

ELQ EDUCATION LAW QUARTERLY

A PREVENTIVE LAW NEWSLETTER

Published For Our Clients by the Cuddy & McCarthy Law Firm

WINTER 2010

Edited by Evelyn A. Peyton, Esq.

IN THIS ISSUE:

Public Schools' Responsibilities to Homeless Children by Ramon Vigil, Jr.	Pg 1
The OMA and "Rolling Quorums" by C. Emery Cuddy, Jr.	Pg 4
Hiring Foreign Professionals: Liabilities to the U.S. Dep.t of Labor by David N. Simmons	Pg7
No More Questions About Criminal Convictions on School Employment Applications by Ramon Vigil, Jr.	Pg 10

PUBLIC SCHOOLS' RESPONSIBILITIES TO HOMELESS CHILDREN

By Ramon Vigil, Jr.

The McKinney-Vento Homeless Assistance Act (42 USC § 11431 *et seq.*) was authorized originally in 1987 and was reauthorized by the No Child Left Behind Act. The McKinney-Vento program is designed to address the problems that homeless children and youth have faced in enrolling, attending, and succeeding in school. Under this program, state educational agencies ("SEAs") must ensure that each homeless child and youth has equal access to the same free, appropriate public education, including a public preschool education, as other children and youth.

Homeless children and youth should have access to the educational and other services that they need to enable them to meet the same challenging state student academic achievement standards to which all students are held. In addition, homeless students may not be separated from the mainstream school environment. States and school districts are required to review and undertake steps to revise laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and youth.

You can find more specific guidance regarding the education of homeless children and youth at the following web site:

<http://www2.ed.gov/programs/homeless/guidance.pdf>

The McKinney-Vento Homeless Assistance Act requires school districts to have a policy that addresses the education of homeless children and youth. Thus, our firm has developed the following model policy that can be adopted and used by our client districts.

POLICY ON HOMELESS STUDENTS

Statement of Policy: The District shall comply with the McKinney-Vento Homeless Education Assistance Act, the laws of New Mexico, and the regulations of the Public Education Department regarding the education of homeless students. Accordingly, the District shall provide educational services to homeless students. The Superintendent shall designate a liaison for homeless students to work with the New Mexico Public Education Department Homeless Education Coordinator, school personnel, service providers, parents of homeless students, homeless students, and advocates for homeless families to determine how to provide homeless students educational services that are in the best interest of the individual student.

1. Definitions

- a. “Homeless Student” means a child who lacks a fixed, regular and adequate nighttime residence. The child may live in a shelter, a temporary home, a motel, a car, a campground, or on the street. Homeless children may be “doubled-up” with

relatives or friends due to a loss of housing, economic hardship, or a similar reason.

b. “School of Origin” means the school that the student attended prior to becoming homeless.

2. School Attendance for Homeless Students

A homeless student can attend the school that serves the address where the student is temporarily living or the school of origin. The student can stay in the school for as long as the student is homeless or until the end of the school year, if the student becomes permanently housed. School staff and the parent(s) will decide what is in the student’s best interest regarding the school of attendance.

3. Transportation for Homeless Students

The District shall provide transportation to the school determined to be in the child’s best interest.

4. Residency Requirements for Homeless Students

The District shall enroll homeless students promptly with or without records of residency.

5. Student Records for Homeless Students

Records are not required for a homeless student to attend school. Records are important for health and school information. However, a school must enroll homeless students promptly with or without school records. The District’s liaison can assist parents of homeless students in acquiring students’ records from previous schools.

6. Additional Services for Homeless Students

Homeless students may be eligible for additional services provided by the District. The District shall assist with school records, school materials, school meal programs, and special

education services. The District may help with food, clothing, and medical assistance by providing referral information. The District may assist with student tutoring.

7. Waiver of School Fees for Homeless Students

The District may waive school fees for homeless students who cannot afford fees. A District form shall be developed regarding parental requests for waiver of student fees.

8. Appeal Procedures for Parents of Homeless Students

A parent may appeal the decisions regarding a homeless child's education. If the parent disagrees about enrollment, school transportation, or waiver of fees, the parent may appeal the decision to the Superintendent of Schools. The decision of the Superintendent of Schools may be appealed to the New Mexico Public Education Department, Homeless Education Coordinator. The District shall develop and make available appeal forms for parents of homeless students.

THE OMA AND "ROLLING QUORUMS"

by C. Emery Cuddy, Jr.

The Open Meetings Act ("OMA") declares that the formation of public policy or the conduct of business by vote shall not be conducted in closed meetings when a quorum of the public body is present, with certain enumerated and very limited exceptions. The concept of the "rolling quorum" has been developed by the Attorney General's Office in its enforcement of the OMA and has been recognized as a violation of OMA even when a quorum of the public body is not physically present. School boards, as public bodies subject to the OMA, need to be aware of the rolling-quorum rule and be careful not to violate it.

A rolling quorum involves the situation in which a public entity subject to the OMA attempts to take action or discuss public business through sequential communications outside of a public meeting. The rolling quorum rule was first recognized judicially in New Mexico in a case

involving the Las Cruces City Council. Two members of the Las Cruces City Council reached a one-on-one agreement outside any meeting of the Council on how a matter of Council business might be addressed. The original two councilors then went to the remaining councilors individually to obtain their consent to the proposal. A Council member then hand-carried a letter formalizing the action to each of the Councilors for signature without a meeting. The district court held that the action was invalid because “[c]onducting walking or rolling quorums” violated the OMA.

Because of the publicity surrounding that case, as well as the training provided to school board members by our firm and the Attorney General’s Office, many school board members understand that such rolling-quorum situations as occurred in the Las Cruces case violate the OMA. However, other situations may also create prohibited rolling quorums. This article attempts to provide some clarification regarding such situations.

It is not uncommon for communications between two members of a public board, such as a local school board, to be followed by further individual communications to other members regarding the communications between the original two. Members might also communicate one-to-one in a “chain” sequence. Similarly, the school district superintendent often will communicate with the members of the board through sequential face-to-face, telephone, or e-mail contacts in a “hub-and-spokes” pattern.

When such communications are *informational only*, they are clearly permissible under the OMA. The Act’s prohibition of rolling quorums is implicated, however, when the communications involve decision-making. Significantly, the polling conducted in the Las Cruces case resulted in an *action* by the Council – each Council member signed a letter setting forth the action – without a meeting ever being held to discuss and take action on the matter.

What if the polling of a local school board does not result in board *action*? Superintendents, for example, will often seek the reaction of their board members even on matters that the superintendent, rather than the board, is authorized to decide. (The superintendent’s authority, of course, became much broader with the passage of HB212 in 2003, when the Legislature gave all employment authority to the superintendent). The Las Cruces ruling probably would not apply in such a situation, so long as the

superintendent's solicitation of the board members' opinions is not binding, and is not treated as binding, on the superintendent.

The OMA also prohibits a quorum of the board from "discussing public business" outside an open meeting. Unfortunately, not much guidance exists as to when sequential discussion of school-related matters constitutes discussion of public business. E-mail correspondence between and among board members is the most likely manner in which three or more board members will engage in written discussion about a matter that must be discussed in an open meeting. With the "reply" and "cc" functions in an e-mail program, board members can communicate their opinions all too easily to one another regarding an issue that must be discussed in public. Consequently, board members must be careful not to discuss public business by a rolling quorum through e-mail. Additionally, because e-mail messages between board members concerning school business are subject to the Inspection of Public Records Act, board members should not communicate anything by e-mail that they do not want to see printed on the front page of the local newspaper.

We offer the examples below of e-mail communications that, in our opinion, can be discussed sequentially by a majority of the board without violating the OMA:

- (1) private communications between two board members (less than a quorum of the Board);
- (2) general information to board members with no discussion, deliberation or decision;
- (3) requests for agenda items;
- (4) communications to determine convenient dates and times for meetings;
- (5) copies of e-mail messages received by board members from teachers, counselors, or community members and/or responses to non-board members with copies shared to other board members;

- (6) copies of e-mail requesting information from other school district with copies to other board members;
- (7) information received by a board member from a non-board member and shared with board members; and
- (8) an expression of appreciation and encouragement from the Board President to all board members for their work.

Other than in the above-listed situations, school board members should be extremely cautious about engaging in sequential e-mail or face-to-face communications regarding school-related matters. If you have questions about whether a particular series of communications would violate the rolling-quorum rule, you should seek the advice of counsel before engaging in those communications.

**HIRING FOREIGN PROFESSIONALS: LIABILITIES TO THE U.S. DEPARTMENT
OF LABOR**
*by David N. Simmons*¹

Even in difficult economic times, an employer may have a job vacancy that can best be filled by a foreign-born, professional employee. For instance, rural school districts often cannot find teachers for subjects such as math, science, and special education. In such cases, the school district may want to hire a teacher who is not a United States citizen.

Whether the decision is based on need or on preference, the employer who decides to hire a foreign-born professional (other than a lawful permanent resident) will deal not only with the three U.S. Department of Homeland Security agencies administering U.S. immigration laws, but with a fourth agency as well. That agency is the United States Department of Labor (“DOL”). The DOL’s mission is to protect U.S. workers, not to permit foreign-born workers to enter the United States. Consequently, the DOL will view every application with suspicion, look for any excuse to deny the application, and hold employers strictly responsible for complying with

¹ Editor’s Note: David N. Simmons is an immigration attorney from The Immigration Law Office of David N. Simmons in Denver, Colorado. We thank him for this article.

all of its regulations. The purpose of this article is to provide an overview of DOL requirements for employers. It is not a substitute for legal advice in a particular case.

Temporary Professionals: H-1B classification: Most foreign-born professionals first come to the United States as H-1B “temporary professionals.” This category is available for individuals (1) with a bachelor’s or advanced degree, and (2) coming to work in an occupation where a degree is an entry-level requirement for the occupation.

The first requirement in applying for an H-1B is to obtain a prevailing wage determination from the DOL. The employer is required to pay at least the prevailing wage to the foreign-born professional *and all U.S. workers who work in the same occupation at the same location*. If the foreign-born professional is paying for any part of the H-1B process (filing fees or attorneys fees, for example), those payments are subtracted by the DOL in its calculation of the wages being paid. Failure to properly calculate and pay the prevailing wage will make the employer liable for back wages, penalties, and interest.

Upon receiving the prevailing wage determination, the employer attests to the DOL that it is offering the foreign-born professional the same wages and working conditions provided to U.S. workers, and that the employer is not paying the foreign-born professional less than the prevailing wage. The employer also certifies that there is not a strike or lockout that affects the foreign-born professional’s occupation and place of employment. Finally, the employer certifies that it has notified U.S. workers of its intent to file the attestation for an H-1B foreign-born professional. The employer is responsible for maintaining records to support each of these statements. Failure to do so can lead to a DOL enforcement action.

When the employer files the H-1B application, the employer will probably be assessed a \$750.00-\$1,500.00 U.S. worker training fee. This fee must be paid by the employer. The employer cannot request reimbursement from the foreign-born professional, nor can it deduct the cost for the fee from the foreign-born professional’s wages.

The employer’s liabilities do not end once the petition is granted and the H-1B professional is employed. If the foreign-born professional’s employment is terminated, the employer must notify both the DOL and the

United States Citizenship and Immigration Service. In addition, the employer must cover transportation expenses for the terminated worker to return to his or her country of last residence. Failure to take all of these steps may cause the DOL to determine that the worker was not properly terminated and order the employer to pay back wages for the time following the attempted termination.

Permanent Residence: The Labor Certification: In many cases, the foreign-born professional will approach the employer concerning “sponsorship” for permanent residence (“a green card”). Employers should remember that the employment-based permanent residence process is controlled by the employer, and should be undertaken on the employer’s terms. If there are any irregularities in the process, the DOL will hold the employer responsible.

The employer’s first step in most cases is to obtain a labor certification from the DOL. In order to obtain a labor certification, the employer must recruit for the position; consider any applications from U.S. workers; and determine that none of the U.S. applicants are able, willing, available, and qualified to fill the job in question. The employer must document each step of this process. As in the H-1B process, the employer must notify U.S. workers of its intent to file for a labor certification on behalf of a foreign-born professional

The DOL requires the employer to pay all costs associated with the Labor Certification process. These costs include recruitment costs, filing fees, and any legal or professional fees. The foreign-born professional may hire and pay for his or her own attorney, but that attorney cannot perform any services on behalf of the employer. An attorney who claims to represent only the foreign-born professional, but who fills out forms for the employer to sign, or advises the employer regarding recruitment, is providing services for the employer. If the employer is not paying for that attorney’s services, then the employer will be liable to repay the fees paid by the foreign-born professional, and for DOL fines and sanctions.

In conclusion, dealing with the DOL in immigration matters is difficult and challenging. The prudent employer will consider the potential liabilities before beginning the process, and take steps – including hiring immigration counsel with experience in labor matters – before beginning the process.

**NO MORE QUESTIONS ABOUT CRIMINAL CONVICTIONS
ON SCHOOL EMPLOYMENT APPLICATIONS**

by Ramon Vigil, Jr.

The 2010 Legislature passed, and the Governor signed into law, SB 254 amending the provisions of the Criminal Offender Employment Act, NMSA 1978 Sections 28-2-1 *et seq.* The changes prohibit boards, departments, or agencies of the state or any of its political subdivisions, including school districts, from making inquiries regarding a criminal conviction on an initial application for employment. Such public employers shall only take an applicant's criminal conviction into consideration after the applicant has been selected as a finalist for the position.

Accordingly, school districts must remove any questions regarding criminal arrests and convictions from their employment application forms. However, school employers may ask about criminal convictions during the interview process if the employee is considered a finalist for the position.

As in the past, a conviction shall not operate as an automatic bar from obtaining public employment. Instead, a public employer may refuse public employment for any one or combination of the following causes:

- Applicant has been convicted of a felony or a misdemeanor involving moral turpitude, and the criminal conviction directly relates to the particular employment, trade, business, or profession;
- The employer determines, after investigation, that the person convicted of a crime that is not directly related to the employment, trade, business, or profession has not been sufficiently rehabilitated to warrant the public trust; or
- Applicant has been convicted of trafficking in controlled substances, criminal sexual penetration or related sexual offenses, or child abuse, and the applicant has applied for reinstatement or issuance of a teaching certificate, a license to operate a child-care facility, or employment at a child-care facility, regardless of rehabilitation.

If you have questions regarding whether your school district's employment applications or interview questions comply with current New Mexico law, we suggest that you contact your school district's legal counsel for advice and guidance.

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.