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SCHOOL LAW BUZZ

March 2022 | Texas School Law E-News | Issue No. 39

SLHA, LLP Facilitates Loan Closing with Promesa Academy Charter School

By Stephanie Bazan

Schulman, Lopez, Hoffer & Adelstein, LLP is pleased to announce a successful closing for our client Promesa Academy Charter School. The deal we closed supports two facility projects in San Antonio, Texas - the acquisition of a 30,200 sq ft building under a 30-year ground lease and the construction of a 12,300 sq ft building on the same site.

Promesa, a K-5 free, public charter school in San Antonio, opened in 2020 with the mission to ensure that every student has the skills and knowledge for middle and high school success, college graduation, and a life filled with opportunity. Promesa will add one grade every year and grow to a K-12 campus. They promise to foster and nurture their students' sense of wonder and hope by building a space where they are loved, respected, and nurtured so that they grow, learn, and create with each passing day.

SLHA, LLP was the real estate counsel for Promesa Academy Charter School. Jason Adelstein leads the Firm's commercial real estate and natural resources practice for both public and private clients and is available to support your next school facility project.

Commercial Real Estate

Schulman, Lopez, Hoffer & Adelstein, LLP, serve private, public and institutional parties in the negotiation, acquisition, development, leasing, financing, operation and purchase/sale of all types of commercial properties, including retail, industrial, office and public use.

For more information, contact jadelstein@slh-law.com.

ACLU Attention to Texas School District Dress Codes

By Karen Ice

In September 2020 the ACLU of Texas has been sending letters to school districts across Texas urging them to modify or change their school dress and grooming code policies. The impetus behind sending these letters was the August 2020 ruling in the U.S. District Court for the Southern District of Texas case, *De'Andre Arnold v. Barbers Hill Independent School District.* In that case, the school district imposed hair length restrictions for male students, but did not have the same restriction for female students. At the hearing, Barber's Hill attempted to argue that the policy was in place to help maintain a standard of excellence, maintain an atmosphere conducive to learning, prepare students for success in college, military and the workplace and it promoted educational goals. The court also noted that the school's website stated that in general the dress code

teaches grooming, hygiene, prevents disruption, avoids safety hazards and teaches respect for authority. However, when pressed, Barber's Hill could not actually articulate one fact that established a discernible relationship between the hair length policy and any of its justifications. (e.g. How does the hair length policy maintain an atmosphere conducive to learning, or prepare students for success in college?)

Inevitably, the court in *Barbers Hill* found that gender specific grooming codes violate the Equal Protection Clause of the Fourteenth Amendment[1]. The court reasoned that Barber's Hill did not have a substantially related purpose for restricting male students from having long hair and not imposing the same restriction on female students.

Even more recently the ACLU brought another very similar lawsuit against Magnolia ISD again in the U.S. District Court Southern District of Texas. The result turned out to be the same, and in that case the Magnolia ISD students argued that the school permitted male students to have long hair in prior years and there was no evidence of disruption to the school or safety issues, so why was the policy being so strictly enforced now?

While it is possible that a school may justify the disparate treatment of male students if it were able to show that the hair-length policy is one component of a comprehensive grooming code that imposes comparable (not identical) demands on both sexes or are sufficiently justified for a sex-based classification, there still may be an issue of discrimination based on race or any other protected class under the Constitution.

If you have not done so already this may be a good time to review your school's student dress and grooming policies for not only sections which may discriminate based on sex, but also based other section which may unintentionally discriminate against students based on their race as well.

Contracting Basics – Don't Forget the Child Support Certification Form!

By Celina Warren

When entering into a contract with a vendor or publishing a Request for Proposal, you may be required to include a Child Support Certification Form as required by Texas Family Code Section 231.006. According to Section 231.006, vendors who receive state funding must complete and submit a Child Support Certification Form to certify that they are not delinquent in the payment of child support. If a vendor says that it is not delinquent, but it turns out that the vendor is, the vendor must acknowledge that the school can terminate the contract and withhold payment. That is the purpose of the Child Support Certification form.

[1] The student in that case brought forth several allegations under the Equal Protection Clause, and Title VI of Civil Rights Act, sex discrimination under Equal Protection Clause, First Amendment violations of free speech, retaliation in violation of the First Amendment, Title IX and intentional race and sex discrimination in violation of Texas law.

Who must sign the Child Support Certification?

If the resulting contract will be paid for with state funding, the following vendors must complete a Child Support Certification form:

- sole proprietorships,
- partnerships,
- entities with shareholders, or
- entities with an owner who has an ownership interest of at least 25 percent of the business entity

What if your Vendor says the certification does not apply?

If your vendor states that the certification does not apply to them, our recommendation is that it is best practice to still have the vendor note on the certification form that the certification is not applicable to them. This way, there is written documentation that the vendor made this representation, and if it later proves to be incorrect, the school has proof that it required the vendor to complete the form.

If your school has questions, would like to discuss the Child Support Certification requirement, or needs a copy of the Child Support Certification form, please contact our office.

SLHA Welcomes New Staff

By Stephanie Bazan

We are pleased to announce that Lisa Schott and Lisa Nyquist have joined the Firm.

Ms. Schott is our Chief Human Resources Advisor and is working out of our Houston office. Ms. Schott offers over 20 years of operations and human resources leadership in charter schools, large system healthcare, and non-profits. Her executive search work includes successfully partnering with boards and executives to recruit for CEO, CFO, Superintendent, and other senior level positions.

Ms. Nyquist is working from the San Antonio office and is our School Finance & Operations Specialist and Technical Advisor. She has spent her career working in K-12 education and brings 11 years of experience working in school finance, compliance and operations. Ms. Nyquist is excited to support the Firm's clients through federal programs & grants management, and procurement as well as a suite of additional financial services.

Please join us in welcoming Ms. Schott and Ms. Nyquist.

ADA Accommodation

By Emily Boney

Title I of the ADA requires an employer to provide a reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

An individual with a disability has "a physical or mental impairment that substantially limits one or more major life activities." If a disability is not obvious, you can ask for medical documentation from a health care provider to confirm the need for accommodation. An impairment does not

have to last a particular length of time to be considered substantially limiting.

Major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

Employees who are "regarded as" having a disability but do not actually have a disability are not qualified to receive reasonable accommodations; rather, they are only protected from disability discrimination under the ADA. An employee is "regarded" as having a disability if the employee:

- Has an impairment that does not substantially limit a major life activity;
- Has an impairment that substantially limits a major life activity only as a result of the attitudes of others toward them; or
- Does not have any impairment, but is treated by an entity as having an impairment.

A qualified individual with a disability who is entitled to a reasonable accommodation under the ADA is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodations. Essential functions are job duties that are necessary to perform the position. If an individual is no longer able to perform the "essential functions" of the position due to a disability (with or without accommodations), they are not a "qualified individual with a disability" and the employer is not legally obligated to provide a reasonable accommodation.

An accommodation would cause "undue hardship" if it would cause "significant difficulty or expense." Whether an accommodation would cause "undue hardship" must be assessed on a case-by-case basis.

In order to determine if an individual is a "qualified individual with a disability" and if the school can provide an accommodation without causing an "undue hardship" the school must engage in the interactive process. The interactive process is an informal process where employers and employees work together to identify a reasonable accommodation. If the appropriate accommodation is obvious, then an interactive process is not necessary. For example, if an employee is in a wheelchair and needs either the use of an elevator or to move their office to the first floor, this is an obvious accommodation that should not require a step-by-step process.

A school can determine if an employee is a "qualified individual with a disability" by asking the employee to provide appropriate documentation from their health care provider regarding the nature of any impairment(s), severity, duration, activities

limited by the impairment(s) and the extent to which the impairment(s) limits the employee's ability to perform the job's essential duties/functions. We recommend sending forms for the employee and their medical provider to fill out in order to determine if the employee is a "qualified individual with a disability." Forms for the employee to fill out should include the following inquiries:

- What accommodation are you requesting?
- What job function are you having difficulty performing?
- What limitation is interfering with your ability to perform your job or access an employment benefit?
- If you are requesting a specific accommodation, how will that accommodation assist you?

Forms for the employee's medical provider to fill out should include the following inquiries:

- Does the employee have a physical or mental impairment? If yes, what is the impairment?
- Is the impairment long-term or permanent?
- If not permanent, how long will the impairment likely last?
- Does the impairment substantially limit a major life activity? If yes, what major life activity(s) is/are affected?
- Does the impairment substantially limit the operation of a major bodily function? If yes, what bodily function is affected?
- What limitation(s) is interfering with job performance?
- What job function(s) is the employee having trouble performing because of the limitation(s)?
- How does the employee's limitation(s) interfere with his/her ability to perform the job function(s)?
- Do you have any suggestions regarding possible accommodations to improve job performance? If so, what? How would they improve job performance?

Once the school receives the requested information, the school will need to review and determine if the employee is a qualified individual with a disability under the ADA who is need of a reasonable accommodation. We recommend consulting with counsel before making this determination.

Once the school has confirmed that the employee is a qualified individual with a disability under the ADA who is need of a reasonable accommodation, the school will determine whether the accommodation is reasonable and whether implementing the accommodation would cause undue hardship to the school. If the accommodation is unreasonable, then the school should propose another accommodation that is reasonable and does not impose an undue burden on the school. The school may determine that a request is unreasonable or an undue burden, but it *must* engage in the interactive process before making this determination.

Property Tax Exemption Law for Charter Schools Goes Into Effect for 2022 Tax Year

By Joe Joyce

In June 2021, after a close vote in the legislature, charter schools were provided some legislative back-up on whether charter school property is exempt from ad valorem property taxation. HB 3610 made changes to the Education Code and the Tax Code to ensure that charter schools, like other public schools, would not have a property tax bill consuming public education dollars. Though HB 3610 took effect on September 1, 2021, 2022 marks the first tax year to which HB 3610's provisions will apply.

Pre-HB 3610: Where we were

In the years before HB 3610, charter schools faced an uphill battle with appraisal district staff to convince the appraisal district that its property was subject to exemption. Tax exemptions for both "public property" and for schools exist in the Tax Code, but neither mentioned charter schools by name. These exemptions also required property to be either owned by "the state or a political subdivision of the state"[2] or owned by the same entity operating the school.[3] In denying exemptions, appraisal districts often cited that the charter schools were not the same as the state or a political subdivision of the state, or that the charter school did not *own* the property. The appraisal districts argued that because some charter schools merely leased the property, they were not entitled to exemption.

When it came to charter schools, some appraisal districts had the same preconceived notions that some members of the public have; that open-enrollment charter schools were either (1) not public schools, or (2) run by private, for-profit companies. To obtain exemptions for their campuses and business personal property, charter schools had to both educate and persuade appraisal districts that this property was public. The arguments for exemption were sound, but they also required a good deal of explanation and legal citation. While some districts agreed to exempt charter property, several did not.

On the eve of 2021, the charter schools' arguments were affirmed by the Dallas Court of Appeals. In *DCAD v. International American Education Federation*, an open-enrollment charter school claimed that it was entitled to exemption as public property, and that its exemption was improperly denied by the Dallas Central Appraisal District. The case was appealed to the Fifth Court of Appeals at Dallas, where Joe Hoffer presented the oral arguments on behalf of the charter school. 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*, 618 S.W.3d 375 (Tex. App.—Dallas 2020, no pet.), where it affirmed the trial court's ruling that the school (1) was entitled to exemption under Texas Tax Code § 11.11, and (2) the fact that the school was leasing the property with an option to purchase gave the school equitable title so as to meet the ownership requirement needed for exemption. Exemption was granted, and charter schools had appellate precedent to

[2] Tex. Tax Code § 11.11.

[3] Tex. Tax Code § 11.21.

back up their arguments to the appraisal districts.

Unfortunately, some appraisal districts have continued to deny exemption despite valid legal arguments and precedent, forcing charters to continue pursue legal action for exemption.

HB 3610: Making exemption even more clear

The legislature clarified in HB 3610 what charter school advocates had been arguing for years, and what the Fifth Court of Appeals recognized as correct; that charter school property is exempt as public property. HB 3610 amended the Education Code to state that property purchased or leased with public funds "is exempt from ad valorem taxation as provided by Section 11.11, Tax Code. Tex. Educ. Code 12.128(a)(4) and (a-1)(4). HB 3610 also made charters a political subdivision for purposes of Tax Code Section 11.11, taking away another of the appraisal districts' arguments against exemption. Finally, HB 3610 amended the Tax Code to create Section 11.211, which exempts real property *leased* to independent school districts, community college districts, or open-enrollment charter schools, provided the property is used exclusively by the public school for school functions, and is reasonably necessary for school functions. Tex. Tax Code 11.211.

Where we go from here

Though appraisal districts should have been granting exemptions for charter school property all along under Tax Code 11.11, HB 3610 gives charter schools even more clarity. Unfortunately for charter operators, the changes in law from HB 3610 are not retroactive, so there will be no refunds as a result. Additionally, the changes made by HB 3610 apply only to taxes imposed in tax years *after* September 1, 2021 (read: 2022 taxes).

For this year's taxes and beyond, HB 3610 should have four positive results for charters. First, charter schools will receive the same exemptions on their property as independent school districts, preventing taxing authorities from taxing money that was intended to benefit charter school students. Second, fewer legal battles will result in exemptions being granted more quickly, and with fewer costs and attorneys' fees. Third, charter schools that decide to lease campuses should also experience tax savings in the form of reduced rental amounts, encouraging new campuses and new operators to open. Finally, and most importantly, education dollars will stay where they belong: in the classroom.

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.

Regulating Student Speech in Light of the *Mahanoy* Decision

By Jasmine Grant

The U.S. Supreme Court weighed in for the first time in many years on the issue of a school's ability to regulate student speech. In June 2021, the Court issued its decision in

Mahanoy Area School District v. B.L., et al.[4] The *Mahanoy* case concerned a school regulating purely off-campus student speech. The Court ultimately held that the school could not regulate the specific speech in question as it occurred purely off-campus and did not fall outside of First Amendment protections.

The facts in *Mahanoy* could have occurred in any school. Student, B.L., was upset that she didn't make the Mahanoy Area High School's varsity cheerleading team (she did make the junior varsity team). Over the following weekend, while at a convenience store, she posted images on the social media app Snapchat ostensibly expressing her feelings about not making varsity. Those images included the text "f*** school f*** softball f*** cheer f*** everything" and showed B.L. and a friend throwing the middle finger. The image was seen by over 250 people before it disappeared 24 hours later. However, before it disappeared, one recipient of the message took a photo of the Snapchat image and showed it to one of the cheerleading coaches.

The coach took the matter to her fellow coaches, and after discussing the situation with the principal, it was decided that the post used profanity in connection with a school activity, and thus, violated school rules. B.L. was then suspended from the junior varsity team for remainder of the upcoming year. The parents of B.L. attempted to get the punishment overturned through the school but were unsuccessful. The parents then filed a lawsuit in Federal District Court.

The Federal District Court ruled in favor of B.L. and, among other things, ordered that B.L. be reinstated onto the junior varsity cheerleading team. In applying the *Tinker* standard that requires a school to show that the student's speech could cause or did cause a "substantial disruption" with school activities or on school premises, the Federal District Court found that the school had failed to meet that standard. It held that the school's actions were unconstitutional and violative of B.L.'s First Amendment Right of freedom of speech. The case was appealed to the Third Circuit Court of Appeal that also ruled in favor of B.L. and then to the U.S. Supreme Court. This was a case of first impression for the Supreme Court as it had never heard a case about the constitutionality of a public school's authority to regulate speech occurring solely off-campus.

The Supreme Court ultimately affirmed the final decision of the Third Circuit Court, noting that there are three features to consider that will diminish the ability of a school to regulate a student's off-campus speech. These features are as follows:

(1) Off-campus speech is generally a parent's responsibility. Rarely does a school stand *in loco parentis* (in place of the parent) when a student is off campus.
(2) If schools can regulate purely off-campus speech as well as on-campus speech, students have no real freedom of speech; and
(3) Schools have an interest in protecting unpopular speech since schools

[4] *Mahanoy Area School Dist. v. B.L. by & through Levy*, --- U.S. ---, 141 S.Ct. 2038, 210 L.Ed.2d 403 (2021).

> function as "the nurseries of democracy." Justice Breyer used a quote from Evelyn Beatrice Hall to explain this feature about the free exchange of ideas: "*I disapprove of what you say, but I will defend to the death your right to say it*."

The *Mahanoy* decision did make clear, however, that there are special circumstances that allow schools to regulate student speech and those circumstances do not just disappear because the student speech occurs off campus. These special circumstances include severe bullying or harassment, threats aimed at teachers or other students, and the failure to follow rules for online school activities.

As of now, it does not appear as if the decision in *Mahanoy* has materially hindered a school's ability to regulate a student's off-campus speech as long as the school has shown that special circumstances exist that allow it to do so and that the *Tinker* standard of "substantial disruption" has also been met. As one can imagine, these cases are always very fact-specific, and school officials should consult with legal counsel before deciding whether to reprimand a student for purely off-campus speech to ensure that the school's decision does not violate a student's First Amendment rights. As always, we are here to help, so please contact our office if you have any questions about this topic.

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.