



Schulman,  
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*Attorneys & Counselors at Law*

## **SCHOOL LAW BUZZ**

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### **Check Your Website**

*By Allen Keller*

Just a friendly reminder that, as part of your school's compliance efforts, you'll need to be reviewing your website for postings that are required for charter schools. Following is a brief summary of the information that needs to be hosted somewhere on your school's website:

#### **A. Administrative Information**

1. All board meeting notices
2. Board meeting agenda (if the school's primary geographic service area includes all or part of a municipality with a population of 48,000 or more)
3. Archived recordings of board meetings (if the school's student enrollment is 10,000 or more)
4. Names of board members
5. Completed conflict disclosure statements and questionnaires
6. Online message boards accessible to the public (if your school has created an online message board or other application accessible to the public and through which board members communicate or exchange information about public policy or school business)
7. Designated mailing and email address for receiving written public information requests
8. Public information request form

#### **B. Financial Information**

1. Superintendent's salary
2. School budget
3. Annual financial statement
4. Annual financial report
5. Federal grant award information

#### **C. Academic Information**

1. Targeted improvement plan
2. Campus turnaround plan
3. Notice of Accredited-Warned, Accredited-Probation, or Not Accredited-Revoked Accreditation Status
4. Texas Academic Performance Report
5. Federal report card
6. State assessment information

#### **D. Health Information**

1. Health-related policies
2. Immunization information
3. Process for reporting bullying
4. Guidelines for the care of students with food allergies at-risk for anaphylaxis
5. Bacterial Meningitis information

#### **E. Other Topics**

1. Early childhood literacy and mathematics proficiency plans and progress reports
2. College, Career, and Military Readiness plans
3. Transition and employment guide

4. College credit program
5. Contact information for Title IX Coordinator(s)
6. Plan for use of ARP ESSER funds
7. Safe return to in-person instruction plan and continuity of services
8. Title I: district and campus improvement plans
9. Title IX training materials
10. Website accessibility

We recently sent out a detailed advisory that provides more information about the required website postings. If you'd like a copy of that advisory, please contact us and we'll provide it as soon as possible.

### **Procuring Construction Services Through Interlocal Purchasing Cooperatives**

*By Bryan Dahlberg*

If your school has amended its charter to adopt Chapter 44 of the Education Code (and Chapter 2269 of the Government Code) as its preferred method for procuring construction services contracts, you may find yourself in a situation where it is advantageous to procure a contract through an interlocal purchasing cooperative such as BuyBoard or TIPS. This can be done through the Job Order Contracting (JOC) method available under Sections 2269.401-.411 of the Government Code.

While the JOC method is not appropriate for all types of projects, it is specifically available for projects that involve the purchase of goods or services, usually of an indefinite quantity, where the contract is based on unit pricing. These projects usually

include categories of repetitive work like plumbing, electrical, painting, landscaping, roofing, and HVAC repair/replacement, but it can also be used for more permanent one-off projects like the purchase and installation of modular buildings, athletic fields, or playground equipment.

The first step in using this method, as always, is for the school to determine that the JOC delivery method "provides the best value to the school." The real benefit of procurement under the JOC method is that under Section 2269.407(2) of the Government Code, if another governmental entity has performed the JOC procurement process (advertising and receiving competitive bids to establish a price list), your school can award a contract subject to that process through the use of an interlocal agreement without having to complete those procurement steps again.

Section 791.025 of the Government Code expressly authorizes a local government (i.e., an open-enrollment charter school pursuant to Section 12.1058(a)(1) of the Education Code) to purchase goods, and any services reasonably required for the installation, operation, or maintenance of those goods, through the use of an interlocal cooperation contract with other local governments. The use of this method satisfies the requirement of the school to seek competitive bids for the purchase of those goods and services through the efforts already performed by the purchasing cooperative. Those efforts give the necessary assurance that the vendor's pricing was competitively sourced.

TASB's BuyBoard is one such interlocal purchasing cooperative made up of local government members. TIPS and Texas SmartBuy are others. These purchasing

cooperatives have already completed the competitive bidding process on a vast array of goods and services, including certain items that could be classified as construction services. If your school is not already a member of the cooperative, it would need to join by completing and submitting the applicable interlocal participation agreement, which the Board should specifically approve by resolution and amend its purchasing policies to allow for the use of such cooperatives for procurement.

We also advise that for each JOC construction contract that is awarded through this method, the school should augment the vendor's proposal and purchase order with a construction contract that addresses the construction-related details and requirements, such as performance and payment bonds (for projects over \$100k and \$25k, respectively), insurance coverage, and criminal history background checks. This construction contract should reference the vendor's proposal and purchase order as exhibits that identify project-specific details such as the scope of work (services and goods to be provided), contract sum based on established unit pricing, payment terms and achievement milestones, and project deadlines.

One additional requirement that must be included in the agreement is the certification regarding professional services. While interlocal purchasing cooperatives can be used to procure construction services under the JOC method, it cannot be used for architectural or engineering services, which must be procured under Chapter 2254 of the Government Code. Therefore, each JOC agreement needs to include the school's written certification that: (i) the project does

not require the preparation of plans or specs by an architect or engineer, or (ii) an architect or engineer selected in compliance with Chapter 2254 has prepared any required plans or specs.

As always, our firm has developed template agreements and related documents that are customized for use by charter schools in this process. If your school is planning an upcoming construction project, get us involved so we can guide you through the process.

### **Announcing New Partner, Maia K. Levenson**

*By Stephanie Bazan*

Schulman, Lopez, Hoffer & Adelstein, LLP is pleased to announce Maia K. Levenson is now a partner of the Firm. Her practice includes the representation of school districts, charter schools, and other public and private entities in all areas, including labor and employment, special education, and administrative law matters.

Ms. Levenson has represented clients in litigation before federal and state courts, including the Supreme Court of Texas. Ms. Levenson is an experienced public speaker who has presented on various school law topics, including school safety and security, the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act, and Title IX compliance.

## **Jasmine E. Grant Promoted to Senior Associate**

*By Stephanie Bazan*

We are excited to share that Jasmine E. Grant is now a senior associate of the Firm. Her practice includes the representation of school districts, charter schools, non-profit organizations, and other entities in litigation and governance. She also handles insurance defense work for schools, daycare centers, and other businesses. Please join us in congratulating Ms. Grant.

## **Texas Supreme Court Requires Employers to Honor Leave Policies**

*By Joe Hoffer*

Mr. Lara was a long-term employee of TXDOT and he had some health issues requiring that he go out for surgery. He used all of his sick leave and personal leave while home recovering post-surgery. TXDOT however also had a written unpaid leave policy and Lara requested access to unpaid leave status as an accommodation. The TXDOT policy provided up to one year of leave without pay. TXDOT did not grant his request and fired the veteran employee and he sued for failure to accommodate, discrimination and retaliation. Apparently, Lara had not used the precise form TXDOT wanted to request the accommodation.

TXDOT filed a jurisdictional challenge to dismiss and the District Court granted it. On appeal, the court of appeals reversed part of the decision and it was appealed up to the Texas Supreme Court. The Court ruled that an employee does NOT need to use a specific form to request an accommodation. The

Court also ruled that TXDOT had a written policy providing for unpaid leave and that it could not just deny that leave request. The Court was troubled with TXDOT's attempt to minimize what its own written leave policy stated and was not convinced by TXDOT's arguments that it had discretion when to grant the leave or not.

**TAKEAWAYS:** What is in your written policies, particularly around leave, matters. The school will be held to those policies as the written leave policies become part of the compensation structure.

See the opinion in *Dept. of Transportation v. Lara*, 625 S.W.3d 46 (Tex 2021) [here](#).

## **IEP Implementation During COVID-19**

*By Alyssa Sandersen*

The central guarantee of the Individuals with Disabilities Education Act ("IDEA") is the provision of a Free Appropriate Public Education ("FAPE"), and implementation of a student's Individualized Education Program ("IEP") is essential to ensuring receipt of that right. Although critical to FAPE, COVID-19 and its aftermath have presented significant challenges for open enrollment charter schools' ability to ensure consistent and appropriate service delivery. Given these challenges, the frequency of "failure to implement" claims through the IDEA's dispute resolution process, and recently passed special education legislation, heightened attention to IEP implementation is highly recommended at this time.

## **IEP Implementation Requirements and COVID-19**

Despite the undeniable issues surrounding COVID-19 such as significant staffing shortages and evaluation backlogs, there is no waiver of a school's obligation to provide FAPE and IEP services during a pandemic, and courts and hearing officers do not accept such difficulties as a reason to justify lapses in IEP implementation. In short, it is vital that administrators and educators work together to come up with creative solutions to ensure special education services are provided with fidelity, and it is vital to communicate any concerns with respect to implementation to the appropriate individual as soon as possible to minimize any potential disruptions.

## **Special Education Dispute Resolution**

Not only is IEP implementation critical in terms of FAPE, but the failure to ensure service delivery also exposes charter schools to significant liability. Schools spend over \$90 million dollars per year on dispute resolution, and the IDEA is the most actively litigated area in the K-12 context.<sup>1</sup> A parent may utilize the IDEA's dispute resolution procedures to challenge a school's IEP implementation by filing a due process complaint or a written complaint to the Texas Education Agency ("TEA"). In fact, since the pandemic, IEP implementation has been the

most common claim in both due process hearings and state complaints nationwide.<sup>2</sup>

To prevail on a "failure to implement claim" in a due process hearing, the parent must prove that substantial or significant provisions of the IEP were not provided such that the student was denied a FAPE in order for relief to be provided.<sup>3</sup> If a parent makes such an allegation through a TEA complaint however, TEA may order corrective action related to *any* implementation shortcoming, even minor technical failures, regardless of the severity or the particular provision at issue.

## **House Bill 1252 and Senate Bill 89**

The Texas Legislature passed two bills of particular importance with respect to special education services during the previous session. First, House Bill ("H.B.") 1252 amended the Texas Education Code by adding Section 29.1064, which extends the limitations period to file for due process. For complaints filed on or after September 1, 2022, a parent will have two years to file a complaint alleging a violation of the IDEA, rather than the current one-year limitations period.<sup>4</sup> This means that beginning with the upcoming school year, a parent can potentially challenge IEP implementation based on an alleged act or omission from two years prior.

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<sup>1</sup> 16 Connecticut Public Interest Law Journal, No. 2, Perry A. Zirkel, The Two Dispute Decisional Processes under the [IDEA]: An Empirical Comparison (2017); IDEA at 40+ Part Two: Due Process, Exhaustion, and Mediation: The Expansion of Litigiousness and a Proposal for a Reset, Kathy Mehfoad and Kathleen Sullivan, <https://cdn-files.nsba.org/s3fs-public/05.%20Mehfoad%20Sullivan%20IDEA%20at%2040.pdf>.

<sup>2</sup> *COVID-19 Guidance and Case Law: Fall Update*, Perry Zirkel (November 10, 2021) <https://perryzirkel.com/2021/11/10/covid-19-guidance-and-case-law-fall-update-2021/>.

<sup>3</sup> See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir 2000).

<sup>4</sup> Acts 2021, 87th Leg., R.S. (H.B. 1252), <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01252F.pdf#navpanes=0>.

Second, Senate Bill (“S.B.”) 89 added section 29.0052 to the Education Code and requires the inclusion of certain supplemental IEP information for each child who was enrolled in the school’s special education program during the 2019-2020 or 2020-2021 school year. In particular, the Admission Review and Dismissal (“ARD”) Committee must address the following information in the IEP with respect to the 2019-2020 and 2020-2021 school years: (1) whether there was a delay in conducting an evaluation; (2) whether there was a delay in developing an IEP; (3) *whether IEP implementation was interrupted, delayed, reduced, discontinued, or suspended*; and (4) whether compensatory services may be appropriate when considering the totality of the circumstances, including the above-mentioned factors.<sup>5</sup>

### **Takeaways and Practice Pointers**

- 1. Maintain thorough documentation of IEP implementation.** Do not put yourself in a situation where services have been provided with fidelity, but the school does not have documentary evidence of IEP implementation. Thorough and accurate documentation will be increasingly important moving forward as parents will soon be able to file complaints about acts or omissions from two years prior.
- 2. Be proactive.** When appropriate, consider offering compensatory or remedial services to address any implementation lapses and document this consideration as required by S.B. 89. Offering and/or providing such services

may reduce a hearing officer’s award should a parent prevail at due process or even prevent the filing of the complaint in the first place.

- 3. Review and revise IEPs.** The IDEA requires implementation of IEPs *as written*. As such, make sure that anything included in the IEP is actually provided, and if changes have been made to a student’s services in practice, the IEP must be revised accordingly to reflect that reality.
- 4. Ensure IEP access.** Given the widespread staffing shortages across the state, it is imperative that substitute teachers and contracted service providers have access to IEPs and know who to contact with questions. Additionally, if personnel and schedule changes are made to address shortages, make sure that impacted teachers have all IEPs on the first day of their new assignments. Doing so may help avoid service interruptions and provides evidence of appropriate IEP implementation if challenged.
- 5. Emphasize school-wide obligations.** Remember, IEP implementation is not just a “special education team” matter – the IDEA’s obligations apply to, and impact, the full scope of charter school operations. As such, it may be wise to offer “refresher” trainings beyond the special education department. Examples may include training general education teachers about their respective roles related to IEP implementation such as the importance of providing and

<sup>5</sup> Acts 2021, 87th Leg., R.S. (S.B. 89), <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00089F.pdf#navpanes=0>.

documenting accommodations or reminding administrators about adhering to behavior intervention plans. All of these steps can help you and your school ensure the receipt of FAPE and uninterrupted IEP implementation.

### **House Bill 25 and Title IX: The Compliance Quandary for Public Schools with Transgender Student Athletes**

*By Maia Levenson*

On January 18, 2022, House Bill 25 (“HB 25”) went into effect in Texas.<sup>6</sup> HB 25 enacts requirements for transgender students’ participation on athletic teams that are at odds with the United States Department of Education (“ED”) formal interpretation of Title IX of the Education Amendments of 1972 (“Title IX”). As described more fully below, HB 25 requires student athletes to play on the athletic team corresponding with their legal biological sex, whereas the ED has interpreted Title IX to require that students be permitted to play on the athletic team aligning with their gender identity (regardless of biological sex). This conflict has placed Texas open-enrollment charter schools in the middle of a clash between state lawmakers and the federal government, with difficult questions over how to comply with HB 25 and fulfill obligations under Title IX.

The ED weighed in on this topic last summer. In mid-June 2021, the ED published non-binding guidance on Title IX, interpreting Title IX to prohibit discrimination based on sexual orientation and gender identity.<sup>7</sup> Around the same time, the federal government filed a Statement of Interest in a lawsuit challenging a West Virginia law similar to HB 25, arguing that the state law violated Title IX (and the Equal Protection Clause). The government took the position that the state law effectively prohibited—on the basis of sex—transgender girls from participating in public school athletic programs because transgender girls were barred from participating on girls’ teams but forcing them to participate on boys’ teams also causes discriminatory harm.<sup>8</sup> In the government’s view, the law afforded transgender girls “no opportunity to participate in single-sex sports teams at all.”<sup>9</sup>

HB 25 was passed in October 2021 during the 3rd special session of the 87th Texas Legislature, after several failed attempts to pass similar bills in the regular and prior special sessions. HB 25 added Section 33.0834 of the Texas Education Code, which prohibits “an interscholastic athletic team sponsored or authorized by a school district or open-enrollment charter school” from allowing “a student to compete in an interscholastic athletic competition sponsored or authorized by the district or school that is designated for the biological sex opposite to the student’s biological sex . . . .”<sup>10</sup> For purposes of Section 33.0834, the

<sup>6</sup><https://capitol.texas.gov/tlodocs/873/billtext/pdf/HB00025F.pdf#navpanes=0>.

<sup>7</sup> <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>;  
<https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

<sup>8</sup> <https://www.justice.gov/crt/case-document/file/1405541/download>.

<sup>9</sup> *See id.*

<sup>10</sup> Tex. Educ. Code § 33.0834(a).

student's biological sex is the sex stated on the student's official birth certificate or, if the student's official birth certificate is unobtainable, another government record.<sup>11</sup>

The drafters of HB 25 took into account transgender students who may have had their biological sex legally changed, and clarified that a statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex *only if* the statement was entered at or near the time of the student's birth or modified to correct any type of scrivener or clerical error in the student's biological sex.<sup>12</sup> The drafters were also seemingly aware of the ED's interpretive guidance concerning Title IX, and included in the bill legislative findings regarding Title IX and athletic opportunities for girls, as well as a stated legislative intent to ensure sufficient interscholastic athletic opportunities remain available for girls and to remedy past discrimination on the basis of sex.

While the federal government is clearly aware of HB 25 (the Biden Administration has called the law "hateful"),<sup>13</sup> neither the ED nor the Department of Justice have taken any legal action to challenge it. We also do not have a binding judicial opinion from the Supreme Court of the United States or the Fifth Circuit concerning Title IX's application to transgender students. Thus, Texas public schools are left with the difficult choice of complying with HB 25 and potentially risking Title IX claims, or

following the ED interpretation of Title IX and risking enforcement action from the Texas Education Agency ("TEA") for violation of HB 25.

At this time, unless and until the federal government takes formal legal action against HB 25, the most conservative option is likely for schools to comply with HB 25. Interventions and sanctions available to the TEA are harsh—including discretionary charter revocation for violation of "applicable law"<sup>14</sup>—and it is not clear that the Office for Civil Rights ("OCR") will have interest in punishing schools for compliance with a state law that has remained unchallenged by the federal government.

If your school has questions, would like to discuss compliance options, or has interest in exploring a legal challenge to HB 25, please contact our office.

#### **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 [lvnstory@slh-law.com](mailto:lvnstory@slh-law.com) or at (210) 538-5385.

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<sup>11</sup> *Id.*

<sup>12</sup> Tex. Educ. Code § 33.0834(c).

<sup>13</sup> <https://www.chron.com/politics/article/Texas-transgender-law-high-school-sports-16548611.php>.

<sup>14</sup> See Tex. Educ. Code § 12.115(a)(4).