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SCHOOL LAW BUZZ

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REGULATORY UPDATE

TEA Issues EDGAR Guidance

By Ramón Medina

On November 29, 2018, the Texas Education Agency (TEA) issued a To The Administrator Addressed letter[1] providing clarifying guidance concerning the micro-purchase procurement method applicable to purchases of supplies[2] or services[3].[4] In its letter, TEA asserted that "The LEA may expend no more than $10,000 on micro-purchases throughout the fiscal year" and that "The threshold amount applies to the sum of all the federal grants received by the LEA."[5]

To alleviate the administrative burden created by the micro-purchase requirement, TEA proffered the following guidance to increase public school micro-purchase flexibility.

(a) "The $10,000 "aggregate amount" threshold applies to purchases of "like-types" of items."

(b) "In its local policies and procedures, the LEA must define what like-types of items may be micro-purchased."

(c) "The $10,000 threshold applies to each like-type that the LEA defines."

(d) "Once the LEA reaches the $10,000 threshold, it must follow small purchase procedures and collect at least two price quotes for additional purchases of items for that like-type."

(e) "A like-type may correlate to a subcategory of a commodity code (not to the commodity code itself)."

(f) "Like-type may not be defined as a single purchase order or a single vendor."

(g) "For each like-type that the LEA defines in its local policies and procedures, it

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1 For a copy of TEA's letter, go to https://tea.texas.gov/interiorpage_wide.aspx?id=51539627037.

2 Pursuant to Code of Federal Regulations, Title 2, § 200.94, "*Supplies* means all tangible personal property other than those described in § 200.33 Equipment. A computing device is a supply if the acquisition cost is less than the lesser of the capitalization level established by the non-Federal entity for financial statement purposes or $5,000, regardless of the length of its useful life."

3 In accordance with Texas Education Code § 12.1053(b)(2), charter schools must procure professional services, as defined at Texas Government Code § 2254.002(2), pursuant to the Professional Services Procurement Act.

4 On August 28, 2018, TEA issued a To The Administrator Addressed letter implementing the increases to the micro-purchase threshold (from $3,500 to $10,000) and the simplified acquisition threshold (from $150,000 to $250,000). Go to https://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/Implementing_Statutory_Changes_to_Micro-Purchase_and_the_Simplified_Acquisition_Thresholds_under_the_Education_Department_General_Administrative_Regulations_(EDGAR)/.

5 In light of conflicting federal guidance, the Firm recently requested that TEA clarify its guidance. We will provide an update once received in a future issue.

may expend up to the $10,000 threshold across all its federal grant funds for the entire fiscal year."

(h) "TEA does not limit the number of like-types that the LEA may define, nor does TEA limit the cost of the items categorized as like-types. LEAs must be aware, however, that their like-type definitions are subject to monitoring and audit."

In light of TEA's policy determination, as set forth in its November 29, 2018 letter, charter school boards, superintendents and business managers should amend their existing purchasing policy and purchasing manuals to reflect the new guidance. Once updated, business managers should provide training and technical assistance to any charter school administrators and employees responsible for procurements with federal grant funds.

Judicial Decision

YES, the ADEA Applies to Your School

By Adam Courtin

Some smaller governmental employers have been under the impression that the Age Discrimination in Employment Act (ADEA) does not apply to them because they have fewer than twenty employees. However, in November 2018, the Supreme Court of the United States issued an opinion that clarified that all governmental employers, no matter how many employees they may have, are subject to the ADEA. Simply stated, no governmental employer may discriminate against an employee or applicant because that person is age forty (40) or older. Does this mean that Texas open-enrollment charter holders and their charter schools are considered governmental employers for purposes of the ADEA? Maybe, maybe not—but it is best to presume that charter schools are considered governmental employers under the ADEA, and that your employees (no matter their age) may not discriminate against other employees or applicants because they are age forty or older. Although the ADEA applies to employees and applicants who are age forty or older, you should not take that to mean you can get away with discriminating against employees or applicants who are not yet age forty. Why? There are other anti-discrimination and anti-retaliation laws out there that apply to "younger" folks. It is best that you just don't discriminate or retaliate for any reason.

Clash of Titans: When Leasing Property Back Becomes an Issue

By Jessica Davis

When charter schools[6] look to acquire existing property for school campuses, churches or other properties used for religious or sectarian purposes are common options, as the properties tend to be well-suited to meet the needs of a school campus with comparatively minimal remodeling. However, as charter schools consider such properties for purchase or use as school campuses, charter schools need to be aware of what kind of financing they will be using to fund these purchases when they are negotiating these deals.

When churches or other sectarian entities are looking to sell their properties, it is often because the entity is constructing a new building elsewhere. As we are all aware, there are many pitfalls and delays associated with construction and remodeling. As such, we frequently see the scenario arise where the seller wishes to sell the property to the school on the condition that the school will sublease the property back to them so that the seller may continue to use the property

[6] Although we use the term "charter schools" for convenience and as a common convention, we acknowledge that only the nonprofit corporation acting as the charter holder may legally acquire property and secure financing.

for church services, Sunday school, weeknight activities, or any other uses for which the church or other religious entity originally used the property. This does not seem like an issue initially, as typically the times during which the seller, as a religious entity, wishes to use the property do not coincide with the school day or conflict with the school's use. However, if you plan to fund the purchase of the property with tax-exempt bonds or a tax-exempt loan, there is an issue that is important for the school to be aware of before entering into negotiations for this type of transaction.

Tax-exempt bonds and loans are often used by charter schools and other 501(c)(3) borrowers as a form of financing for large expenditures, such as for the purchase of property, because tax-exempt obligations typically bear interest at a lower rate than would be available on a conventional loan. This lower rate is possible because bondholders or other lenders do not pay income tax on the interest payments that they receive on the bonds or loans and are therefore willing to charge a lower rate. However, since the federal government is foregoing its right to tax such interest payments, tax-exempt bonds and loans are considered by the IRS to be providing a government subsidy. Consequently, tax-exempt bonds and loans are subject to the Establishment Clause of the First Amendment of the United States Constitution, which provides for the separation of church and state. As such, there are very strict limitations on the use of the proceeds of tax-exempt bonds and loans. As a result, a charter school's ability to lease the property back to the religious entity, even if it is merely for a few hours a week, is limited. If it were to be determined that the proceeds of tax-exempt bonds or loans were being used to finance property that was being used for a sectarian purpose, the tax-exempt bonds could become taxable *ab initio*, and all taxes that the holders had previously been exempted from having to pay would become due immediately for all prior tax-years. It is also likely that such use of the property would constitute an event of default under the bond or loan documents that could result in an acceleration of the debt such that the school would immediately owe the total balance of the bonds or loan to the holders.

There are some possible ways to address this issue if the sectarian use can be quantified and properly limited. However, it would be beneficial to the school to be aware upfront of the constraints they have on their ability to negotiate a deal involving the purchase of a property with prior religious affiliations where the religious entity wishes to continue to use the property subsequent to the sale. Oftentimes, this issue comes to a head during the negotiation of the Letter of Intent or even after a Letter of Intent has been signed, which can lead to acrimony between the parties and decrease the likelihood of reaching an agreement, as the school will have a very limited amount of room to negotiate on this issue due to the rigid restraints associated with tax-exempt bonds and loans.

If you have any questions or concerns related to the topic discussed above, please reach out to our office. We have in-house bond counsel, Janet Robertson, and in-house real estate counsel, Jason Adelstein, who would be more than happy to provide advice and guidance related to this issue or any others.

New Dyslexia Handbook

By Christopher Schulz

The State Board of Education adopted the most recent version of the Dyslexia Handbook in November 2018. This was anticipated as part of TEA's overall corrective action plan to ensure students with disabilities are appropriately served by school districts and charter schools. The new handbook includes expanded information on initiating referrals for evaluation and indicators of dyslexia. For instance, the

handbook added descriptions by grade level of common risk factors associated with dyslexia, and a flowchart to guide assessment staff in determining whether an evaluation under Section 504 or the IDEA is warranted — keeping in mind that a referral may be made at any point under Section 504 or the IDEA if a disability is suspected. The handbook also reiterates TEA's position taken over the summer that RTI is appropriate if the school determines the data does not give school staff reason to suspect that a student has dyslexia, a related disorder, or other disability.

In addition to the expanded sections on initiating referrals for Section 504 or the IDEA, the handbook contains expanded sections on dysgraphia, training requirements for educators providing dyslexia services, and requirements for dyslexia evaluations.

Consider Yourself Warned: New TAC Rule

By Joe Hoffer

Effective December 4, 2018, charter schools and school districts will be subject to a new state rule[7] governing how quickly the commissioner of education may escalate state interventions and sanctions against an underperforming charter, district or campus. Not surprisingly, under the new rule, the commissioner will use student performance as the determining factor for applying elevated intervention and sanctions or maintaining the status quo. Specifically, pursuant to the newly adopted rule at Texas Administrative Code, Title 19, Section 97.1070, the commissioner may apply an elevated intervention or sanction if a charter school does not exhibit improvement in student performance, which is defined as an increase in the scaled score for the overall academic performance rating.

Under the new rule, the commissioner may apply an increased intervention or sanction if:

(a) A charter school or a campus has consecutive years of poor performance that exceeds the limits allowed in state law or rule;

(b) The commissioner determines that circumstances warrant an increased level of intervention or sanction; or

(c) The commissioner determines that an increased level of intervention or sanction would better fulfill the intent of state law and rule governing accreditation statuses and sanctions.

The new requirements for when an elevated intervention or sanction is warranted notwithstanding, the commissioner may, under the new rule, determine that good cause exists for maintaining the current level of intervention or sanction. However, this determination falls solely within the commissioner's purview.

When Something Simply Ain't Right: School District Consideration of Vendor Relationships with Charter Schools

By Celina Warren

In November, the Texas Attorney General's Office (AG) shed some light on school district procurement practices and the applicability of Texas Education Code (Tex. Ed. Code) Section 44.043 to a school district's consideration of a vendor's or person's relationship with a charter school in a school district's procurement activities. In a recent opinion,[8] the AG addressed a concern that

[7] For the newly adopted rule, go to https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Adopted/18_11_Adopted_New_19_TAC_§97_1070/.

[8] Tex. Att'y Gen. Op. No. KP-0225 (2018). For a copy of this opinion, go to https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2018/kp0225.pdf.

some school districts in Texas may be requiring vendors to agree *not* to work with Texas charter schools as a requirement to either contract with or continue to contract with those school districts. The AG found that such a requirement is prohibited by Section 44.043.

Tex. Ed. Code § 44.043, "Right to Work," states:

> "(a) This section applies to a school district while the school district is engaged in:
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> (1) Procuring goods or services;
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> (2) Awarding a contract; or
>
> (3) Overseeing procurement or construction for a public work or public improvement.
>
> (b) Notwithstanding any other provision of this chapter, a school district:
>
> (1) May not consider whether a vendor is a member of or has another relationship with any organization; and
>
> (2) Shall ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other relationship status with respect to any organization."

Construing the prohibition in section 44.043, the AG found that a school district may not take into account a vendor's relationship (including a business relationship) with any organization (including a charter school) while engaged in contracting and procurement.

Regarding procurement or construction for a public work or public improvement, the Attorney General found that the section 44.043 prohibition applies to *all* aspects of the procurement process, from the beginning of the process to any subsequent contracts or agreements. In areas other than a public work or improvement project, the section 44.043 prohibition applies to procurement of goods or services or award of contract. Therefore, a school district may not use its bid specifications or any subsequent contract or agreement to refuse a person work with the school district or to lessen a person's ability to work with the school district because of the person's membership or other relationship status with respect to any organization (including a charter school).

Furthermore, the Attorney General noted that section 44.043 applies when a school district engages in procurement activities under *any* statute authorizing a school district's procurement.

Interested In Being In The News?
By Allen Keller

Hillary Clinton was in the news for her use of a private email account. Now, Ivanka Trump is making headlines for the same conduct. Other office holders have found themselves in the same predicament. If a private email address is being used to conduct official school business, you should be aware that this address is not excepted from disclosure to the public.

In *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.), the Third Court of Appeals ruled that "the City [of Austin] Officials' email addresses are not shielded from disclosure and must be disclosed as public information." Correspondingly, in the 2018 Public Information Act Handbook, the Office of the Attorney General stated that the exception in Section 552.137(a) of the Texas Public Information Act (Government Code Chapter 552) "does not apply to the private e-mail

addresses of government officials who use their private e-mail addresses to conduct official government business." Thus, if a private email address is used to conduct official school (i.e., government) business, the private email address is subject to disclosure if a request for public information is made for an email containing said address. Thereafter, you may enjoy the same limelight as Secretary Clinton and Ms. Trump.

FASRG Makeover Coming Soon
By Ramón Medina

During the meeting of the Committee on School Finance/Permanent School Fund of the State Board of Education (SBOE) on November 15, 2018, the SBOE considered certain amendments to the Financial Accountability System Resource Guide (FASRG) as follows:

(a) The replacement of:

(1) Module 1, Financial Accounting and Reporting, and related appendices were replaced;[9] and

(2) Module 4, Auditing; and

(b) The repeal of:

(1) Module 2, Budgeting;

(2) Module 5, Site Based Decision-Making;

(3) Module 6, Accountability;

(4) Module 7, Data Collection and Reporting; and

(5) Module 8, Management.

The FASRG was last in April 2012 when Module 4, Auditing, was amended to address updated auditing requirements.

At present, "The remaining modules in the FASRG will undergo a comprehensive review and be presented for discussion at the January-February 2019 [SBOE] meeting. The proposed amendment to [19 Tex. Admin. Code] §109.41 will be presented for first reading and filing authorization at the April 2019 SBOE meeting after all updated modules of the FASRG have been discussed."[10]

Have Questions? We'll Answer.

If you have any questions concerning the content in this e-newsletter or any other school law matter, please contact Lori Madla at lmadla@@slh-law.com or at (210) 538-5385.

[9] The new Module 1 would apply to an open-enrollment charter school operated by a governmental entity and to open-enrollment charter school operated by an institution of higher education. A new Module 2, Charter Schools, will be proposed at a future date.

[10] SBOE Agenda, page III-16.