or may deduct time spent in the placement at the prior district from the mandatory one semester placement period.

Student not under court supervision: The district may place the student in the appropriate alternative education program for one semester or in the regular classroom. The student cannot be placed in the classroom if the board determines that such a placement poses a threat to other students or teachers, will be detrimental to the educational process, or is not in the best interests of the other students.

Review of placement: After the student completes one semester in the alternative placement, a committee composed of a teacher from the student's regular campus, the student's parole or probation officer or a representative of the local juvenile probation department, an instructor from the alternative program, a district designee selected by the board, and a district counselor must meet to determine whether the student should be returned to the regular classroom. The board must follow the committee's recommendation absent a special finding by the board. If the student remains in the alternative placement, the committee must reconvene before each school year to reconsider the placement.

The district must apply the review process to transfer students who are not under court supervision to determine whether the student should be placed in an alternative program or the regular classroom.

Placement of special education students: If the student is a special education student, the review committee will be the ARD committee. The ARD committee may request that the board convene a review committee with the members listed above to assist them in the determination.

Alternative education placement: Registered sex offenders assigned to an alternative program must be placed in DAEP unless the board enters into a memorandum of understanding with a juvenile board that provides for the students to be placed in JJAEP or a court orders that the student be placed in JJAEP.

Appeals: A student or the student's parent may appeal the student's placement in an alternative program by requesting a conference between the board or the board's designee, the parent, and the student to discuss the placement. The only issue to be considered is whether the student is required to register as a sex offender. The board's decision is final and cannot be appealed.

10. Student attendance: House Bill 1137 allows a school district to admit a person who is at least 21 years of age and under 26 years of age for the purpose of completing the requirements of a high school diploma. A person who is 21 or older shall not be placed in a DAEP or JJAEP. If the student engages in conduct that would otherwise require DAEP or JJAEP placement, the district shall revoke the student's admission.

Students who are 21 years of age or older and who have not attended school in the three preceding school years may not be placed with a student who is 18 years of age or younger in a classroom setting, a cafeteria, or another district-sanctioned school activity. A student is not prohibited from attending a school-sponsored event that is open to the public as a member of the public.

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