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Judicial Decision

San Antonio Court of Appeals Decision Limits Charter School Immunity

By Bryan Dahlberg

The Fourth Court of Appeals in San Antonio recently issued an opinion that significantly curtails the extent of a charter school's immunity under Section 12.1056(a) of the Education Code, which says that charter schools have immunity to the same extent as a school district. In that case, *Konark Limited Partnership v. BTX Schools, Inc. and BASIS Schools, Inc.*, the charter school was sued by a neighboring apartment complex under Section 11.086 of the Water Code for, allegedly, negligently diverting rainwater and causing the apartment complex to flood.

Although the Water Code applies to all "persons", including government entities, and every other type of legal entity, such as nonprofit corporations, it does not include a waiver of immunity. As a result, Water Code claims against school districts and other governmental entities with immunity are routinely dismissed for this reason. The trial court initially granted the charter school's motion to dismiss based on immunity. However, while the case was on appeal, the Texas Supreme Court issued its opinion in *Neighborhood Centers, Inc. v. Walker*, 544 S.W.3d 744 (Tex. 2018), holding that the Texas Whistleblower Act did not expressly apply to charter schools, as is required by Section 12.1058(c) of the Education Code.

The Fourth Court of Appeals construed *Walker* to hold that charter schools do not

have immunity from a statutory claim unless they are expressly considered governmental for purposes of that statute. Consequently, since charter schools are not expressly considered governmental for purposes of the Water Code, they do not have immunity from claims under the Water Code. Yet, because it applies broadly to all "persons", charter schools can be sued for statutory claims arising out of the Water Code.

The Fourth Court of Appeals' opinion narrows the immunity granted to charter schools by the Legislature in Section 12.1056(a) to only cover certain tort claims and breach of verbal contracts (immunity is waived for written contracts). Under this holding, it is doubtful that charter schools would have the same immunity defenses as school districts when confronted with defective employment discrimination and retaliation claims under Chapter 21 of the Labor Code. While a defective claim could still, in theory, be dismissed on summary judgment, charter schools would have no interlocutory appeal from such a denial since it doesn't involve immunity.

We expect that this decision will be appealed to the Texas Supreme Court on the basis that the Fourth Court of Appeals' analysis is inconsistent with the ultimate holding in *Walker* – where the Supreme Court held that the charter school's motion to dismiss based on immunity should have been granted, even though charter schools are not considered governmental under the Whistleblower Act. The Supreme Court's holding would not have been possible without the implicit

recognition that Section 12.1056(a), standing alone, confers immunity on charter schools. However, for the time being, the *Konark* decision is the law of the land within the jurisdiction of the Fourth Court of Appeals (*i.e.*, San Antonio and surrounding areas extending South and West to the Mexico border). While this decision broadly conflicts with other appellate courts that have held charter schools are generally immune, those precedents may likewise be called into question if other courts find the *Konark* reasoning persuasive.

Applicability of Parent's Right to Appeal Charter School Camera Determination

By Christopher Schulz

The Texas Education Agency approved new rules pertaining to cameras in self-contained classrooms. The rules specifically addressed the most recent legislative updates to Section 29.022 of the Education Code regarding the right of a parent to appeal a decision by the school concerning the installation or operation of cameras in their child's classroom. Importantly, the new rules confirm that appeals to the commissioner of education do not apply to open-enrollment charter schools. In its comments to the new rules, TEA observed that "TEC, §29.022, does not give the commissioner the authority to expand the commissioner's jurisdiction under TEC, §7.057, to include charter schools." Open-enrollment charter schools may still request extensions of time, but TEA has not yet proposed rules regarding how an open-enrollment charter school would make that request to TEA.

Managing Public Comment Portions of Board Meetings

By Allen Keller

The public comment portion of your board meetings can be a great opportunity for the board to hear directly from parents and students, employees, or community members on school matters that impact individuals or the community. However, your board needs to maintain order during the meeting and make sure that the public comment opportunity does not take so much time that matters posted on the agenda cannot be discussed.

We recommend that schools adopt operating procedures that serve as guidelines for the public comment portion of the board meeting. These operating procedures could include:

- (a) A requirement that anyone wishing to address the board during the public comment portion of a meeting list their name on a sign-in sheet and identify the topic on which he or she wants to speak. The sign-up sheet may remain posted until the board meeting begins, after which a person will no longer be able to sign in to address the board.
- (b) The board may set a time limit for each speaker during the public comment portion of the meeting; this is typically three-to-five minutes per speaker. However, if multiple persons sign up to address the board on the same topic, one of those individuals can be designated as the single presenter on that topic. Also, the board may limit overall time given for public comments during a meeting; for instance, the board can provide that no more than 30 minutes will be allowed for the public comment portion of the meeting before the board moves on to other matters.

- (c) Matters discussed during public comment portions should relate to school business or another topic related to school operations. Speakers may also be required to limit their discussion to the topic identified on the sign-up sheet; if a speaker goes off topic, the presiding officer may interrupt to request that the speaker remain on topic. The public comment portion of the meeting also is not the appropriate time for complaints about individual school employees or students, to discuss a personnel action, or to discuss pending litigation. If this occurs, the presiding officer may interrupt and refer the speaker to the appropriate grievance or complaint procedure to address the particular concern.
- (d) The board should expect that all speakers will be courteous, respectful, and not engage in disruptive conduct. Speakers should not engage in personal attacks against board members, school staff, students, or other community members, nor should they make unsupported or unfounded accusations against others.
- (e) The board generally will not respond to a speaker during the public comment portion of a meeting. And, the board also may not deliberate or make decisions regarding any subject that is not on a posted agenda.

Please let us know if your school would like assistance in setting guidelines for hearing public comments during open meetings.

Uh, Where Are My Students?

By Ramón Medina

On Thursday, January 24, 2019, McDade ISD posted the following notice on its website:

Dear McDade Parents and Staff,

Due to attendance issues because of the flu and flu-like viruses, I have decided to close school for this Thursday, January 24, and Friday, January 25. Today we had only 67% of our PK students in attendance, 68% of our kinder, and 78% of our first graders. This gave us 83% for the elementary school and 86.5% district-wide. We have enough minutes built into the calendar that students will NOT have to make-up the missed time. All custodial and maintenance staff will report to work as usual to sanitize all buildings and buses.

We take the health and safety of our students and staff very seriously and we hope that this 4 day weekend will help to give everyone time to rest and get well. Please let me know if you have any questions or concerns.

Barbara Marchbanks
Superintendent McDade ISD

On Wednesday, January 30, 2019, Fairfield ISD posted the following notice on its website:

School Closure Due to Illness

January 30, 2019

Dear Parents,

Our town is experiencing several serious health issues (flu, strep throat and stomach virus). After careful consideration, I have determined that it is in the best interest of students, staff and community to cancel Fairfield ISD classes for Thursday and Friday, January 31 and February 1. Our

cleaning service has been doing extra cleaning, but with the staff and students out of the buildings on those days they will be able to do even more. It is my hope and prayer that four days of separation will help break the cycle and allow our students and staff to re-unite on Monday, February 4 as a much healthier unit.

Tony Price
Acting Superintendent
Fairfield ISD

Lago Vista ISD, New Summerfield ISD and Winters ISD also announced or posted a similar notice on January 30th.

So what should a school official do when students are no shows to school due to illness and the possibility of even more students staying home in the coming days for the same reason?

Under House Bill (HB) 2442 passed by the 85th Texas Legislature (Regular Session), open-enrollment charter schools are required to adopt an academic calendar that includes 75,600 minutes of operation, unless the charter has been grandfathered under the old law and rules requiring 180 days of instruction. If your charter school adopted a calendar with more than 75,600 minutes of operation, you may not need to worry about the impact that closing for a day or two may have on your state funding, such as McDade ISD noted in its notice above. However, if your charter school's calendar does not have sufficient minutes of operation to meet the 75,600 threshold or was grandfathered under the old law and rules, you may need to consider submitting a low-attendance day waiver. As set out in the Student Attendance Accounting Handbook, Section 3.8.1.4, a charter school "may apply for a waiver to have the day excluded from ADA and FSP funding calculations" "For a day when school was held but attendance was at least 10 percentage points below the overall **average**

attendance rate for your district (or the applicable campus) for the prior year because of inclement weather-related or health or safety issues".

If the decision is made to file a waiver, the school must provide the following information:

- "documentation of low attendance for the day, including the reason for the low attendance rate, and
- the prior year's attendance report, showing the overall average attendance rate for the year, for the district or applicable campus. For a district or campus with multiple tracks, the overall average attendance rate for all tracks must be used. For a campus that existed as two separate campuses the prior year, the overall average attendance rate for the district as a whole must be used."

If the determination is made that a waiver is necessary, you must file the waiver "by the end of July for the current school year using the automated waiver system."

For more information, go to: <https://tea.texas.gov/StateWaivers/> and review Student Attendance Accounting Handbook, Section 3.8.1.4.

NOTE: The above discussion is not necessarily applicable to charter schools subject to an exception under HB 2442.

Superintendent Job Searches: Finding What You're Looking For

By Allen Keller

The search for a new superintendent can be a stressful and time-consuming task. While there is no “easy” path to finding a qualified administrator who fits with your school’s mission and programming, there are ways to help your school streamline the process of searching for and selecting your educational leader.

Step 1: Identify the qualifications and characteristics you want in a superintendent. For instance, will you require a current Superintendent certification, a doctorate in education, or previous experience as a superintendent of schools? Also, consider the need to assess your school’s current educational and financial achievement ratings and look for leadership that is able to anticipate and respond to achievement gaps and changing community demographics.

You should also identify characteristics that best fit your school’s growth plans and consider leadership experience or strategies that can help build bridges with government regulators, parents, community members, philanthropic groups, and the private sector so that staff members, students, and parents are able to contribute to and benefit from the local economy and community resources.

With tightened state financial support and budgets, the ability to create positive fundraising opportunities is also key.

Experience with marketing and branding is also important; consider characteristics that would help a superintendent emphasize your school’s mission and programming in order to attract applicants to build student enrollment and maintain consistent and sustainable growth.

Step 2: Prepare a job announcement. The announcement should provide a description

of your school’s mission and vision, along with details about your student enrollment and demographics. Also outline the skills, characteristics, and qualifications desirable to the school. A summary of the total compensation package and benefits available to the superintendent should also be provided. The job announcement should also inform of the deadline for submitting applications, as well as the timeline for the board to review applications, conduct interviews, and ultimately select a leader.

Step 3: Accept and review applications, and conduct interviews with qualified applicants. You may consider assistance from a consulting firm or your school attorney in reviewing and ranking applicants. It’s also important to contact references and review service records; it’s always best practice to have the applicant sign an authorization form to allow the school to obtain documents from prior employers in order to verify employment and assess past performance. It’s also vital to treat applicants fairly and consistently, and not to engage in any interviewing or hiring processes that could lead to complaints of discrimination based on age, sex, race, religion, etc. Also, consider potential conflicts of interest or nepotism concerns throughout the selection process.

Step 4: Select an applicant with the necessary qualifications, characteristics and begin supporting your new educational leader as you work toward sustainable growth.

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.