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IN THIS ISSUE:

Upcoming Election Deadlines By Patricia Salazar Ives	Pg. 1
The Equal Access Act: Use of School Buildings By Student Religious Groups By John F. Kennedy and Evelyn A. Peyton	Pg. 2
Foreign Field Trips: Developing, Approving and Implementing Appropriate Plans By Ramon Vigil	Pg. 5
Changes Regarding Facilities Use Agreements By Ramon Vigil	Pg. 9
Preventing And Addressing School Violence: Gangs, Gang Activity and Gang Dress By Andrew Sanchez and C. Emery Cuddy, Jr.	Pg. 10

UPCOMING ELECTION DEADLINES
by Patricia Salazar Ives

November 30, 2010 is the date on which New Mexico school districts must file their election documents with their county clerk's office. The county clerk must then publish the school district's election proclamation in English and Spanish by December 13, 2010. Therefore, make sure your school board adopts the necessary resolutions and proclamations in time for them to be filed on November 30. The resolutions and proclamations must also address the ballot measures that may be presented to the voters for approval, such as bond issues or mill levies.

Most of you have already contacted your school district's counsel to assist you with this process. If you have not, it's not too late, but please do so as soon as possible to ensure meeting these critical statutory deadlines.

**THE EQUAL ACCESS ACT:
USE OF SCHOOL BUILDINGS BY STUDENT RELIGIOUS GROUPS
by John F. Kennedy and Evelyn A. Peyton**

As a school board member or a school administrator, you may have received questions or engaged in discussions about whether or not a religious group may use a school building for its meetings or other activities. Such questions present potentially complex legal issues. Answering such questions correctly requires some understanding and analysis of the First Amendment of the United States Constitution, the federal Equal Access Act, and federal court cases addressing religion in public schools.

The First Amendment states in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” In addressing First Amendment issues, the federal courts have held that these two clauses – often called the Establishment Clause and the Free Exercise Clause, respectively – apply not only to laws made by Congress, but also to any actions by the federal or state governments. Thus, governmental entities such as public schools cannot engage in conduct either establishing religion, or prohibiting any student's or employee's free exercise of his or her religious preference or firmly held beliefs. Complying with both the Establishment Clause and the Free Exercise Clause can be a delicate balancing act for a public school, particularly in communities where religious groups may actively seek public school students as members.

Religious groups' use of public school property implicates both the Establishment Clause and the Free Exercise Clause. In certain circumstances, such use of school property could be considered an unconstitutional act by the school if it actively supports, sponsors, or otherwise “establishes” a particular religion. In other circumstances, a public school's refusal to let a student-initiated religious group use school property for its meetings or other activities could be considered an unconstitutional interference by the school with the group members' free exercise of their religious beliefs. Use of school property by any outside groups (including religious groups) pursuant to the school's facilities use

policy is not addressed in this article, but will be addressed in another article in a future *Education Law Quarterly* issue.

The Equal Access Act

The federal Equal Access Act (the “Act”) provides some guidance regarding when and whether religious groups can use public school property for their meetings and activities. The Act provides that any public *secondary* school receiving federal funding is required to allow student religious groups to meet at school on an equal basis with other “noncurriculum-related student groups” if the school has created a limited open forum. 20 U.S.C. § 4071. Some key terms and concepts of the Act are as follows:

Noncurriculum-related student group: A student group is considered “noncurriculum-related” under the Act if the group’s activities are not directly related to the school curriculum. Thus, for example, a student chess club or ski club would be considered a noncurriculum-related student group, but a Spanish club or a science club would not.

Limited open forum: A “limited open forum” is created when a school allows any noncurriculum-related student groups to meet on school premises during non-instructional time. If the school permits even one noncurriculum-related student group to meet on school premises, the school has created a limited open forum under the Act and must make the school’s facilities accessible to other student groups on equal nondiscriminatory terms.

Neutrality: Under the Equal Access Act, neutrality on the part of the school toward a student-initiated religious group requires the following:

1. The noninstructional activity must be voluntary on the part of the students, and it must be student-initiated;
2. The noncurriculum-related student groups can meet on school premises during “noninstructional time”;
3. The activity may have no sponsorship by the school, the government, or its agents or employees;

4. The activity may not include employees or agents of the public school or the government at religious meetings, except in a nonparticipatory, custodial capacity only;
5. The activity may not materially or substantially interfere with the orderly conduct of educational activities within the school; and
6. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

Noninstructional time: The term “noninstructional time” means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. 20 U.S.C. § 4072. In the case of *Ceniceros v. Board of Trustees*, 106 F.3d 878 (1997), the Ninth Circuit Court of Appeals held that “the plain meaning of ‘noninstructional time,’ as defined in [the Equal Access Act], includes the lunch period.”

In determining whether a religious group can use your school building for its meetings, or activities you will need to discuss numerous issues with your school district’s legal counsel. Does your school have a limited open forum? Are the proposed meetings or activities voluntary on the part of the students? Are the meetings or activities truly student-initiated, or were they actually initiated by parents, clergy, or other non-students? When will the proposed meetings or activities take place, and is that time noninstructional time? How would the school announce such meetings or activities, and would such announcements be construed as school sponsorship of the meetings or activities? Is it proposed that any of the school’s employees attend the meetings or activities, and if so, in what capacity? Will the meetings or activities interfere with the school’s educational activities in any way? Is it proposed that any nonschool persons direct, conduct, control, or regularly attend the meetings or activities?

As you can see, there is no single answer to the question of whether a religious group can use a school building for its meetings or activities. If such questions arise in your school district, we strongly encourage you to consult with your school district’s legal counsel for advice appropriate to the facts in your particular situation.

**FOREIGN FIELD TRIPS:
DEVELOPING, APPROVING AND IMPLEMENTING APPROPRIATE PLANS
by Ramon Vigil, Jr.**

Frequently, our law firm's attorneys receive questions from school administrators about student field trips to foreign countries and the fund-raising activities that may be associated with such a field trip. Administrators often indicate concern about potential legal liability for their school district if the trip, and/or any fund-raising efforts for the trip, are school-sponsored activities.

The decision about whether a school district wishes to sponsor a foreign field trip and the activities leading up to the trip, including fund-raising activities, is a decision that the school district will need make after weighing all of the pros and cons related to the trip. If the school district decides to sanction this trip and its related activities, the school district must develop safeguards and supervisory limits to minimize potential liability. The school district must make trip preparations that will help to clarify duties and responsibilities of students, parents, chaperones, and school personnel. As part of these preparations, the school district should require specific, detailed plans for the trip in order to minimize the liability of the school district and school employees. However, if the school district decides against sponsoring the trip, the school district must (1) notify parents and students *clearly and immediately* that the trip is not a school-sponsored activity, (2) prohibit employees or students from organizing or promoting activities regarding the trip at school, and (3) prevent students and employees from otherwise creating an apparent connection between the trip and the school.

In order to minimize risk and stress, a school district's action plan for a foreign field trip should include at least the following:

1. Review travel advisories presented by the U.S. State Department through its Travel Advisory website, <http://travel.state.gov>;
2. Register the trip with the U.S. Embassy for the country or countries to which the group will travel;

3. Decide whether an educational tour company will be used, and if so, conduct reference checks regarding the company's reliability;
4. Contact the New Mexico Public Insurance Authority ("NMPSIA") or Cannon Cochran Management Services, Inc. ("CCMSI") and notify them of the plans for the trip to assure that foreign jurisdiction coverage is in place in accordance with the New Mexico Tort Claims Act, NMSA 1978, Section 41-4-28, that the trip will be covered by the school district's insurance carrier, and determine whether there are special requirements for the school district to address in order to assure the existence of such coverage;
5. Review the travel carriers to be used for credibility and reliability, and confirm that they are licensed by the Federal Motor Carrier Safety Administration;
6. Review all lodging selections for certain criteria, including whether the school can secure a block of rooms, whether single-sex rooms or floors can be accommodated by the location, and how easily curfew can be monitored at the location;
7. Establish a safety plan that includes how emergencies will be handled *before* they occur;
8. Decide whether cell phones will be part of the safety/emergency plan (while cell phones may create problems related to loss or theft, their use for instant communication on a foreign trip may override those concerns);
9. Create a behavior policy that includes not only all of the current student behavior rules/policies, but also includes rules/policies specific to behavior issues related to the trip (that is, any rules/policies needed to address issues specific to this trip that otherwise would not be covered by your regular student behavior rules/policies);
10. Decide how minor infractions of student behavior policy will be enforced, such as removal of free time, sitting out a day of activity, or detention/suspension at the culmination of the trip;
11. Decide how serious student behavior problems will be addressed, including whether and how students will be returned home immediately for severe infractions;
12. Decide how alcohol issues will be handled, given that many foreign countries have relaxed alcohol use laws for teenagers;

13. Make students aware of cultural differences they may encounter that could promote student misbehavior during a foreign trip, and educate students about their duty to follow all foreign laws, in addition to U.S. and state laws, school rules, and specific trip rules;
14. Schedule and conduct informational meetings regarding different aspects of the trip, starting with interest-getting meetings followed by meetings on itinerary, fund-raising, legal information, and permission slips;
15. Make meetings mandatory for students and parents when discussing trip itinerary, “free time” schedule and what activities will be allowed during free time, fund-raising, legal information, and permission slips with releases and waivers;
16. Determine how many chaperones will be needed (educational tour companies generally recommend at least one chaperone for every six students on foreign trips);
17. Determine the type of individuals who will be allowed to serve as chaperones (that is, licensed personnel, non-licensed personnel, associates from a travel company, and/or parents);
18. Determine how students will be supervised during day activities, evening activities, and sleeping hours;
19. Determine how criminal background checks will be conducted for all chaperones;
20. Schedule a mandatory meeting for all chaperones to discuss their specific responsibilities and duties while on the trip, alcohol and tobacco use by chaperones during the trip, applicable laws of the countries being visited, the student behavior policies and trip rules for students, child abuse reporting procedures, general liability concerns, and any medical training required;
21. Develop a plan that will provide each chaperone with specific information about each student and each chaperone; specific itinerary details of the trip; departure and arrival times to and from each destination; contacts for tour companies, transportation companies, and lodging establishments; and location and contacts for the U.S. Embassy in each location;
22. Schedule a presentation regarding the trip plan with the Principal and the Superintendent, and be prepared to respond to questions;

23. Schedule a presentation regarding the trip and the specific detailed plan for the trip to the Board of Education with a request for approval based on the plan submitted;
24. Identify the school employee(s) who will be responsible for recruiting supervisors and chaperones, running the various meetings, distributing information, collecting forms and waivers, and collecting money;
25. Require forms for each student attending a foreign trip regarding medical waiver; physical history form; up-to-date health information including previous hospitalizations, whether the student has been advised to have surgery, whether the student is required to take medication/injections, restrictions on the student's participation in physical activities, whether the student is able to swim, the student's known allergies, the student's health limitations, and the student's dietary restrictions;
26. Decide what medical insurance plans will be required for all participants;
27. Develop consent or permission slips tailored specifically for the planned foreign trip with its specific travel itinerary (broad descriptions of risk may be found insufficient by a court, and too narrow a description may not sufficiently cover all potential risks during a foreign trip);
28. Require an indemnity/hold harmless clause in the travel consent and release form whereby the student /parent agrees to be financially and legally responsible for the trip;
29. Require a waiver and release of liability clause in the travel consent and release form whereby the student /parent agree not to pursue legal action against the school relating to the trip;
30. Require both student and parent(s) to sign all travel consent forms, releases, and waivers; and
31. Establish a system for keeping all permission slips, forms, and waivers *at least* for three years so that the school district may use them for defense in any legal cause of action that might arise from the trip.¹

¹ This list was compiled, in part, with information from a School Law Practice article of the NMSBA Council of School Attorneys, *Adopting and Enforcing Foreign Field Trip Procedures: Avoiding the Pitfalls of Poor Planning* by Justino D. Petrarca, Darcee C. Williams, and Trish A. Olson, Scariano, Himes and Petrarca, CHTD., Chicago, Illinois.

The school district should be aware that consent, release, and waiver forms help minimize the risk to the school district, but such forms probably will not release the school district from liability for gross negligence, or willful and wanton conduct. Although planning and preparation help protect against liability, sometimes *things just happen*. Therefore, in addition to requiring thorough and diligent planning by those involved in the trip, make sure that the school district has appropriately warned students and parents of specific hazards in connection with the planned trip, and make certain that the plan properly addresses how school officials will exercise reasonable/ordinary care to protect and supervise students on the trip.

Traveling and studying abroad can be a tremendous learning opportunity for your students, but the school district must demand that detailed planning for the trip be conducted. The trip plan must be executed in such a way as to provide reasonable care and protection – including adequate supervision – for the trip’s participants.

CHANGES REGARDING FACILITIES USE AGREEMENTS by Ramon Vigil, Jr.

During the 2009 Legislative Session, the New Mexico Legislature passed and the Governor signed into law the amendments to Section 22-29-7, NMSA 1978 of the Public School Insurance Authority Act. The changes required the New Mexico Public Insurance Authority (“NMPSIA”) to establish a policy to be followed by participating members relating to the use of school facilities by private persons/third parties. Although boards of education can still determine how, when, and by whom school district facilities are used, a school board may *not* require that the private person or third party obtain liability insurance as a condition of facility use. Instead, NMPSIA members ***will be*** insured by NMPSIA for claims arising as a result of the facility user’s event and for which the member district may be held liable. If the user elects to remain uninsured, the user does so at its own risk. The personal assets of the event sponsor may be in jeopardy if a loss occurs. The legislative changes and subsequent regulations promulgated by NMPSIA went into effect on July 1, 2010.

The following documents regarding use of school facilities by private persons can be found on the NMPSIA website (www.nmpsia.com):

1. A written explanation from NMPSIA to its participating members regarding the changes on Use of School Facilities by Outside Parties,
2. A copy of the Application and Site Use Agreement recommended by NMPSIA, and
3. A copy of the NMPSIA regulations promulgated by NMPSIA, NMAC Sections 6.50.17.1 through 6.50.17.8.

Local school board members and school administrators are urged to inform themselves regarding these new changes, and to contact their school district's legal counsel with any questions or concerns regarding their facilities use agreements.

**PREVENTING AND ADDRESSING SCHOOL VIOLENCE: GANGS, GANG
ACTIVITY, AND GANG DRESS**
by Andrew Sanchez and C. Emery Cuddy, Jr.

School policies prohibiting gangs, gang activity, and gang dress must be written to withstand claims of Constitutional violation of rights to freedom of association, freedom of expression, and freedom of religion. Rather than implementing policies that generally prohibit the presence of gangs, gang activity, and gang dress, as a result of recent federal court decisions, schools must adopt policies that describe with specificity the prohibited activity or dress and be able to articulate rational reasons for the prohibition. Policies that prohibit gangs, gang activity, and gang dress without specific definitions for those terms, if challenged, are likely to be found void for vagueness.

Court rulings consistently find that policies, regulations, or statutes using the undefined terms “gang” and “gang behavior (or activity)” are void for vagueness when the policy, regulation, or statute “forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). “A vague law [or policy or regulation] impermissibly delegates basic policy matters to policemen, judges, and juries, [or school officials] on an *ad hoc* and subjective basis.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09

(1972).

The U.S. Supreme Court has analyzed the common usage of the term “gang.” *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939). In the *Lanzetta* case, the Court observed that “[t]he meanings of [gang] indicated in dictionaries and in historical and sociological writings are numerous and varied.” *Id.* at 453-54. In *Lanzetta*, the Court held the following statute facially void for vagueness:

Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or any other State, is declared to be a gangster.

Id. at 452. The Court concluded that the terms the provision “employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.” *Id.* at 458.

In *Chalifoux v. New Caney Independent School District*, 976 F. Supp 659 (S.D.Tex. 1997), the federal district court found that a school district’s prohibition against the wearing of rosaries as necklaces because they were believed to be gang-related attire was unconstitutionally vague and violated students’ religious freedom. The New Caney Independent School District had a dress code that prohibited the wearing of “gang-related apparel . . . in school or at any school-related function.” *Id.* at 663. The policy included a provision stating “that because gangs frequently change their identifying symbols the list of prohibited gang-related items in the Student Handbook only is meant to be a representative list.” *Id.* at 664. After a campus policeman received information that members of the “United Homies,” a gang operating within the school district, were wearing rosaries as identifying symbols, the district determined that wearing rosaries as a necklace outside the shirt should be prohibited under the district’s ban on gang-related apparel. *Id.* Two students were told that they could not continue wearing their rosaries outside their clothing, but that they could wear them inside their shirts where they could not be seen by others. *Id.* Those students sued the district, seeking damages and injunctive relief for alleged violation of their First Amendment rights to free speech and religious expression. *Id.*

Among other findings, the *Chalifoux* Court held that the provision of the dress code prohibiting wearing of any “gang-related apparel” was void for vagueness. *Id.* at 669. The court determined that the definition of “gang-related apparel” used in the student handbook was ambiguous. *Id.* at 668. The student handbook defined “gang-related apparel” as “[a]ny attire which identifies students as a group (gang-related).” *Id.* The court further stated that this definition revealed little about what articles of clothing or student conduct was prohibited. *Id.* Because the handbook lacked a sufficient definition for “gang-related apparel,” the regulation failed to provide adequate notice to the plaintiffs regarding prohibited conduct. *Id.* at 669. Moreover, the court determined that the school district provided excessive discretion to law enforcement (and school) officials in defining the parameters of its ban on gang-related apparel. *Id.* Therefore, the court found the prohibition on gang-related apparel was void for vagueness. *Id.*

In *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1996), the Eighth Circuit Court of Appeals found that a school district’s policy prohibiting gang symbols failed to provide adequate notice of prohibited conduct because the term “gang,” without more, was vague. A female student in the Davenport Community School District tattooed a small cross between her thumb and index finger. *Id.* at 1305. The student did not consider the tattoo a religious symbol, but rather a form of self-expression. *Id.* The student later enrolled in a school within the district. *Id.* Because of an increase in gang activity, the district implemented a regulation stating that “[g]ang activities such as display of ‘colors,’ symbols, signals, signs, etc. will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the Board for expulsion.” *Id.* No definition of “[g]ang related activities” or “‘colors,’ symbols, signals, signs, etc.” existed in the district’s regulation. *Id.*

A police liaison officer stated that in his opinion, the tattoo in question was a gang symbol. *Id.* Thus, the student was required to either remove the tattoo or face suspension. *Id.* The student completed laser treatment for removal of the tattoo, and the removal procedure, which cost about \$500, left a scar on the student’s hand. *Id.* at 1306. She filed suit. The district court granted summary judgment for the school district, and the student appealed. *Id.*

The appellate court found that the district regulation “sweeps within its parameters constitutionally protected speech” because it “forbids or requires the doing of an act in terms so vague that [persons] of common

intelligence must necessarily guess at its meaning and differ as to its application.” *Id.* at 1308. The court reasoned that because the school regulation left the word “gang” undefined, yet that word represented the sole adjective for the prohibited “‘color,’ symbols, signals, signs, etc.,” the regulation failed to provide adequate notice of prohibited conduct. *Id.* at 1309-10. The court additionally found that the regulation allowed school administrators and local police unfettered discretion to decide what represented a gang symbol. *Id.* at 1310. Accordingly, the court determined that the district must “define with some care” the “gang related activities” it wished students to avoid. *Id.* at 1311. Thus, the court held that the district regulation violated the central purposes of the vagueness doctrine because it failed to provide adequate notice regarding unacceptable conduct and failed to offer clear guidance for those who apply it. *Id.*

By contrast, a federal district court in Kentucky held that a school dress code adopted to create a safe and peaceful environment did not violate the First Amendment rights of high school students. *Long v. Board of Educ. of Jefferson County, Ky.*, 121 F.Supp. 2d 621 (W.D.Ky. 2000). There, the school officials developed a new dress code to address the problem of gangs at Atherton High School. *Id.* at 623. However, unlike the policies in *Chalifoux* and *Stephens*, the policy did not make reference to gangs, gang signs, or gang-related activity. Instead, the policy specifically listed permissible clothing and stated that “[i]tems not listed are inappropriate and not allowed.” *Id.* at 628. This policy was much more like a uniform-dress policy adopted by some schools. The students and parents of students at Atherton High School alleged that the dress code violated their right to free speech, free exercise of religion, substantive due process, procedural due process, and equal protection. *Id.* at 622. The court disagreed, concluding that school officials have an important and substantial interest in creating an appropriate learning atmosphere by preventing gang presence and limiting fights in school, and that school officials did not intend to suppress free speech. *Id.* at 627. However, in *Long*, the court did not have to deal with the issue of vagueness, because terms such as “gang,” “gang activity,” “gang signs,” “gang colors,” and “gang symbols” were not used in the policy. *See id.* at 628-31.

Based on these decisions, and in order to avoid similar challenges, school districts must take sufficient time to develop a comprehensive list of the specific clothing and apparel items or other manifestations of gang membership or activity that will be permitted and prohibited. Although the

justification for including specific clothing or apparel in the list may be that established gangs have been using these items as “gang symbols,” so long as the items are sufficiently described in the student handbook as being prohibited, the mention (or lack thereof) of the gang connection is not a problem. The specific list needs to be published to students and parents so that there is sufficient notice of, and no question about, approved and prohibited apparel. By specifically listing what is prohibited – and not by merely relying on the gang connection – school officials will not be placed in a position in which they will have to make subjective interpretations of what a “gang” is or what “gang dress or apparel” might be. The more specific the policy, the less likely a court will find the policy to be void for vagueness if challenged.

School officials must continually monitor what clothing or symbols are being used as gang symbols. Gangs frequently change their symbols and /or apparel. As a result, it is important that school officials stay in touch with local police and other law enforcement authorities to stay up-to-date as to the changing gang-symbols environment. School authorities should clearly state in student handbooks that the list of prohibited clothing/apparel/accessories will be revised and updated as necessary, and that students will be given notice of the changes as they occur. You should document the interactions with law enforcement in which the updated information is received, and keep such documentation available in the event of a legal challenge. Perhaps on a regular basis, or at least whenever it appears to be warranted, the listing of the prohibited items or activities should be updated and distributed to students and parents to assure that adequate notice of the change is given.

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.