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SCHOOL LAW BUZZ
January 2021 Texas School Law E-News Issue No. 35

Dallas Central Appraisal District v. International American Education Federation

By Joe Joyce

A tumultuous 2020 for everyone ended on a high note for charter schools leasing property in Texas. For the first time, an appellate Court was presented with the question of whether property leased by a charter school and subject to a purchase option is entitled to exemption from *ad valorem* property taxes as public property.

A common facilities arrangement: the lease-purchase option

For years, charter schools have used a common arrangement to open a new campus: a build-to-suit lease agreement with an option to purchase. Under this type of contract, a charter school will enter into an agreement to lease property from a landlord, build a facility, and operate a campus once the facility is built. Included with the lease is the ability to purchase the property on pre-negotiated terms. Without the ability to tax like a traditional school district, this arrangement is preferable for charters when it does not make fiscal sense to purchase the property immediately.

The issue: the Tax Code requires "ownership" for exemption

While this arrangement is convenient for charters, some appraisal districts still assess *ad valorem* taxes against these public charter school campuses. Landlords pass these costs along to charters, who are then forced to expend their funds on taxes, rather than students.

Tax exemptions for both "public property" and for schools exist in the tax code. The issue is that both require the property to be either owned by a public entity[1] or owned by the same entity operating the school.[2] In denying exemptions, appraisal districts often cite that the charters do not *own* the property. The appraisal districts argued that because the charter schools merely lease the property, they were not entitled to exemption.

A legal solution: equitable title

The path to exemption is found in the legal concept of "equitable title." Ownership, for tax purposes, is defined under Texas law as being either the legal title holder (usually the person named on the deed) or the *equitable title* holder. Equitable title is defined as the present right to compel legal title (a deed) through conditions wholly within the purchaser's control. Under an equitable title argument, charter schools that have a lease purchase option that compels the delivery of a deed through performing conditions wholly within the charter's control, are the equitable owners of property, and the property is therefore entitled to exemption.

Using precedent that applied equitable title to determine exemption cases, SLHA began

[1] Tex. Tax Code § 11.11.

[2] Tex. Tax Code § 11.21.

successfully advancing these arguments in appraisal districts for its charter clients around the state. However, a minority of appraisal districts, such as Dallas Central Appraisal District, continued to assert that charter schools were not exempt, despite their public nature and equitable title.

The case: *Dallas Central Appraisal District v. International American Education Federation*

In the recent *DCAD v. International American Education Federation ("IAEF")* case, an open-enrollment charter school, IAEF ("the School"), entered into a lease with a purchase option for one of its campuses. The School applied for a tax exemption under Texas Tax Code § 11.11, which exempts property owned by the state or a political subdivision and used for public purposes from taxation. In typical fashion, Dallas Central Appraisal District denied the exemption request because the School did not hold the deed to the property, reasoning that they only had a leasehold interest with a purchase option. The School appealed to the Dallas Appraisal Review Board, which affirmed the denial of the exemption request.

The School then appealed to the District Court in Dallas. The District Court ruled in the School's favor and reversed the judgment of the Appraisal Review Board, determining that the School was entitled to exemption under an equitable title theory.[3] The District Court found that the School's "*Lease-Option Agreement constituted equitable title for property tax purposes and that the property was exempt from ad valorem taxes pursuant to Tex. Tax Code § 11.11 […]*." The Dallas Central Appraisal District then appealed that decision to the Fifth Court of Appeals in Dallas.

The Fifth Court of Appeals received briefing from both parties and heard oral arguments from both sides. Joe Hoffer presented the oral arguments on behalf of the School. A few weeks later, on December 29, 2020, the Fifth Court of Appeals in Dallas issued its written opinion in *Dallas Central Appraisal District v. International American Education Federation*, 05-19-01354-CV, 2020 WL 7706288, (Tex. App.—Dallas Dec. 29, 2020, no pet. h.), where it ruled in the School's favor. It upheld the Dallas District Court's judgment approving a tax exemption for the School under Texas Tax Code § 11.11 reasoning that the School had equitable title "*because the lease contains a purchase option that gave [the School], by unilateral exercise of its own will, the immediate right to compel the transfer of fee title*." *Id.* at *4. The School is now entitled to an exemption as public property under Section 11.11 of the Texas Tax Code.

The effect:

The *Dallas Central* case marks the first time that an appellate court in Texas has ruled that an open-enrollment charter school is entitled to exemption under section 11.11 of the Texas Tax Code. In a slightly different scenario, a Houston Court of Appeals ruled that property subleased by a charter school (without a purchase option) was not entitled to exemption as public property under the same tax code provision.[4] A difference between the Dallas case and the Houston case is that the Houston case did not feature a purchase option, which the Dallas courts relied upon in determining that the charter school equitable title.

Although the *Dallas Central* decision is not binding on all other appellate courts, the

[3] The School has since exercised its purchase option and is now the legal title holder to the property.

[4] That case was granted review by the Texas Supreme Court, with SLHA presenting oral arguments in February 2021.

Dallas Central ruling reflects a significant breakthrough for charter schools. Multiple appraisal districts still resist application of tax exemptions for charters, but we are hopeful that other courts of appeal will follow the sound legal reasoning in the *Dallas Central* case, and it will become the precedent for the entire state. The practical positive effects are numerous. If this precedent is followed by all other Texas courts, charter schools will have more affordable access to facilities, and across the state, Charters will be able preserve millions of dollars for their intended purpose: serving their students. Statewide application of the *Dallas Central* decision will also end a wasteful practice of forcing charters to pay taxes on the tax dollars the State allocated to them to serve charter school students. As we know, open-enrollment charter schools are public schools; hopefully now they will be treated as such under the Texas Tax Code.

This article is intended for informational purposes only, and does not constitute legal advice, nor form an attorney-client relationship. Issues with lease-purchase options agreements and tax exemptions can be complicated and nuanced. If you have a question about an agreement, please contact your counsel.

Texas Supreme Court Grants Charter School Districts Immunity

By Emily Boney

The Texas Supreme Court recently held that charter school districts are entitled to governmental immunity from liability and suit to the same extent as public schools. El Paso Educ. Initiative, Inc. v. Amex Properties, LLC, No. 18-1167, 2020 WL 2601641 (Tex. May 22, 2020). However, the Court also held that a private university was not entitled to governmental immunity. Univ. of Incarnate Word v. Redus, No. 18-0351, 2020 WL 2601602 (Tex. May 22, 2020). The two holdings are discussed in detail below.

In El Paso, Amex Properties, LLC ("Amex") filed suit against Burnham Wood Charter School District ("the District") for anticipatory breach of a lease for development of a new charter school that was executed by the District superintendent, but was not approved by the District's governing board.

At a board meeting, the superintendent requested permission to "continue to negotiate a lease" with an Amex owner, which the board granted. The superintendent and the Amex owner signed a lease requiring Amex to construct two school buildings for the District's use. Despite both individuals signing the lease, Amex understood that the District's board had to approve the lease in order to finalize it. The parties continued to negotiate the lease after their representatives had signed it, until the District repudiated the lease two weeks later. Although the board never approved the lease, Amex began construction and ultimately leased the property to another tenant at a lower rate.

Amex brought claims against the District for anticipatory breach of the lease. The District argued that it was immune from suit to the same extent as a public school district and that the lease was not "properly executed" as Local Government Code Chapter 271 requires.

In holding that open-enrollment charter schools and charter-holders are entitled to governmental immunity, the Court reasoned that "[e]xtending governmental immunity to open-enrollment charter schools also satisfies governmental immunity's purposes. Diverting charter school funds to defend lawsuits and pay judgments affects the State's provision of public education and reallocates taxpayer dollars from the legislature's designated purpose…."

Next, the Court considered whether the lease was "properly executed" on behalf of the District as Local Government Code section 271.151(2)(A) requires. In order for immunity for a breach-of-contract claim to be waived, the party claiming a

breach of contract "must in fact have entered into a contract that is 'subject to this subchapter' as defined by section 271.151(2)." Section 271.151(2)(A) requires that a contract be ""a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is *properly executed* on behalf of the local governmental entity." The District argued that, because the Texas Education Agency (TEA) regulations require that a charter school's governing board approve contracts such as the lease at issue, unless the District's board approved the lease, it was not "properly executed." The Court agreed, and held that, because the board did not approve the lease, the lease was not "properly executed," and the School did not waive its immunity.

The Texas Supreme Court also recently held that a private university was not entitled to sovereign immunity from suit where the parents of a student who was fatally shot by university police during a traffic stop brought wrongful death and survival actions based on negligent hiring, supervision and training. Univ. of the Incarnate Word v. Redus, ___ S.W.3d ___, ___ (Tex. 2020). The Court differentiated this holding from its holding in El Paso as follows: "The legislature's limited authorization to private universities to commission peace officers stands in contrast to its incorporation of open-enrollment charter schools into the State's public-education system. Charter schools are expressly "part of the public school system of this state"; no similar declaration exists for a private university. **The legislature directs that open-enrollment charter schools have immunity from suit; it has not directed that private universities have it**… In the case of open-enrollment charter schools, the purposes of extending immunity are served: to protect the public treasury and prevent intrusion into legislative and executive oversight of the allocation of public resources. We conclude that private universities do not operate as an arm of the State government through their police departments. **We further conclude that extending sovereign immunity to the University does not comport with the doctrine's purposes, nor is it consistent with enabling legislation that extends immunity to peace officers engaged in law-enforcement activities**. Univ. of Incarnate Word v. Redus, No. 18-0351, 2020 WL 2601602, at *10 (Tex. May 22, 2020) (emphasis added)

In deciding these two cases, the Texas Supreme Court focused on the nature of the institutions that were claiming sovereign immunity, and whether each institution served the purposes of extending immunity.

Commissioner of Education Proposed Rule Filings: Reimbursement of Disaster Remediation Costs

By Amber Garza

The Texas Education Agency recently published a proposed new rule that would reflect changes made by House Bill 3, passed by the Texas Legislature in 2019, establishing the criteria, funding sources, and procedures that a school district or an open-enrollment charter school, all or part of which is located in an area declared a disaster by the governor under Texas Government Code, Chapter 518 must meet in order to receive disaster remediation expense reimbursement.

Under this proposed rule, the Commissioner of Education could provide disaster remediation cost reimbursement to schools affected by disaster only if funds are available for that purpose from amounts appropriated for that purpose or from the Foundation School Program (FSP) funds available based on a determination by the commissioner.

A school district or an open-enrollment charter school is eligible to apply if the following criteria is met:

1) all or part of the district or charter school must be located in an area

declared a disaster area by the governor;

2) the district or charter school must have incurred and paid disaster remediation costs during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster that the district or charter school does not anticipate recovering through insurance proceeds, federal disaster relief payments, or anther similar source for reimbursement; and

3) the district or charter school must apply by submitting a completed application during the two-year period following the date of the governor's initial proclamation or executive order declaring a state of disaster.

Per the proposed rule, if a school district or charter school makes more paid disaster remediation cost payments after submitting an initial application to the TEA and prior to the deadline announced, the TEA will create a form allowing for the submission of additional paid disaster remediation cost payments, and will increase the amount of reimbursement as available and appropriate.

Take note that per the rule, there will be a reporting requirement. Annually after the date of the award of reimbursement, the district or charter school's board and superintendent or CEO shall provide a certified report on a form provided by TEA until all insurance proceeds, federal disaster relief, or other similar sources of reimbursements related to the disaster are finalized. In addition, the district or charter school shall maintain all documents necessary to substantiate payment and certification. Such documentation would be subject to audit by TEA until two years after the school district or charter school certifies in writing to the TEA that the disaster.

The public comment period is ongoing through August 24, 2020. The proposed effective date for this rule would take effect November 8, 2020. This rule would apply to disasters that occur on or after September 1, 2019.

Title VII

By Karen Ice

On June 15, 2020 the Supreme Court of the United States issued s significant ruling deciding that an employer who fires an individual merely for being gay or transgender, or for the individuals' sexual orientation or gender identity, violates Title VII of the Civil Rights Act of 1964. The decision, *Bostock v. Clayton County, Georgia*, will directly impact employment decisions and perhaps other decisions and policies of Texas school districts and charter schools.

Under *Bostock,* homosexuals, transgender individuals, and other sexual orientations, including gender identity, are entitled to freedom from workplace discrimination to the same extent as other protected classes covered under Title VII. *Bostick* applies a causation or "but for" test to be applied to most employment decisions. Similar to avoiding allegations of racially bias employment decisions, before making any employment decision, the *Bostock* inquiry for employers of 15 or more individuals is, "Would I make this decision if the employee in question were of a different gender, sexual orientation of identifies with a different gender identity?"

Despite the Court's application of a "but for" test, the sex or gender-based consideration does not need to be the only factor considered by the employer to come under the prohibitions of *Bostock*. The *Bostock* Court further held, that even if an employment decision is based on matters other than the sex or the sexual orientation or identity of an employee or employment applicant, it will still be an unlawfully discriminatory decision if the sex or sexual orientation of the individual *had any part the employer's decision-making process. Bostock* should also have an impact on employment in such matters as the conference of benefits on same-sex spouses and coverage under group health plans for medical procedures that were traditionally excluded from coverage such as gender affirmation surgery.

While the holding is limited to employment decisions, *Bostock* is also destined to impact LGBTQ discrimination outside of direct employment decisions. For example, *Bostock* will have an impact on the way Texas public schools address bathroom, locker room and gender identity choices of employees. Coupled with already existing guidance from the Equal Employment Opportunity Commission, under *Bostock,* it is now clear that employers must allow employees to use restrooms, locker rooms, and any other "sex segregated" facilities consistent with the employees' gender identities, regardless of sex assigned at birth.

In 2017, Governor Greg Abbott made it a priority to pass a "transgender bathroom bill," that would have restricted transgender people's (including students') access to public bathrooms. While, in 2017 the Texas Legislature adjourned without voting on the proposed Bill, and while this decision does not directly apply to discrimination claims of students, Title VII is not the only federal law that prohibits employment sex discrimination. Title IX of the Education Amendments of 1972 provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Another significant Supreme Court case, *Franklin v. Gwinnett County Public Schools*, tell us that Title IX's ban on discrimination in educational programs "on the basis of sex" *imposes the same duty to avoid sexual harassment (**as to students**) that Title VII imposes on employers*.

The *Bostock* decision has broad implications, but it currently leaves many questions with regard to sex-segregated facilities, dress codes and even pronoun usage (suggesting even that employers may need to be cognizant of preferred the names and pronouns of their employees) unanswered. We encourage you to call upon legal counsel for assistance in determining and applying the full impact of this decision as that impact unfolds.

Updated TEA and EEOC Guidance for Employer Vaccine Policies

By Emily Boney & Bryan Dahlberg

TEA COVID-19 Vaccine FAQ

On January 7, 2021, the TEA issued its K-12 COVID-19 Vaccine FAQ ("TEA FAQ") to address how the release of COVID-19 vaccines may affect school systems.[5] In addition to addressing when teachers will be eligible to receive the COVID-19 vaccine and the fact that those eligible will not be required to pay any out

[5] *See* K-12 COVID-19 Vaccine FAQ, https://tea.texas.gov/sites/default/files/covid/k-12_covid-19_vaccine_faq.pdf, hereinafter ("TEA Vaccine FAQ").

of pocket expense to obtain the vaccine, the TEA FAQ also discussed whether a school can require an eligible educator to receive the vaccine:[6]

> The current COVID-19 vaccination process will be voluntary and left up to each individual to determine if it is the right course of action for that individual to take. The current COVID-19 vaccines were authorized under the Emergency Use Authorization (EUA); therefore, vaccination cannot be required by employers. Once a vaccine is formally approved by the FDA, employers may choose to require employees to obtain that vaccine.[7]

The TEA FAQ's information is based on guidance from the Texas Department of State Health Services (DSHS), which states that getting vaccinated is voluntary and currently cannot be required while the vaccine is being distributed under an emergency use authorization (EUA).[8]

Thus, according to the TEA and DSHS, schools cannot require that their employees receive a COVID-19 vaccine until it has been formally approved by the FDA.

EEOC Guidance

The EEOC has also updated its COVID-19 Technical Assistance Questions and Answers to include information about COVID-19 vaccinations.[9] Where COVID-19 vaccines are only available to the public under the EUA granted by the FDA, the FDA has an obligation to ensure recipients are informed that they have the option to accept or refuse the vaccine.[10] Although some have interpreted the EEOC's guidance to mean that employers may currently require employees to receive the COVID-19 vaccine that is available under the EUA, we strongly encourage schools to follow the guidance issued by the TEA, which states that employers may not require employees to receive a COVID-19 vaccine until it has been formally approved by the FDA. Once the vaccine is approved by the FDA, employers that wish to make COVID vaccination mandatory for employees are legally required to offer exceptions to that requirement for employees who have a disability under the ADA and/or object to vaccination on the basis of a sincerely held religious belief.

ADA Accommodations

Although requesting proof that an employee has received a COVID-19 vaccination is not likely to elicit information about a disability and as such is not a disability-related inquiry, subsequent questions, such as asking why an employee did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."[11]

The ADA allows employers to have a qualification standard that "an individual shall not pose a direct threat to the health or safety of individuals in the workplace."[12] However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, then the burden is on the employer to show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[13] The EEOC recommends that employers evaluate employees individually and

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[6] *Id.* at Questions 1-3.
[7] *Id.* at Question 3.
[8] *See* DSHS COVID-19 Vaccine Frequently Asked Questions, https://www.dshs.state.tx.us/coronavirus/immunize/vaccine-faqs.aspx, hereinafter ("DSHS FAQ").
[9] *See* What you Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Technical Assistance Questions and Answers https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws, hereinafter ("EEOC Q & A"), at Section K.
[10] *Id.* at Question K.4.
[11] *Id.* at Question K.3.
[12] *Id.* at Question K.5.
[13] *Id.*

use four factors to determine whether a direct threat exists: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. If the employer determines that an individual who cannot be vaccinated due to a disability poses a direct threat, the employer cannot take any action, such as exclude the employee from the workplace, unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the individual will no longer pose a direct threat.[14]

If there is a direct threat that the employer is unable to reduce to an acceptable level, then the employer can prevent the employee from physically entering the workplace. However, rather than simply terminate the employee, if the individual cannot receive the vaccine because of a disability under the ADA, then the employer must determine if the individual is entitled to an accommodation, such as working remotely.[15] Schools may rely on CDC recommendations when determining whether an effective accommodation that would not pose an undue hardship is available. Please be sure to remind managers and supervisors that it is unlawful to disclose that an employee is receiving an accommodation or retaliate against an employee for requesting an accommodation.

Religious Accommodations

If an employer is informed that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer under Title VII of the Civil Rights Act. An "undue hardship," as defined by courts, means having more than a *de minimus* cost or burden on the school.

Although schools should ordinarily assume that an employee's request for a religious accommodation is based on a sincerely held religious belief, if the school has an objective basis for questioning either the religious nature or sincerity of a belief, practice or observance, the school may request additional supporting information.[16]

If there is no reasonable accommodation possible for an employee who cannot get vaccinated for COVID-19 because of a disability or a sincerely held religious belief, practice, or observance, then it would be lawful for the school to exclude the employee from the workplace. However, as discussed above, an accommodation such as working remotely may be required, rather than outright termination. Before taking any employment action in such a scenario, we strongly caution that you seek legal guidance to ensure that the employee does not have any other rights under the EEO laws or other federal, state, and local authorities.[17]

We understand that schools are facing difficult decisions every day regarding balancing the need to educate students with the need to protect the health and safety of students and staff. However, it is extremely important to follow TEA and EEOC guidance when making these decisions.

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 Laura Van Story at lvanstory@slh-law.com or at (210) 538-5385.

[14] I*d.*
[15] *Id.*
[16] EEOC Q & A at Question K.6.
[17] *Id.* at Question K.7.