

**IN THIS ISSUE:**

- *No Child Left Behind Act* ..... 1
- *New Charter Schools Regulation* ..... 1
- *Mold Litigation on the Rise* ..... 2
- *Fair Labor Standards Act Practice Tips* .... 3
- *Health Insurance Portability & Accountability Act*..... 4
- *Supreme Court to Rule on Race-Based Admissions* ..... 4

**No Child Left Behind Act**

On November 26, 2002, the U.S. Department of Education ("Department") issued its final Title I rules, implementing part of the No Child Left Behind Act ("NCLBA"). These rules became effective January 2, 2003. Although the rules are voluminous, below are several significant aspects that will immediately affect many school districts in South Carolina.

- A student who does not attend a school for a full academic year, but who does attend school within a single school district for that year, must be included when determining the school district's adequate yearly progress ("AYP"). A student who attends schools within several districts within the same state for a full academic year must be included in the determination of the state's AYP, but not in any district's AYP.
- School districts must provide parents of students eligible to transfer a choice of more than one school, if more than one school is available in the district. This rule applies to special education students as well.
- School districts may not use lack of capacity to deny an eligible student the opportunity to transfer. For example, if a school district identifies three schools to which students may transfer, the district may not deny an eligible student the opportunity to transfer because there is not sufficient capacity at any of the schools. The Department suggests adding classes, *i.e.* portables, and hiring additional teachers if a large number of students wish to transfer.

The provisions discussed above are merely summaries of detailed rules, and cannot substitute for a thorough reading and analysis of the rules. Fortunately, the Department will be issuing frequent guidance to the states and school districts that should assist school districts understand and comply with their new and constantly evolving obligations. A helpful reference regarding the NCLBA can be accessed on the Internet at the following address:

<http://www.ed.gov/offices/OESE/reference.html>.

**Charter Schools**

The heavily revised Charter Schools Act ("Act") passed by the General Assembly this past summer calls upon the State Board of Education ("SBE") to draft certain rules and standards on additional issues addressed in the 2002 legislation that were not included in the 1996 Act, or in areas where experience under the 1996 Act showed the need for clarifications. After publication of proposed "Procedures and Standards for Review of Charter School Applications" last October, the SBE solicited and received written comments in November and held a public hearing in December, 2002. Based on the public written and oral comments from groups on all sides of the issues, a second reading was postponed until January 7, 2003, to fine-tune the proposal. On January 7, 2003, the SBE approved the regulation, designated as S.C. Reg. 43-601.

Although approved by the SBE, the regulation still must be approved by the General Assembly before it has the force of law. Although the regulation is subject to change by the Legislature, following is a summary of its main components.

The regulation adopted by the SBE has four main sections. Section I simply restates the authority of the newly created Charter Schools Advisory Committee to review applications in the first instance and requires the applications to comply with each of the standards established in the law and the remainder of the application regulation.

Section II establishes the standards that the Advisory Committee must use to determine an applicant's compliance with application components under the Act. This section is generally a checklist of items that must be addressed, clarifying the sorts of

documentation or commitments required of the applicant. Highlights of the regulation include a requirement that: the applicant set forth the anticipated enrollment at each grade level of the school; the school explain its method for meeting State High School Diploma requirements if the school offers the State Diploma; the charter school use the same budget codes required of school districts; and many other subtle clarifications or disclosure-related requirements for the initial application process.

Section III simply authorizes a local school board to grant a conditional charter to an applicant whose application meets the requirements in all other respects but has not yet secured access to appropriate facilities and/or approval of its facilities by the State Department of Education.

Section IV deals exclusively with “adverse impact on students.” The General Assembly failed to define this term in the Act and delegated this responsibility to the SBE. Although a wide variety of opinion still exists, the SBE voted to require school districts to “demonstrate adverse impact on students” to deny a charter, rather than to “prove” an adverse impact. The heart of adverse impact on students is, of course, that a charter school takes funding “off the top” of the district’s funds; the District can either cut programs, services, or personnel in order to pay for the cost of the charter school or it can raise local property taxes to “break even.” Section IV of the regulation deals expressly with funding-related adverse effect stating that a district must follow these criteria when claiming an adverse impact based upon the redirection of funding to the charter school are: (1) a direct and unavoidable negative impact on students; (2) a good faith effort to reduce the adverse financial impact of the charter school; and (3) consideration by the district of the net fiscal impact of the charter school “including the fiscal benefits that the charter school may bring to the district.”

Disappointingly, the SBE’s proposed rules do nothing to untangle the issues of programmatic and financial responsibility for special education students or specify a district’s potential responsibilities for the charter school under the federal “No Child Left Behind Act.” Section V of the regulation merely provides that the State Department of Education “may” issue guidelines on these matters.

At this point, there have been so many divisions of opinion on key features of the Act and the proposed SBE regulations that many of the fundamental issues may resurface in the General Assembly this year, with unpredictable results. The uncertainty in the current law and the proposed regulations, and how they relate to other laws create legal pitfalls for all parties involved with a charter school. We will continue to keep our clients

informed of developments.

## Mold Litigation on the Rise

Personal injury and property damage lawsuits based on mold-related illnesses and contamination have increased dramatically in the past few years. Like other public property owners, school districts across the country have been frequent targets in mold exposure lawsuits brought by current and former students and employees. Fortunately, school districts have also successfully sued design professionals and building contractors for mold cleanup/remediation costs and property damage associated with poorly designed or constructed buildings.

Because the mold litigation explosion is a recent phenomenon, the applicable legal standards are still evolving. Just last year, the federal Environmental Protection Agency (EPA) issued non-binding “guidelines” for preventing and remediating mold contamination in schools. See “Mold Remediation in Schools and Commercial Buildings,” [www.epa.gov/iaq/molds](http://www.epa.gov/iaq/molds). Although these guidelines likely will establish a “standard of care” for school districts to follow, the lack of any controlling federal or state indoor air quality standards leaves many issues associated with mold litigation literally “up in the air.”

We are unaware of any pending mold cases filed by or against school districts in South Carolina. However, a review of mold litigation across the country suggests that school districts in South Carolina should be prepared for the following types of litigation.

### Personal injury claims by students alleging:

- failure to investigate and discover mold and mildew conditions;
- failure to properly maintain or repair buildings and prevent moisture and mold-producing conditions from developing;
- failure to properly remediate mold problems after receiving notice of the conditions; and/or
- failure to warn of mold and mildew contamination and the associated health risks.

### Claims by employees for:

- reasonable accommodation under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 based on mold-related respiratory illnesses;
- retaliation and whistle-blowing based on employee complaints about mold or poor indoor air quality; and/or

- violation of the Family and Medical Leave Act (FMLA). “Sick Building Syndrome,” asthma, allergies, and other mold-associated illnesses will likely be considered “serious health conditions” that would entitle an employee to leave under the FMLA.

By taking the following actions, school districts may limit their exposure to liability to students, employees, and others for mold-related illnesses.

- **Follow EPA Remediation Guidelines.** Now that the EPA has issued its mold guidelines, which have purportedly been adopted by at least 10,000 school districts nationwide, any failure to follow the guidelines would likely be used as evidence that the school district failed to follow the proper standard of care in remediating mold and preventing conditions that cause mold to grow.
- **Carefully Screen Mold Consulting and Remediation Firms.** The proliferation of mold litigation has also spawned countless purported mold “experts.” School districts should carefully assess qualifications and references and follow proper procurement procedures before hiring mold consulting and removal specialists.
- **Train Staff.** Train custodians and maintenance staff to recognize mold and mildew and conditions that result in excessive moisture, as well as in the remediation and clean-up strategies recommended by the EPA guidelines.
- **Take Complaints Seriously.** While certain staff and students may manufacture symptoms to take advantage of an alleged “sick building,” school districts have a duty to investigate and take action once they are put on notice of a problem. Additionally, districts should proceed cautiously if considering disciplinary action against someone who has spoken out against or complained about mold contamination, even if the disciplinary action is based on completely unrelated factors or events.
- **Monitor and Investigate Problems.** Acting before health-related complaints arise shows good faith and commitment to a safe school and workplace. It can also result in lower clean-up costs if problems are recognized and dealt with in early stages.
- **Evaluate and Pursue Potential Claims Against Contractors and Design Professionals.** School districts may have valid claims against architects, builders, and subcontractors. Putting these parties on notice of potential claims and aggressively pursuing them may result in assistance with and

indemnification for cleanup and repair of “sick buildings” caused by poor design or construction.

## Fair Labor Standards Act Practice Tips

It is always a good time to ensure that non-teacher employees are being properly paid under the federal Fair Labor Standards Act (“FLSA”). Enterprising plaintiffs’ attorneys in several states have recently brought lawsuits for unpaid overtime work on behalf of groups of classified employees against their employing school districts, and plaintiffs’ attorneys are beginning to advertise in South Carolina. For those school districts that had not been properly crediting and compensating these employees for their overtime hours, the cumulative value of the employees’ claims, in addition to FLSA statutory damages enhancements and statutory entitlement to attorneys fees for the employees’ lawyers, has resulted in settlements ranging from tens of thousands to hundreds of thousands of dollars per school district. The cumulative effect of two or three years of unpaid overtime liability for a large group of employees is substantial.

In this litigious climate, it is extremely important that school districts are mindful of their employees’ basic rights under the Fair Labor Standards Act, including:

- The right to overtime pay for any work over 40 hours in one workweek, regardless of whether the work is performed in one job or in several jobs for the school district. In other words, the right to overtime is based on the person and not the job(s).
- Non-exempt employees’ hours worked must be recorded and recorded accurately.
- The right to overtime pay cannot be waived by agreement, contract, or policy.
- Employees are not “exempt” just because they are paid a salary, rather than on an hourly basis. A salaried employee is still entitled to overtime pay for work in excess of 40 hours in a workweek unless the employee meets one of the FLSA’s specifically defined exemptions for professional, administrative, or executive employees, based upon the employee’s actual job duties.
- Employees may have to be compensated if they provide “volunteer” work that is similar to their regular jobs for the school district.
- If a school district grants compensatory time off in lieu of cash overtime, the “comp time” plan must be administered in compliance with FLSA regulations.

We will be sending more detailed guidance regarding FLSA compliance to our clients in the near future.

## Health Insurance Portability and Accountability Act

In 1996, the U.S. Congress enacted the Health Insurance Portability and Accountability Act ("HIPAA"), which was designed to improve the efficiency and effectiveness of the nation's health care system. The goal of this sweeping legislation purportedly was to merge billing and the transfer of health information into one system. Unfortunately, HIPAA's stated purpose of administrative simplification has proven to be anything but simple.

Although HIPAA was designed to deal with the health care industry, based on certain definitions in the Act, school districts may be covered by the provisions if they engage in electronic billing for Medicaid or other health care services. Many school districts participate in Medicaid reimbursement programs and receive reimbursements for health-related services that they provide to special education students as part of their individualized education plans. Such services include occupational and physical therapy services, as well as nursing and personal care assistance services. If schools are covered pursuant to HIPAA, they may be required to comply with the complex requirements in HIPAA. Failure to comply with HIPAA's requirements can subject a school district to both civil and criminal liabilities.

Some requirements of HIPAA become effective April 14, 2003. Because there is currently debate as to whether HIPAA is intended to apply to school districts, prior to the April deadline, we will provide further guidance to our clients regarding their HIPAA responsibilities.

## Supreme Court to Rule on Race-Based Admissions

The United States Supreme Court is scheduled to hear arguments and decide whether public universities may consider race as one factor in admission decisions. A ruling is expected by the summer of 2003. The applicable case arises from a challenge brought by several Caucasian applicants who were denied admission to the University of Michigan and its law school, although minority applicants with lower grades and/or test scores were admitted. The lower courts determined that the practice was permissible because the use of race was a "narrowly tailored" means of achieving a compelling government interest, *i.e.*, student body diversity.

The implications of this decision may be significant. If the Court finds that a diverse student body is not a "compelling interest" that would support basing government decisions on race, affirmative action in public universities effectively will be ended; if the Court supports

the university, the Court may give schools guidance regarding how to constitutionally structure such programs.

Regardless of how the Supreme Court rules, many experts agree that even though this case only directly affects public colleges and universities, virtually all public schools that use any form of race-based criteria for admission or assignment will be significantly impacted by the decision. Essentially, this decision could either mark the beginning of the end of affirmative action programs in educational settings or could open a whole new realm of possibilities in the area of race-conscious admission policies.



We are pleased to announce that Thomas K. Barlow has joined our firm as an associate. Tom received his undergraduate degree from the University of North Carolina and his J.D. from the University of South Carolina.

Tom previously worked for several years at Childs and Halligan. He returns to the firm after practicing education and employment law in both North and South Carolina.



## CHILDS & HALLIGAN, P.A.

A Professional Association  
Attorneys and Counselors at Law

Kenneth L. Childs	Vernie L. Williams
William F. Halligan	Allison Aiken Hanna
Kathryn Long Mahoney	Keith R. Powell
Allen D. Smith	Christopher M. Adams
Shirley M. Fawley	Connie P. Jackson
John M. Reagle	Thomas K. Barlow

The SCHOOL LAW NEWSLETTER is published twice yearly by Childs & Halligan, P.A., 900 Bank of America Tower, P.O. Box 11367, Columbia, SC 29211, (803) 254-4035, and is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, to treat exhaustively the subjects covered, or to provide legal advice or render a legal opinion.

© Childs & Halligan, P.A. 2003