ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2296 HHESS SB 354 - SB 362

2296

legislature is adequate, regardless of whether inducing habitual truancy be deemed a criminal or civil violation.

Burden of Injunctive Relief on Plaintiffs

There is a strong presumption against the constitutional validity of any restraint of future expression. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). See also Near v. Minnesota, 283 U.S. 697, 713-23 (1931) [statute permitting public officials to bring publisher before judge to obtain injunction against publication of scandalous and defamatory matter was an unconstitutional prior restraint].

Religious worship and discussion, integral aspects of the curricula of the plaintiff church schools, constitute forms of speech and association entitled to full First Amendment protection. Widmar v. Vincent, 454 U.S. 263, 269-70, n.6 (1981) [state-university regulation prohibiting use of facilities for religious worship and teaching was content-based discrimination against religious speech, not narrowly drawn to serve a compelling state interest]. "[T]he regulation of a communicative activity . . . must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 315 (1980) [per curiam]. "[T]he burden of supporting an injunction against a future [communication] is even heavier than the burden of justifying the imposition of a criminal sanction for a past

communication." Id. at 315-16. "[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." Id. at 316 n.13 [emphasis in original].[45]

At first glance it may seem superficial to draw a distinction between closing down unapproved church schools, on the one hand, and multiple truancy prosecutions against the parents of unapproved church-school students, on the other. But aside from the singularly sufficient reason that the Maine Legislature has mandated truancy-law enforcement and has never authorized the closing of a private school by courts or administrators for any reason relevant to the present action, there is a vital difference between the two approaches and it goes to the heart of the plaintiffs' objections in this case.

Defendants claim a right to close[46] schools which plaintiffs assert are "pervasively sectarian" institutions, Cuesnongle v. Ramos, 713 F.2d 881, 883 (1st Cir. 1983),[47] in order to protect the state's interest in the compulsory education of Maine children. Without a doubt the closing of a "pervasively sectarian" school would burden the First Amendment rights of more individuals (those teaching and preaching at, and those supporting and attending, the institution) in a more direct and substantial manner than truancy actions against the parents or guardians of the "habitual truants" whose education the state seeks to promote.[48] Therefore, the requested injunctive relief raises far more problematic constitutional questions than those

brought into play by the truancy-prosecution scheme prescribed by the legislature.

And from a purely practical perspective as well injunctive relief would impose substantially greater burdens on all of the plaintiffs, the churches, schools, parents and staff, than would enforcement under the legislative scheme. The requested injunctive relief (apparently) would prohibit the operation of an unapproved church school during public school hours if a single compulsory-school-age child were in attendance, in derogation of the religious liberties of the nonschool-age students and despite the fact that the school-age child might be otherwise exempt from the requirement of compulsory attendance at a public school. For example, the local school board may excuse compliance with the compulsory education laws for students 14 years of age or older. 20-A M.R.S.A. §§5002(1)(E), 5051(2)(D)(2). Alternatively, a compulsory-school-age child attending an unapproved church school may have obtained an exemption by establishing that the school (which may be unapproved solely because it refused to seek approval) provides "equivalent instruction," or by establishing that the child receives "equivalent instruction" "in any other manner" for which the approval of the Commissioner has been obtained. 20-A M.R.S.A. §5001(2)(D).[49]

The Public Interest

The Maine legislature perceives the public interest as requiring that truancy-law enforcement be commenced at the local level by local officials who are directed to consider and address the needs of the individual student, whereas the requested injunctive relief would relegate the individual student to the backgr und of the constitutional controversy between church and state.

It does not appear that the plaintiff church schools have acted unlawfully;[50] if they have acted unlawfully, it does not appear that defendants' remedy at law is inadequate; and injunctive relief would pose a severe risk of burdening protected First Amendment rights. Accordingly, injunctive relief against the church schools is not warranted.

D. Dismissal of Counterclaim

There being no relevant legislative prohibition and no legislative delegation of the power to prohibit the operation of private schools, the defendants are no more entitled to the requested declaratory relief than to injunctive relief. There being no obligation to seek approval, the plaintiff church schools are not required to provide the information n cessary to obtain approval. Whether unapproved schools may be required to furnish to the state the names, addresses and attendance records of their students is not before the Court, since it

does not appear that there has been any attempt to impose such a requirement.[51]

Except for possible prosecution under the truancy laws, nonapproval is the only direct consequence of the failure or refusal of the plaintiff church schools to provide the school approval information demanded by the Department.

The counterclaim is therefore DISMISSED.

III. COMPLAINT

There being no legislative license to close unapproved private schools, the Court must next determine whether the complaint presents a "case or controversy."

Article III, section 2, of the United States Constitution restricts the exercise of the judicial power of the United States to "[c]ases . . . [and] [c]ontroversies," U. S. Const. art. III, §2, cl. 1.

A. Ripeness of Claim for Relief Enjoining Truancy Actions Against Parents[52]

The doctrine of "ripeness" has undergone significant transformation from the days when the term "advisory opinion" was afforded a sweeping definition. See International Longshoreman's and Warehousemen's Union v. Boyd, 347 U.S. 222 (1954). Since the watershed decision in Abbott Laboratories v. Gardner, 387 U.S. 136

(1967), ripeness jurisprudence has assumed a decidedly practical bent.[53] Absent congressional action curtailing jurisdiction, "[t]he problem [of the ripeness of a challenge to a statute, regulation or rule] is best seen in a twofold aspect, requiring . . . evalua[tion of] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149.

Fitness of Issues for Judicial Decision

The existence of a sufficiently developed factual record is essential to any determination that problematic constitutional issues are ripe for judicial review. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 301, 304 (1979); Abbott Laboratories v. Gardner, 337 U.S. at 149; American Committee for Protection of Foreign Born v. Subversive Activities Control Board, 380 U.S. 503, 505 (1965) [per curiam]. Due to the fact-specific nature of the constitutional claim asserted by the parent-plaintiffs, Bangor Baptist Church v. State of Maine, 549 F. Supp. at 1216-20, their claim cannot be considered ripe without a fully developed record, cf. Abbott Laboratories v. Gardner, 387 U.S. at 149 [sparse factual record no obstacle to ripeness where "issue tendered is a purely legal one"]. Although the parties have labored to develop the record, most of their efforts have focused upon whether the state's interest in either "licensing" or closing the various plaintiff church schools overrides the plaintiffs' religion-

based interest in insulating their church schools from the state approval requirement. Much of that evidence is rendered valueless since Maine law simply establishes a private-school approval scheme for the purpose of determining the eligibility of private school students to an exemption from the public-school compulsory attendance requirement. What remains to be decided under the parent-plaintiffs' request that the defendants be enjoined from prosecuting parents under the truancy laws is whether the compulsory education law, despite its flexibility and myriad exceptions, impermissibly burdens the exercise of the religious beliefs of the plaintiff-parents.[54] The present record relevant to these issues is extraordinarily sparse.

The very existence of this flexible, in some respects fairly new, and largely untested, statutory scheme, itself militates against judicial review. Although the Board's present approach to the implementation of the statutory scheme implicates serious First Amendment concerns, those constitutional concerns are mooted by the Court's ruling that the Board's present approach is invalid under the statutory scheme. See p. 36 supra. Presumably, new Board regulations implementing a different approach will follow. How the new Board regulations may comport with the statutory scheme and affect plaintiffs' constitutional rights are questions which time, not speculation, can best answer. See California Bankers Association v. Shultz, 416 U.S. 21, 55-56 (1974) [challenge to statutory recordkeeping requirement, on grounds that it "could possibly be used to obtain" protected information, held nonjusticiable].

Hardship To The Parties

Affecting both the fitness of the challenge for judicial review and the hardship to the parties in the absence of judicial review, the likelihood of enforcement is central to the ripeness of an anticipatory challenge to a statute prohibiting conduct arguably entitled to constitutional protection.

> A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. O'Shea v. Littleton, 414 U.S. 488, 494 (1974). But '[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923); see Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974); Pierce v. Society of Sisters, 268 U.S. 510, 526 (1925).
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> When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.' Steffel v. Thompson, 415 U.S. 452, 459 (1974); see Epperson v. Arkansas, 393 U.S. 97 (1968); Evers v. Dwyer, [358 U.S. 202,] at 204. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' Doe v. Bolton, 410 U.S. 179, 188 (1973). But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.' Younger v. Harris, 401 U.S. 37, 42 (1971); Golden v. Zwickler, 394 U.S. 103 (1969). When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court. Younger v. Harris, [401 U.S.] at 42.

Babbitt v. United Farm Workers National Union, 442 U.S. at 298-99 (1979).[55]

The First Circuit recently found no "case or controversy" where a juvenile brought a First and Fourteenth Amendment facial challenge against a city curfew ordinance directed against persons under age 16. McCollester v. City of Keene, 668 F.2d 617, 621-22 (1st Cir. 1982). The court considered the action unripe because the juvenile plaintiff failed to allege the conduct in which she intended to engage and because the challenged ordinance was susceptible to an interpretation by local officals which would limit its reach to after-curfew conduct posing a risk of injury or disturbance to others. Id. at 620-21. The First Circuit said that "there is no case or controversy unless the plaintiff is subject to something more than a speculative risk of prosecution." Id. at 621.

> There must be 'a credible threat of prosecution' of the plaintiff personally, Babbitt, supra, which means, in the words of Justice Brennan - a justice whose opinion in Steffel shows him sympathetic to a broad construction of Article III in connection with complaints seeking a federal court declaratory judgment with respect to the constitutionality of state statutes - a 'likelihood that a prosecution will actually ensue.' Regional Rail Reorganization Act Cases, supra.

Id. at 621. See also City of Los Angeles v. Lyons, ___ U.S. ___, 103 S.Ct. 1660, 51 U.S.L.W. 4424, 4426-28 (1983); Munoz-Mendoza v. Pierce, 711 F.2d 421, 426-30 (1st Cir. 1983); High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980) [plaintiff must demonstrate "a genuine threat of imminent prosecution"]; Bickham v. Lashof, 620 F.2d

1238, 1247 (7th Cir. 1980) ["case or controversy" requirement satisfied by showing that state intended to prosecute act plaintiff expressed intention to commit]; St. Martins' Dress, Inc. v. Carey, 605 F.2d 41, 44-45 (2d Cir. 1979) [no "case or controversy" in challenge to child pornography statute where prosecutors declared that they would not enforce statute in regard to the book which was the object of plaintiff's complaint]; Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 4-6 (9th Cir.), [absent some relevant history of prosecution, statements made by deputy sheriffs to Indians, that gambling ordinance was applicable to all in the county, and by the sheriff, that all laws would be enforced, were insufficient threats of prosecution to give rise to "case or controversy" in challenge to enforcement of ordinances on Indian reservations], cert. denied, 419 U.S. 1008 (1974). See generally Comment, Threat of Enforcement - Prerequisite to a Justiciable Controversy, 62 Colum. L. Rev. 106 (1962).

There is no threat by any state or local official to enforce the truancy laws against any of these plaintiff parents. The record reveals that defendants expressly disavow any intention to institute, encourage or permit truancy actions against the parents of church-school students. See Babbitt v. United Farm Workers National Union, 442 U.S. at 302. The Commissioner testified that, if it were held that truancy actions against the parents of children attending unapproved church-schools offered the only means of enforcing the

school approval laws and regulations, he would "act through the courts" rather than institute truancy actions, Tr. at 1085, 1139, and that before he could pursue truancy actions against parents he would first have to obtain legislative authorization for additional funding and staff, id. at 1144.[56] Enforcement of the truancy laws against the parents of children attending unapproved church-schools was characterized by the Commissioner as a "misuse" of the truancy laws, and "inappropriate, if not harmful," Tr. at 1139-41. The trial testimony was corroborative of an earlier affidavit in which the Commissioner stated that he had "discouraged" local officials from undertaking truancy enforcement against the parents of the students of these unapproved church schools.[57] Second Supplementary Affidavit of Commissioner Raynolds, ¶13 (filed April 20, 1982). On October 14, 1980 the Commissioner instructed school superintendents that, "[u]ntil [they] hear from . . . [the Commissioner's] office, [they] should not take any legal steps to enforce the truancy laws against students attending these unapproved schools." Defendants' Exhibit 36.

These representations by the Commissioner, together with the position consistently taken throughout these proceedings by the defendants, through their counsel, see, e.g., Defendants' Post-Trial Brief, at 59 ["truancy actions are an inappropriate, ineffective and unacceptable . . . way of dealing with the issues in this case"], demonstrate that the defendants do not contemplate, even if they are empowered to pursue or "direct,"[58] truancy prosecutions against the

parents of children attending the plaintiff church schools.

Furthermore, the record is devoid of evidence that a truancy proceeding has ever been commenced, even to this day, against a parent or guardian of any child attending any unapproved private school, much less one of the unapproved plaintiff church schools. Moreover, there is no evidence that there has ever been a threat, by local public school officials or by any of the defendants, to bring, encourage or permit any such truancy action. Instead, the record reveals: (1) repeated disavowals by the Commissioner of any intention to proceed with truancy actions against either students or parents; (2) instructions by the Commissioner to all public school superintendents to refrain from truancy actions against those students and parents "until [the Superintendents] hear from . . . [the Commissioner's] office;" (3) uniform compliance by local public school officials with the instructions of the Commissioner; (4) uncontradicted evidence that, before resorting to truancy actions against the parents of students attending these unapproved schools, the Commissioner would first have to obtain legislative authorization for additional staff and funding; and (5) no intimation whatever that any of the defendants would resort to truancy actions to enforce the compulsory education laws once it had been finally determined by the courts that direct action to close unapproved private schools is *ultra vires*.

Finally, the complaint does not allege and the record does not indicate that any potential truancy-action prosecution against the

plaintiff parents has chilled the exercise of their First Amendment rights or affected the actions of those parents or any other plaintiff. See Doe v. Bolton, 410 U.S. at 188-89 [challenge to Connecticut abortion statute justiciable since doctors alleged that the statute "chilled and deterred" practice of their profession].

Since the defendants deny any intention to institute truancy actions against the parents of students attending these unapproved church schools, neither plaintiffs nor defendants can point to any relevant hardship resulting from the Court's refusal to enjoin.

B. Claim for Relief Enjoining Actions Against Schools for Inducing Truancy by Mere Operation

In dismissing defendants' counterclaim, the Court has held that mere operation of an unapproved private school does not violate the prohibition against inducing habitual truancy. See pp. 36, 46-47 supra. Accordingly, and in view of the judicial obligation to avoid serious constitutional issues when other grounds are available, p. 40 supra, the Court does not reach the issue as to whether a statute authorizing such an action would violate the constitutional rights of the plaintiffs. Moreover, the Court is satisfied that enjoining the defendants from instituting such actions under the current statute would be inappropriate.[59] "[T]here is no evidence before [the Court] that would indicate that defendants will not accept in good faith" the Court's holding as to the meaning of the word "induce." Wulp v. Corcoran, 454 F.2d 826, 835 (1st Cir. 1972).

C. The Claim for Relief Enjoining Actions Against Pastors

Ripeness

The only other credible prospect of truancy prosecution which might be considered sufficient to present a "case or controversy" under the complaint in this action results from the absence of any express disavowal of an intention to commence actions against the plaintiff pastors for inducing habitual truancy in violation of 20-A M.R.S.A. §5053(1)(B). See Babbitt v. United Farm Workers National Union, 442 U.S. at 302. Although the Commissioner did not actually threaten any such prosecution of the pastors in the letters which precipitated the present action, the language of those letters, see Defendants' Exhibits 46a-i [Attorney General will "commence legal action"], is broad enough to encompass an action under the "inducing" statute, and, as of February 16, 1983, defendants' attorneys considered the statute applicable to the conduct of at least some of the plaintiffs. See Defendants' Memorandum Regarding Ultra Vires Issue, at 10-11. Moreover, actions against the plaintiff pastors would fit neatly into the strongly held view of the Commissioner, see pp. 52-53 supra, and defense counsel, see p. 53 supra, that enforcement of the compulsory education laws should be directed at the plaintiff schools, rather than at their students or the parents of their students. Indeed, defendants' threatening assertion, that "the plaintiffs . . . induce their students to attend their unapproved schools," [Defendants Memorandum Regarding Ultra Vires Issue, at 10], appears to refer to

the religious edification of parishioners by the plaintiff pastors. The record is adequately developed as to the nature and basis of this religious instruction. There can be little doubt that in every sense of the word pastors do "induce" parishioners to send their children to church-affiliated schools and that the threatened enforcement actions raise serious constitutional questions.

Accordingly, the claim for injunctive relief protecting the right of the pastors to preach the Gospel is ripe.

Merits

Prosecution of the pastors or the administrators of church schools for inducing truancy, whether in sermons or in other communications with students or parents in the congregation, would raise fundamental free speech and free exercise concerns.[60]

In 1945 the Supreme Court observed that in establishing the boundary "where the individual's freedom ends and the State's power begins . . . the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." Thomas v. Collins, 323 U.S. 516, 529-30 (1945). When First Amendment rights are implicated,

> [t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion

> for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceful assembly.

Id. at 530. "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." Id. See also id., at 532 (intrusion permitted "only if grave and impending public danger requires" it). "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978). Government authorities may not "forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (footnote omitted) [per curiam]. See also Hess v. Indiana, 414 U.S. 105 (1973) [disorderly conduct statute unconstitutionally applied to anti-war protester since there could be no rational inference "that his words were intended to produce, and likely to produce imminent disorder"]. Courts must balance the magnitude and imminence of the danger posed by the speech, against "the need for free and unfettered expression," as well as the "possibility that other measures will serve the State's interests." Landmark Communications, Inc. v. Virginia, 435 U.S. at 843. See also State v. John W., 418 A.2d 1097, 1102 (Me. 1980) [constitutionality of

disorderly conduct conviction must be tested by balancing magnitude and character of evil, as well as its likelihood, against need for free and unfettered expression].

Any action brought against plaintiff pastors, administrators or church schools for inducing truancy by "preaching" that the Bible commands fundamentalist Christians to send their children to schools regulated solely by fundamentalist Christians would certainly "restrain orderly discussion and persuasion," Thomas v. Collins, 323 U.S. at 530. Such a restraint would also hinder the right of assembly and the free exercise of religion. Defendants have not suggested any "grave[] abuses, endangering paramount interests," id., which would justify the threatened restraints. Clearly, there are other, less problematic measures, i.e., enforcement of the truancy laws, which would serve the state interests involved.

Plaintiffs therefore are entitled to declaratory and injunctive relief[61] precluding defendants from bringing actions against them on the grounds that they induce truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children.

Dated at Bangor, Maine this 20th day of December, 1983.

United States District Judge

1/The plaintiffs are: ten independent fundamentalist Christian churches and their affiliated schools and pastors; the chief administrators of four of the plaintiff church schools; four parents whose children attend either Bangor Christian Schools or the Grace Baptist Church Schools; two parents of pupils attending Ellsworth Christian School, which is a member of plaintiff Maine Association of Christian Schools (MACS); a Bangor Christian Schools teacher and its principal; a Grace Baptist Church Schools teacher; and MACS.

Calvary Foursquare Church and Gardiner Christian Academy appear to have been omitted from the Second Amended Complaint through inadvertence, after having been added as plaintiffs on December 28, 1981. The chief administrator of Gardiner Christian Academy (Reverend Allen) was named as a plaintiff in the Second Amended Complaint. After defendants counterclaimed against Gardiner Christian Academy, it responded and Gardiner Christian Academy is treated as a plaintiff in the trial stipulation filed with the Court on January 30, 1983. Accordingly, the pleadings are hereby amended to conform to the evidence, pursuant to Fed. R. Civ. P. 15(b).

Also dropped as a party plaintiff is Reverend William Greenwood, the administrator of Kingfield Christian Academy, which has ceased operations and was dropped as a party, along with its affiliate, First Baptist Church, on January 25, 1983.

2/Plaintiffs' 'Revised List of Exhibits,' as supplemented at trial, contains 98 exhibits. Defendants' 'Final Revised List of Exhibits,' as supplemented at trial, contains 102 exhibits. All exhibits were admitted into evidence, except plaintiffs' Exhibit 38, which was withdrawn, and defendants' Exhibits 89 and 90.

3/<u>See</u> note 6 <u>infra</u>.

4/Prior to the spring of 1979 many of the schools which founded MACS belonged to its regional predecessor, Northeast Region American Association of Christian Schools [NERAACS], an organization of Christian schools in New England and New York. NERAACS was gradually phased out of existence as its members formed state associations.

5/Thirteen of the 23 Christian school members of MACS in 1979 are no longer members:

South Hope Christian School
Clinton Christian School
Blaisdell Baptist Academy
Lisbon Falls Christian Academy
Penobscot Valley Christian Academy

Tabernacle Christian Academy
Heritage Christian Academy
Mid-Coast Christian School
Hermon Christian School
Limestone Christian Academy
Enfield Christian School
Central Maine Christian School
Ossippee Valley Christian School.

The ten schools which have remained MACS members since 1979 are

Bangor Christian Schools
Grace Baptist Church Schools
Wayside Christian School
Downeast Christian School
Ellsworth Christian School
West Sumner Christian School
Calvary Christian Academy (Turner)
Kennebec Valley Christian School
Northwoods Christian School
Wiscasset Christian Academy.

Of these, only Bangor Christian and Grace Baptist Church Schools are plaintiffs in this action.

The following seven schools, the first five of which are plaintiffs, have since joined MACS:

Falls Road Christian School
Lee Christian Schools
Victory Christian Schools
Sebec Christian Academy
Athens Christian Academy
Calvary Hill Christian School
Hartland Christian School.

6/Bangor Christian, which began operating in 1970, obtained state approval for each of its first eight years of operation and in 1978 received a five-year approval certificate which expired in June, 1983. Until at least 1975 Bangor Christian displayed its certificate of state approval in the school catalogs and expressed pride in having achieved the academic quality evidenced by state approval. See Defendants' Exhibit 67. Reverend Frankland testified that the certificate was displayed in order to demonstrate to parents that "we weren't some fly-by-night organization." Tr. at 285.

Grace Baptist Church Schools obtained initial state approval in 1976 and renewed approval in 1977 and 1978.

7/The ACE teaching program, marketed by a Texas-based company, consists of a series of booklets on various subjects, each of which is called a Packet of Accelerated Christian Education (PACE). Each PACE contains Bible-oriented instructional information and self-test questions on a particular subject. Students work at their own speed in each subject. After completing the booklet and passing the self-test and a supervised test, students move on to the next sequentially-numbered PACE until they reach the twelfth level of achievement. The supervisors who administer the tests do not teach regularly, but remain available to maintain discipline and to assist students on request.

8/Reverend Frankland wrote as follows:

> This brings us to the crux of the matter. The United States Constitution and the Maine Constitution guarantees (sic) us certain religious liberties under the First Amendment, if these beliefs and practices are convictions on our part and not preferences. In order for the courts to rule it is a conviction rather than preference, we must be willing to go to jail for, or die for said beliefs.
>
> Some judges and state agencies are asking, 'Why was this not an issue 10 years ago?' Our reply is, 'We were in unchartered waters endeavoring to be good citizens and actually not aware we were rendering unto Caesar that which belongs to God.' After 200 successful court cases across the nation and a refining of our own philosophy, we are forced to act immediately, or we have no guarantees under the First Amendment. In the judge's eyes, these things are not a conviction with us if we continue allowing the State to have jurisdiction in this area, when we know in our heart it is wrong. Therefore, we have several new schools starting this fall which believe this to the point they are willing to go to jail for their convictions, and we who had previously accepted basic approval and state licensure are convinced we must stand with them.

Defendants' Exhibit 8.

9/The notice states that it is late in going out "because MACS has been waiting for the tape and the sample letter from David Gibbs." It goes on to state "that the tape will be made while Charles Craze is here. The letters will be drafted at the same time."

10/The ten schools which have belonged to MACS since 1979, see n.5 supra, were among the 19 schools whose pastors or administrators wrote letters to the Commissioner.

11/These five schools were located in Hermon, Canaan, Limerick, Clinton and North Whitefield. The latter three were described as "not [having] a conviction against state approval."

12/These nine schools were Kingfield Christian Academy, Farmington Christian School, Lee Christian Schools, Sebec Christian Academy, Victory Christian Schools, Athens Christian Academy, Gardiner Christian Academy, New Life Academy and Windham Assembly Christian Academy. Eight of these schools are plaintiffs in this action. Kingfield Christian Academy has ceased operations. Farmington Christian School is now known as Falls Road Christian School, a plaintiff.

13/The original plaintiffs were Bangor Baptist Church and Grace Baptist Church, the pastor of each church, four parents whose children were attending either Bangor Christian or Grace Baptist Church Schools, the principal of Bangor Christian, one teacher from Bangor Christian and one from Grace Baptist Church Schools, and MACS. Bangor Christian and Grace Baptist Church Schools were added as plaintiffs on October 28, 1981.

14/Disputes as to the constitutionality of legislative enactments are not necessarily unripe merely because the enactments are not effective as of the commencement of the action, see Colautti v. Franklin, 439 U.S. 379, 383 (1979) [permitting challenge of abortion statute before statute became effective]; Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102, 142-43 (1974); Pierce v. Society of Sisters, 268 U.S. 510, 535-36 (1925); Arizona v. Atchison, T. & S. F. R. Co., 656 F.2d 398, 402-03 (9th Cir. 1981), rather their ripeness is determined by considering whether, in view of the need for judicial economy, the surrounding circumstances warrant judicial relief, see Blanchette v. Connecticut General Insurance Corp., 419 U.S. at 144-48. Of the many factors militating in favor of interpreting and testing the constitutionality of the provisions of Title 20-A, the most significant is that the provisions of Title 20-A went into effect on July 1, 1983. The Supreme Court has considered, as relevant to the issue of ripeness, events which took place after the entry of a judgment by a circuit court of appeals. Buckley v. Valeo, 424 U.S. 1, 115-17 (1976). A fortiori, events occurring after the commencement of an action and before any decision by the trial court are appropriate for consideration in testing ripeness. See Lynch v. Dukakis, No. 82-1884 slip op., at 10 (October 12, 1983) [district court acted permissibly in finding that defendant "would not comply" with, and in conforming equitable relief to, strictures of statute effective 11 days after the entry of the court's order].

Furthermore, from the outset of this action the validity and intendment of various regulations and statutes, both those which were

then, and those which are now, in force, have affected the ongoing relationship between the plaintiff church schools and the defendants. See Blanchette v. Connecticut General Insurance Corp., 419 U.S. at 144. Finally, the parties have developed the present record in light of the strictures of Title 20-A. See id., at 143.

Accordingly, the Court is satisfied that the mere fact that Title 20-A went into effect following the commencement of this suit does not bar judicial review of its provisions. Of course, this does not mean that the Court should or must resolve all disputes arising under Title 20-A. "'Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality.'" Id. at 145-46, quoting Communist Party v. SACB, 367 U.S. 1, 71 (1961).

In reviewing the provisions of Title 20-A the Court will consider the clarifying amendments made by P.L. 1983 c. 485, 1983 Me. Legis. Serv. 2583, which became effective on June 24, 1983.

15/It was stipulated at trial that all of the plaintiff schools are now in compliance with all Maine laws regarding health, sanitation and safety. Tr. III, at 469.

16/Also exempt from compulsory attendance at public schools are:

(1) persons who graduate from high school before age 17, see 20-A M.R.S.A. §5001(2)(A);

(2) persons who have (a) completed the 9th grade (or reached age 15), (b) obtained their parents' and their school board's permission to leave school [denial by the board is appealable to the Commissioner, see 20-A M.R.S.A. §5001(3)], and (c) agreed in writing to meet annually until age 17 to review educational needs, 20-A M.R.S.A. §5001(2)(B);

(3) persons who obtain "equivalent instruction . . . in any other manner arranged for by the school committee or the board of directors," provided such instruction is approved by the Commissioner, 20-A M.R.S.A. §5001(2)(D);

(4) persons age 14 or older participating in a "suitable program of work, work study or training" who have the consent of their parents or guardians and the approval of their principal (appealable to the school board), 20-A M.R.S.A. §§5001(2)(E), as amended by P.L. 1983 c. 485, §21, 1983 Me. Legis. Serv. at 2591, & 5002; and

(5) persons age 14 or older as to whom the local school board has waived the compulsory education requirement, 20-A M.R.S.A. §§5001(2)(E), as amended by P.L. 1983 c. 485 §21, supra, & 5051(2)(D)(2).

17/As originally adopted 20 M.R.S.A. §5001(2) provided as follows:

> 2. Exceptions. Compulsory attendance shall not apply to the following:
>
> A. Persons who graduate from high school before their 17th birthday;
>
> B. Persons who have:
>
> (1) Reached the age of 15 or completed the 9th grade;
>
> (2) Permission to leave school from their parent or legal guardian;
>
> (3) Permission to leave school from the school board or its designee; and
>
> (4) Agreed in writing with their parent or legal guardian and the school board or its designee to meet annually until their 17th birthday to review their educational needs;
>
> C. Students who obtain equivalent instruction in an approved private school shall be credited with attendance at a private school only if a certificate showing their names, residence and attendance at the school, signed by the person or persons in charge of the school, has been filed with the school officials of the administrative unit in which the students reside;
>
> D. Equivalent instruction is as follows:
>
> (1) A child shall be excused from attending a public day school if he obtains equivalent instruction in a private school or in any other manner arranged for by the school committee or the board of directors and if the equivalent instruction is approved by the commissioner; and

(2) If any request to be excused is denied by a local school committee or board of directors, an appeal may be filed with the commissioner. The commissioner shall review the request to be excused to determine whether the local school committee or board of directors has been correct in its finding that no equivalent instruction is available. If the commissioner finds that equivalent instruction is available to the child, he shall approve the request to be excused; or

E. Children shall be credited with attendance at a private school only if a certificate showing their names, residence and attendance at the school, signed by the person or persons in charge of the school, has been filed with the school officials of the administrative unit to which the children reside.

Chapter 485, section 21, of the Maine Public Laws (1983), supra, however, repealed paragraph (C) [without relettering paragraphs (D) or (E)]. The amendment also added to subsection (2) new paragraph (E), which makes clear that the compulsory attendance requirement shall not apply to "[a] person whose absence is excused under section 5002 or 5051."

18/Private schools approved for attendance purposes by the department shall:

1. Immunization. Comply with the immunization provisions under section 6351;

2. Language of instruction. Use English as the language of instruction except as specified under section 4602;

3. Courses required by statute. Provide instruction in history as specified under section 4601, subsection 1 and English as specified in section 4601, subsection 2;

4. Commissioner's basic curriculum. Provide instruction in the basic curriculum established by rule by the commissioner under section 4601, subsection 4;

5. Certified teachers. Employ only certified teachers;

6. Secondary schools. For private secondary schools:

A. Meet the requirements of a minimum school year under section 4801;

B. Provide a school day of sufficient length to allow for the operation of its approved education program;

C. Have a student-teacher ratio of not more than 30 to one;

D. Include not less than 2 consecutive grades from 9 to 12; and

E. Maintain adequate, safety (sic) protected records; and

7. State board rules. Meet the requirements applicable to the approval of private schools for attendance purposes established by the state board pursuant to section 405, subsection 3, paragraph E.

20-A M.R.S.A. §2902 (1983).

19/Section 2902, subsection 7, requires that

> [p]rivate schools approved for attendance purposes by the department shall:
>
> . . . .
>
> Meet the requirements applicable to the approval of private schools for attendance purposes established by the state board pursuant to section 405, subsection 3, paragraph E.

20-A. M.R.S.A. §2902(7) (emphasis added). Not surprisingly and as expressly stated in the statute itself (see italics), "private schools approved for attendance purposes by the Department" must meet the Board requirements "applicable to . . . approval of private schools for attendance purposes. . . . (Emphasis added.)

20/There appears to be statutory authority for forbidding the operation of schools which are not in compliance with state health, safety and hygiene standards.

Title 25, section 2392 of Maine Revised Statutes Annotated authorizes the State Fire Marshal or state fire inspectors to "forbid the use of any building or other structure which, (sic) does not conform to the laws, ordinances, rules and regulations promulgated by the Commissioner of Public Safety . . . [and] which creates a danger to other property or to the public." (Supp. 1982-83). An order to repair, remove or vacate a structure must be in writing, state a reasonable time within which to undertake such action and be served on the owner and the occupant. 25 M.R.S.A. §2392. The owner or occupant may within 24 hours of receiving such an order appeal to the Commissioner of Public Safety who is required to hold a hearing regarding the order and render a final decision on the issue within 30 days after such hearing. Failure to comply with a final order is a Class E crime punishable by a fine of not less than $100. See also 25 M.R.S.A. §§2357, 2358, 2360 [building inspectors, fire inspectors, municipal officers may order removal or rectification of inflammable conditions dangerous to safety of a building or surrounding premises].

Title 22, section 42(3), authorizes the Department of Human Services to seek to enjoin violations of its rules and regulations relating to plumbing and subsurface sewage disposal.

The local health officer is authorized by statute to require occupants to quit any dwelling place which is unfit for occupancy due to "want of cleanliness or other cause" and which is a cause of sickness to the occupants or the public. 22 M.R.S.A. §461. He may close the premises until restored to a sanitary condition, id., and in doing so, if he seeks the assistance of "any constable, that constable is required to render assistance." 22 M.R.S.A. §462. See also 22 M.R.S.A. §1015 [district and superior court judges authorized to issue any order necessary for proper enforcement of statutes and rules relating to communicable diseases]; 22 M.R.S.A. §1016 [Department of Health and Human Services authorized to order dismissal of all students and employees of any school in the event of an actual or threatened outbreak of communicable disease]; 22 M.R.S.A. §1561 [local health officer may order removal or discontinuance of any source of filth deemed potentially injurious to health].

21/Forty-five years after the Supreme Court decided Erie, uncertainty still exists as to the extent to which state law controls the power of the federal courts to enjoin violations of state substantive law. Indeed, Guaranty Trust Company v. York, 326 U.S. 99 (1945), which interpreted Erie as requiring a federal court to apply a state statute of limitations to an equitable claim arising under state law, provides seemingly conflicting directives. York declares that in resolving disputes in diversity actions the federal court is, "in effect, only another court of the State [and] cannot afford recovery if the right to recover is made unavailable by the State, nor can it substantially

affect the enforcement of the right as given by the state." Id. at 108-09 [emphasis added]. It can scarcely be doubted that the availability of alternative or additional equitable remedies in federal, as opposed to state, court may "substantially affect the enforcement of the right." Yet York contains the following dictum which may be read as divorcing equitable remedies from rights, leaving only the latter to be controlled by state law:

> This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a State court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery; a plain, adequate and complete remedy at law must be wanting; explicit Congressional curtailment of equity powers must be respected; the constitutional right to trial by jury cannot be evaded. That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts. State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it.

Id. at 105-06 [citations omitted].

That dictum has confounded a number of commentators, see 19 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, §4513, at 208, and notes and comments cited therein.

22/As is the case under Maine law, see pp. 22-23, 36-37 infra, absent a contrary statute a request for injunctive relief under federal law implicates the court's discretion and is to be granted only if no adequate remedy at law exists and the competing interests of the parties so indicate, and generally only if the right to relief is clear. See 11 Wright & Miller, Federal Practice and Procedure §2942, at 367-68 (1973). However, the reluctance to grant injunctive relief, still prevalent in federal courts, see id. at 369-78, appears yet greater in the Maine judicial system. See p. 37 infra. Whereas the parameters of judicial discretion to enjoin "crimes" are relatively well defined in the First Circuit, see United States v. Zenon, 711 F.2d 476, 479 (1st Cir. 1983), the Court is unaware of any instance in which the Maine Law Court has addressed this issue.

23/The failure or refusal of a private school to obtain Department approval is not necessarily without _indirect_ consequences, since in some instances nonapproval could deter attendance.

24/_See_ n. 16 _supra_.

25/Additional _approval_ requirements apply to private schools receiving public funds, _see_ 20-A M.R.S.A. §§2951-55; to those serving only nonresidents, _see_ 20-A M.R.S.A. §3051; and to those offering special or vocational education programs, 20-A M.R.S.A. §3001-02. The plaintiff church schools do not come within any of these special provisions.

26/Defendants were clearly informed of the Court's concern as to the sufficiency of the statutory basis for the Board regulations no later than October 26, 1982, when the Court denied their motion for summary judgment:

> _These [Board] regulations may have transformed the scheme selected by the Legislature for the enforcement of the compulsory education laws, i.e., the truancy laws, into an unauthorized administrative system for the licensing of private schools._

Bangor Baptist Church v. State of Maine, 549 F. Supp. 1208, 1231-32 (D. Me. 1982).

27/"Courts must construe legislative enactments so as to avoid the danger of unconstitutionality . . . [since] [t]he cardinal principle of statutory construction is to save, not to destroy," _State v. Davenport_, 326 A.2d 1, 5-6 (Me. 1974); a principle "fully consistent with the general rule" of giving effect to legislative intent, since drafters of laws are assumed to have intended those laws to have constitutional sway, _Stewart v. Inhabitants of Durham_, 451 A.2d 308, 311 (Me. 1982).

28/The legislative history reveals that "the Education Committee [meant] to make [no] . . . substantive changes at all in this recodification." 1982 Me. Leg. Rec. 315, 539-40 (House, March 23, 1982 & April 5, 1982) (comments of Rep. Connolly - Chairman of Education Committee). _See also id._ at 315 (comments of Rep. Murphy) [during drafting process, any proposed change that any member of public thought would possibly change meaning was left in its original language]; _id._ at 483-84, 533-34 (Senate, March 31, 1982 & April 1, 1982) (comments of Sen. Trotzky - Chairman of Joint Standing Committee on Education) [no substantive changes were made during drafting process]; _id._ at 539 (House, April 5, 1982) (comments of Rep. Thompson - member of Education Committee) [all agree that the

recodification makes no substantive changes]. In fact, in response to objections made to the 110th Legislature by Christian schools, it was specifi[illegible]lly stated by legislative leaders that the recodification did not alter the governance of state approval of private schools, id. at 315 (comments of Rep. Connolly), and that the recodification was "not intend[ed] to affect the consideration of issues in [this action]," id. at 532 (comments of Sen. Trotsky).

See also n.32 infra.

29/See 1982 Me. Leg. Rec. 540 (House, April 5, 1982).

30/Instead, the terminology used in section 2901 contrasts sharply with that used in the statutes enacted in 1975 regulating day care facilities and nursery schools. See 22 M.R.S.A. §§7801-04, 8301, 8404. Whereas section 2901 provides that "[a] private school may operate as an approved private school. . . ," the statutes regulating day care facilities and nursery schools provide that "[n]o person, firm, corporation or association shall operate a nursery school [or day care facility] without having . . . a written license therefor from the Department of Human Services." 22 M.R.S.A. §§7801, 8402.

Also co[illegible]ously absent from the subchapter of the statutes gov[illegible] basic approval of private schools are provisions limiting administrative discretion in prescribing licensing requirements, see 22 M.R.S.A. §8402(1), requiring prompt issuance of licenses, see 22 M.R.S.A. §8402(4), setting license fees and terms, see 22 M.R.S.A. §§7801(2), 8303, 8402(2) & (5), authorizing the issuance of temporary or conditional licenses, see 22 M.R.S.A. 7802(2)-(4), authorizing hearings under the Maine Administrative Procedure Act for any person whose initial application for a license has been denied, see 22 M.R.S.A. §7802(c) (compare 20-A M.R.S.A. §§2904-05 [hearings for nonrenewal and removal of approval], with 05-071 CMR 125 section 1-A (I)(2) [Commissioner makes final determination as to initial approval]), requiring an Administrative Court proceeding prior to suspension or revocation of a license, see 22 M.R.S.A. §7803(1); 5 M.R.S.A. §10051(2), and granting regulators the right of entry to inspect licensed facilities for compliance, see 22 M.R.S.A. §7804.

A comparison of the elaborate protective provisions in the statutes governing day care facilities and nursery schools further demonstrates that Chapter 117, subchapter 1, of the education laws was not viewed by the legislature as establishing a private-school licensing scheme. Had such a licensing scheme been intended by the legislature it seems inconceivable that something at least remotely similar to the restrictive language and procedural safeguards of Title 22 would not have been used.

31/Defendants would read section 2901 as though written: "A private school may operate ~~as an approved private school for meeting the requirement of compulsory school attendance under section 5001~~ if it: . . ."

32/Defendants' construction of section 2901 is also at odds with the crystal clear language of the private-school approval section as it existed from its legislative inception in 1955 until the recodification of the education statutes in 1982. As originally enacted, see P. L. 1955, c. 369, §1, and as it remained through 1981, the approval section read "no school shall be given basic approval for attendance, tuition or subsidy purpose . . . unless it meets the following requirements. . . ." See 20 M.R.S.A. §1281 (1982-83 Supp.) (emphasis added). There was not the slightest legislative intimation that this provision empowered the closing of any unapproved school by anyone, whether administrator or judge.

The 1982 recodification separated the matter contained in 20 M.R.S.A. §1281 into five sections of title 20-A. See 20-A M.R.S.A. §§2901, 2951, 4401, 4404, 4801. Section 1281 was amended, by section 2901, to read: "A private school may operate as an approved private school for meeting the requirement of compulsory school attendance under section 5001 if it. . . ." 20-A M.R.S.A. §2901 (1981). There is not a whisper in its legislative history which would hint that this amendment represented a departure from the legislative intent of section 1281 as it had existed for over 25 years. See, e.g., n.28 supra. Similarly, the preamble to P.L. 1983 c. 485, indicates that the amendments made by that law were intended to resolve "existing ambiguities."

33/There is no right of appeal to the Commissioner if the local board waives the compulsory attendance requirement.

34/See nn.28 & 32 supra.

35/The following paragraph from the statement submitted to the Education Committee by the Department contains the only hint in the legislative history of these bills that the legislature may have been aware of the Commissioner's interpretation of the compulsory education laws:

> In conclusion, the Department recognizes that private, religious schools have a place in the State and that they provide a legitimate alternative to public schools. However, the Department also feels it is essential that these schools meet the minimum standards required by the Maine Constitution and by the Legislature which all schools must abide by to be able to operate in the State of Maine.

But since the statutory provisions then in force provided absolutely no basis for the power the Commissioner claims to have had (and still have), see n.32 supra, it is inconceivable that the legislature understood and accepted the full import of this assertion, without discussion. Indeed, the remainder of the Department's Statement indicates that the Department understood the approval scheme to mean only that "if non-public, private schools are going to be used to satisfy the compulsory attendance law, then these schools must comply with certain minimum standards and be approved. . . ." (Emphasis added.)

The statement by the Commissioner before the Education Committee on February 14, 1980 likewise indicates that the proposed amendments were an effort to chart an optional path for certain church-affiliated schools to qualify as suitable alternatives to public day schools, rather than to repeal any existing law which might be perceived as authorizing direct action to close unapproved private schools. See Defendants' Exhibit 19, Statement of Commissioner Raynolds (February 14, 1980) [in order to satisfy compulsory attendance requirement through attendance at private school, the private school must meet certain standards].

Moreover, had the 109th Legislature understood, agreed with and "acquiesced" in the Commissioner's interpretation, the 110th Legislature could have adopted unambiguous language to that effect as part of its recodification of the education laws, without doing violence to its policy of making no substantive change, see nn.28 & 32 supra. Instead, the wording of sections 403(3)(E), 2901, 2902, 5001(1) and 5051-53 of new Title 20-A makes clear that private school "approval" is, as it has always been, merely the means of satisfying one of the exceptions to compulsory public school attendance. See n.16 supra & p. 45 infra. Under these circumstances a finding of "legislative acquiescence" would represent a reckless approach to statutory construction.

36/Legislative rules are products of the exercise of delegated power to create law through rules. 2 K. Davis, Administrative Law Treatise §7:8 (2d ed. 1979). If valid, legislative rules are binding on courts. On the other hand, interpretative rules, which merely represent the administering agency's interpretation of existing law, may issue without an express delegation of authority. Id.

37/The Commissioner states that although children attending unapproved private schools may be considered habitual truants, he has discouraged local school superintendents from truancy actions, because their parents might be acting in the "good faith belief that their children [were] receiving the benefits and protections of the State's compulsory education laws," and because truancy actions on a broad scale would be "unduly burdensome" and expensive for local school officials,

the Department and the courts. See Affidavit of Commissioner Raynolds, dated April 20, 1982, at 5.

38/If considered interpretative, as opposed to legislative, the regulations, of course, are not binding on the Court. See Soucy v. Board of Trustees, 456 A.2d 1279, 1281 (Me. 1983); General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); 2 Davis, Administrative Law Treatise §7:10, supra. Cf. Maine School Admin. Dist. No. 15 v. Raynolds, 413 A.2d 523, 531 (Me. 1980) [indicating that an administrator's interpretation of regulation does not bind courts].

39/The Ingraham court stated,

> Before granting a preliminary or permanent injunction, the Court must find that four criteria are met:
>
> (1) that plaintiff will suffer irreparable injury if the injunction is not granted,
>
> (2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant,
>
> (3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility),
>
> (4) that the public interest will not be adversely affected by granting the injunction.

Ingraham v. University of Maine at Orono, 441 A.2d 691, 693 (Me. 1982). But although the Law Court referred to "preliminary" and "permanent" injunctions, it does not appear that Ingraham establishes a four-point talismanic test for determining the propriety of permanent injunctive relief. Rather, the court was defining the test controlling its power to grant injunctions under Me. R. Civ. P. 62(g). This conclusion finds support in the Law Court's citation to Women's Community Health Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979), which summarized the test in the First Circuit for granting a preliminary injunction, and further support in the reference to "a likelihood of success on the merits." (Emphasis added.)

40/L.D. 1401 prescribed forfeitures of not less than $200 and not less than $500, but was changed by Committee Amendment A, 110th Me. Leg., Filing No. H-396, to provide that the penalty for being responsible for a child's truancy is a forfeiture of "not more than $200."

41/Whether the plaintiff-pastors in some other way may have induced habitual truancy within the meaning of the statute is irrelevant to this counterclaim. "The 'principles of equity jurisprudence' suggest that 'the scope of injunctive relief is dictated by the extent of the violation established . . . [and] the relief afforded [may not be] more burdensome than necessary to redress the complaining parties.'" Lynch v. Dukakis, supra at 21, quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979). See Town of Shapleigh v. Shikles, 427 A.2d at 464. Enjoining the operation of unapproved church schools would be an overbroad response to the transgressions of individuals encouraging attendance at those schools.

42/Of course, the state need not show the inadequacy of a criminal law remedy were it to appear that the legislature has authorized civil injunctive relief against future violations of the substantive law. United States v. Cappetto, 502 F.2d 1351, 1358-59 (7th Cir. 1974).

43/The nature of the sanction is central to the determination as to whether a proceeding is criminal. See n.44 infra. Obviously, injunctive relief is not a sanction endemic to criminal law. Nothing is gained by noting that violation of the injunction may lead to a finding of contempt and to eventual imprisonment, for that is so irrespective of the nature of the conduct (civil or criminal) forming the basis for the injunction.

> The argument [that the constitutional rights of criminal defendants preclude injunctions against crimes] contains a more fundamental weakness: it assumes that one of the purposes in enacting a criminal statute is to give special protection to the defendant or to the conduct the statute proscribes. Suppose, for example, that state A makes criminal the maintenance of a certain nuisance and that state B does not, but will issue an injunction against it. It is anomalous that state A, which has manifested its policy by penal legislation, should be thought to be more solicitous of the defendant's welfare than state B, whose legislature has not acted. Yet, according to the argument, a court of state A should be disabled from enjoining the nuisance. Assuming, arguendo, that trial by jury would be a desirable feature of either the civil or criminal aspects of injunction procedure, it is hard to see why the injunction defendant whose conduct is also criminal has a greater claim to jury trial than an injunction defendant whose conduct is not criminally proscribed.

Note, Developments in the Law - Injunctions, 78 Harv. L. Rev. 994, 1019 (1965).

44/Whether conduct proscribed by statute is "criminal," thereby implicating the protections of criminal procedure, is, in the first instance, a matter of statutory construction to be determined conformably with the legislative intent. State v. Anton, 463 A.2d 703, 705 (Me. 1983). See United States v. Ward, 448 U.S. 242, 248-49 (1980). Where the legislature intends the offense to be considered civil, courts must inquire further whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." State v. Anton, 463 A.2d at 706, quoting United States v. Ward, 448 U.S. at 249.

The 1981 amendment [ch. 391, 1981 Me. Laws 620] to the predecessor of section 5053, i.e., 20 M.R.S.A. §911, may have been designed to constitute the proscribed conduct (i.e., inducing habitual truancy) a civil violation rather than a criminal offense.

Prior to 1981 inducing habitual truancy had been considered a criminal offense. See Shaw v. Small, 124 Me. 36, 40 (1924). However, the relevant portion of chapter 391 amended 20 M.R.S.A. §911(8), as follows:

> Any person who induces a child to absent himself from school, or harbors or conceals such child when he is absent ~~shall be punished by a fine of not more than $25 or by imprisonment for not more than 30 days for each offense If the~~ commits a civil violation for which a forfeiture of not less than $500 shall be adjudged. The court ~~imposes a sentence of probation, it~~ may ~~in its sentence, as a condition of probation~~ require that the ~~convicted~~ person receive professional counseling by a qualified professional counselor who shall be selected by the convicted person, with the approval of the court, or by the court.

The Statement of Fact accompanying the bill, L.D. 1401 (1981), provided in part, "This bill . . . would change the penalty section for a parent responsible for truancy to a civil violation punishable by either a $200 or $500 forfeiture, depending on the nature of the offense."

In the process of recodifying the education laws, the legislature inserted the words "guilty" and "punishable," language which might suggest that inducing habitual truancy was to be considered a criminal offense. See State v. Clayton, 584 P.2d 1111, 1113 (Alaska 1978). Clayton is clearly distinguishable. The Alaska legislature had declared that certain traffic infractions are "not considered criminal." But by focusing on, inter alia, the use of certain criminal phraseology in the relevant provisions, the Clayton court

concluded that the legislature intended the infractions to be "quasi-criminal offenses," not "civil in nature." State v. Clayton, 584 P.2d at 1113. Section 5053 expressly declares that inducing habitual truancy is a "civil violation." In short, the language embodied in and accompanying the 1981 amendment to 20 M.R.S.A. §911, the fact that section 5053 declares the "offenses" listed therein to be "civil violations" and the further fact that the subsequent recodification was not intended to effect substantive change, nn.28 & 32 supra, may well warrant the conclusion that the Maine legislature intended that inducing habitual truancy be considered a civil violation.

If so, the safeguards of criminal procedure apply in prosecutions for inducing habitual truancy only if "the statutory scheme . . . is 'so punitive in purpose or effect as to negate [the legislature's] intent.'" State v. Anton, 463 A.2d at 706, quoting United States v. Ward, 448 U.S. at 248. The considerations used to determine whether constitutional guarantees apply to 'civil' penalty provisions include:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id. at 706, quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). Thus, the degree of severity of the penalty is important. Id. In addition to these factors, courts consider "the nature of the conduct, whether adverse collateral consequences may arise and whether there exists the possibility of pretrial arrest and detention." Id. Finally, legislative "use of terminology associated with the criminal law" may undercut the intent to create a civil offense. Id. at 708.

Sanction

Although inducing habitual truancy is no longer punishable by incarceration, it is at least arguable that the authorized "forfeiture" (minimum of $500; with no maximum) is "so unreasonable or excessive that it transform[s] what was clearly intended to be a civil penalty into a criminal penalty." State v. Anton, 463 A.2d at 707. Certainly the threat of an unlimited fine provides significant deterrence, a "traditional aim[] of punishment," id. at 706.

Scienter

As previously discussed, the term "induce," both in legal and lay parlance, connotes intent. Therefore, scienter appears to be an element of the offense of inducing habitual truancy. See pp. 38-40 supra. On the other hand, since it does not appear that an inducement of truancy violates any other "criminal" statute, the conduct to which the prescribed "forfeiture" applies is not "already a crime."

Statutory Language

The incorporation in section 5053 of the terms "guilty" and "punishment" arguably evidences a legislative determination that inducing habitual truancy is to be condemned, a concept endemic to criminal and not civil law. Brown v. Multnomah County Dist. Court, 570 P.2d 52, 59 (Or. 1977). See State v. Anton, 463 A.2d at 708.

Arrest and Detention

Although 20-A M.R.S.A. §5053(3) makes reference to "[w]arrants and legal process" for the enforcement of section 5053, it does not appear that arrest warrants may issue against persons who induce habitual truancy, see Me. R. Crim. P. 1, 4 & 9 and Me. R. Crim. P. (district court) 1 & 4. For the purpose of obtaining credible identification, a law enforcement officer may detain a person the officer has probable cause to believe has committed a civil violation. 17-A M.R.S.A. §17. But a formal arrest is permitted only if the person refuses or intentionally fails to supply credible identification. Id.

Thus, the factors relevant to determining whether a person charged with inducing habitual truancy is entitled to the protections of criminal procedure do indeed "point in different directions," State v. Anton, 463 A.2d at 706.

The fact that the offense of being primarily responsible for the habitual truancy of a child who is under one's control has been held to be a civil violation, State v. McDonough, Doc. No. Pen-83-252 slip op. at 8 n.5 (Me. December 8, 1983), is not dispositive of the characterization of the offense of inducing habitual truancy. Although both offenses are defined in 20 M.R.S.A. §5053, the offense of "inducing" habitual truancy carries a much more stringent sanction ("forfeiture" of not less than $500) than the offense of being primarily responsible for habitual truancy ("forfeiture" of not more than $200), and scienter appears to be an element of inducing, but perhaps not of being primarily responsible for, habitual truancy. Therefore, the characterization of the offense, a matter which was neither raised nor

briefed by the parties, is better left to the state courts. For present purposes it is sufficient to note that the possibility that inducing habitual truancy is a "crime" provides yet another reason to withhold injunctive relief.

45/See also Hunter, Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton, 67 Cornell L. Rev. 283, 284-87, 292-96 (1982).

46/Of course, the defendants do have the right to request the courts to close unapproved schools, both by virtue of their "standing" in the present action and by virtue of a Board regulation, see 05-071 CMR 125, section I-A, subsection I(4) (as amended Feb. 10, 1983). Thus viewed, however, their assertion of right is without that legislative sanction which would reduce the heavy burden of proof incumbent upon any private litigant seeking similar drastic relief in the face of severe equitable and constitutional obstacles.

47/In order to be considered "pervasively sectarian" a school must not only be run directly by a church, but have "attributes such as integration of secular and religious education, mandatory religious instruction, religious based admission policies [and have] as a central purpose the inculcation of religious values [or the preparation of] students for a religious career." Cuesnongle v. Ramos, 713 F.2d 881, 883 (1st Cir. 1983).

48/A burden on the free exercise of religion may be justified only "by showing that it is the least restrictive means of achieving some compelling state interest," Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 718 (1981). Although it is unnecessary to decide on the present record (there being no authority for defendants' attempt to close the church-schools), the closing of pervasively religious institutions does not appear to be "the least restrictive means" of achieving the state's interest in assuring that children between 7 and 17 attend adequate schools for a minimum number of hours during 175 days per year or obtain equivalent instruction in some other manner. While administrative convenience has at times justified some burdens on religious exercise, see United States v. Lee, 455 U.S. 252, 259-61 (1982) [inconvenience of accommodating "the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs"], it is highly unlikely that the administrative burden of pursuing numerous prosecutions under an existing truancy system could be considered sufficient justification for directly burdening these plaintiffs, particularly since it is not unreasonable to expect that the general deterrent effect likely to flow from the initiation of exemplary prosecutions against a few truancy law violators may well promote improved compliance with the compulsory school attendance laws.

49/Of course, injunctive relief would have to be limited so as to reflect these possibilities. See Lynch v. Dukakis, No. 82-1884 slip op. at 21 (1st Cir. October 17, 1983). But drafting such an injunction would be a cumbersome and perilously difficult undertaking. Certainly the defendants' proposal is overbroad. More importantly, injunctive relief would burden the plaintiff church schools with the task of determining which students are (and perhaps which students may be) exempt from the compulsory attendance requirement. Finally, since the essence of their free exercise claim is that plaintiffs should not be made to answer to the state for their ("biblically-mandated") educational activities, any requirement that the plaintiff schools assume an active role in the enforcement of the truancy laws against the parishioners of their affiliated churches would heighten significantly the threatened intrusion upon plaintiffs' asserted religious convictions.

50/The Maine compulsory education scheme differs importantly from that considered in State ex rel. Douglas v. Faith Baptist Church, Neb., 301 N.W.2d 571 (1981), appeal dismissed sub nom. Faith Baptist Church v. Douglas, 454 U.S. 803 (1981), where the Nebraska Supreme Court upheld a judgment enjoining the operation of a church school for refusal to comply with statutory requirements imposed upon "[a]ll private, denominational, and parochial schools in the State of Nebraska. . . ," Neb. Rev. Stat. §79-1701. The Nebraska statutes governing private schools provide that "[a]ny person violating any of the provisions of [Article 17, governing private, denominational and parochial schools] shall be guilty of a Class III misdemeanor." The Nebraska Supreme Court held that injunctive relief was not foreclosed merely because state law prescribed penal sanctions. 301 N.W.2d at 575. The United States Supreme Court summarily dismissed the appeal. 454 U.S. 803. The essential distinction here is that Maine law neither requires private schools to obtain approval as a condition precedent to their right to operate nor does it imply any sanction (except possible prosecution for inducing habitual truancy) for operating as an unapproved school.

51/Private schools which seek approval are required to disclose their "policy with respect to" attendance records. Regulations under the heading "Procedures and Standards for Basic School Approval of Private Schools" provide that "[t]he school shall maintain a register of the daily attendance of all pupils throughout the school year . . . [and] notify the superintendent of [local] schools . . . if a pupil withdraws from school or is habitually truant from school." 05-071 CMR 125, section 1-A, subsection (F)(1)(3), as amended February 10, 1983. The regulations apparently impose no such requirement on schools which do not seek approval.

52/The second Second Amended Complaint prays for a declaration that the requirements of the compulsory education law and school approval

scheme are contrary to the First, Ninth and Fourteenth Amendments to the Constitution, and for relief enjoining "defendants . . . from taking any action in an attempt to impose upon plaintiffs [those requirements]." [Emphasis added.] It has been clear throughout that plaintiffs' primary concern is with the state's alleged right to license or close unapproved schools. That concern is answered by the Court's holding that Maine law establishes only an optional approval system, not a licensing scheme. Therefore, in determining whether the complaint raises any justiciable issues the Court must consider seriatim the other "actions" which defendants conceivably could take "in an attempt to impose upon the plaintiffs [the requirements of the compulsory education law and the school approval scheme].

Title 20-A M.R.S.A. section 13003(2) provides that a person teaching at a public school without a teacher's certificate "shall be barred from receiving pay or wages for that teaching." No penalty is prescribed for teaching at a private school without a certificate.

Plaintiff teachers have not even alleged, much less "demonstrate[d,] a realistic danger of sustaining a direct injury as a result of the . . . enforcement," Babbitt v. United Farm Workers National Union, 442 U.S. at 298, of any statutory or regulatory provision other than those directed against the church-schools. See n.55 infra.

53/For a discussion of the development of the law of ripeness, see 4 K. Davis, Administrative Law Treatise 349-93 (2d ed. 1983).

54/The justiciability of plaintiffs' request to enjoin actions against schools and pastors for inducing habitual truancy is considered below. See pp. 55-59 infra.

55/On occasion the Supreme Court has found the likelihood of enforcement of a challenged statute too remote to give rise to a "case or controversy." See Poe v. Ullman, 367 U.S. 497 (1961) [challenge to legislation prohibiting use of, or giving medical advice as to, contraceptive devices was nonjusticiable, because no one had been prosecuted since its enactment in 1879 despite open and notorious sales of contraceptives]; United Public Workers v. Mitchell, 330 U.S. 75, 88-89 (1947) [action by federal employees challenging constitutionality of Hatch Act prohibition of political activity was nonjusticiable, since plaintiffs merely alleged their desire to engage in politics and their fear of dismissal, but failed to allege an actual violation or an actual threat of disciplinary action].

56/This testimony reflects the Commissioner's consistent misconception as to the legislative placement of primary responsibility for the enforcement of the truancy laws. It is clear beyond doubt from the statutes that the Maine legislature has imposed that responsibility

primarily upon local public school officials. See 20-A M.R.S.A. §§5051, 5052 & 5053. See nn.57 & 58 infra.

57/Subchapter I of Chapter 211 of Title 20-A, M.R.S.A., dealing with compulsory attendance (§5001), alternate programs (§5002) and administration (§5003), expressly provides that the local public school boards "shall administer" subchapter I, see §5003(1), and adopt rules "to carry out this subchapter," see §5003(2). Subsection (3) of section 5003 provides that "[t]he Commissioner shall guide school boards in adopting these rules." 20-A M.R.S.A. §5003(3).

58/Section 254 provides:

> The Commissioner shall have the following duties.
>
> 1. General duty. The commissioner may inspect and have general supervision over all public schools and shall advise and direct superintendents and school boards in the discharge of their duties, by circular letters and personal conferences.

20-A M.R.S.A. §254.

The Court need not decide whether section 254 empowers the Commissioner to "direct superintendents and school boards" to refrain from "the discharge of their duties," as well as "direct" those officials "in the discharge of their duties." If the Commissioner does not have the authority to direct superintendents and school boards to refrain from truancy actions, those officials who might pose more than a speculative risk of prosecution to the plaintiffs (i.e., local superintendents and school boards) are not before the Court.

59/No declaratory relief is granted on this point because none is requested.

60/The principles applicable to speech in general are clearly applicable as well to religious speech. "[S]peech about religion is speech entitled to the general protections of the First Amendment." Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981). See also Heffron v. International Society for Krisna Consciousness, Inc., 452 U.S. 640, 647 (1981).

61/The right of these pastors to preach their interpretation of the Bible is clear. The requested injunction would ensure the preservation of that right and protect the pastors (and the public) from the expense of presenting (and resolving) this same constitutional claim as a defense to a state court action for "inducing" habitual truancy. On the other hand, injunctive relief will impose no burden on the

defendants, who remain free to pursue legislatively-prescribed means for the protection of the interests of the state. Accordingly, injunctive relief is appropriate under the standards relevant to this federal claim, _see_ n.22 _supra_.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DEC 23 11 :20 AM '83

BY:

DEPUTY CLERK

BANGOR BAPTIST CHURCH, ET AL.,)
Plaintiffs)
)
v.) CIVIL 81-0180-B
)
STATE OF MAINE, ET AL.,)
Defendants)

JUDGMENT

In accordance with the Court's Order for Entry of Judgment entered this date in the above matter,

JUDGMENT is hereby entered (1) for the defendants against the plaintiffs on plaintiffs' claims for declaratory and injunctive relief, except as otherwise provided in clauses (3) and (4) hereof; and (2) dismissing plaintiffs' claims, except as otherwise provided in clauses (3) and (4) hereof; (3) for the plaintiffs as against the defendants on plaintiffs' claim for a judicial declaration that the bringing of actions against the plaintiff pastors, administrators or church schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children would violate the rights secured to the plaintiffs by the First and Fourteenth Amendments of the United States Constitution; (4) for the plaintiffs against the defendants on plaintiffs' claim for injunctive relief enjoining the defendants from bringing actions against the plaintiff pastors, administrators or schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that

the state should have no role in regulating the education of Christian children; (5) for the plaintiffs as against the defendants on defendants' counterclaim; and (6) dismissing the counterclaim.

Dated at Bangor, Maine this 20th day of December, 1983.

WILLIAM S. BROWNELL, CLERK

By
Linda L. Jacobson
Chief Deputy Clerk

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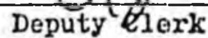
ATTEST: William S. Brownell, Clerk
By 
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Dec 29 11 21 AM '83

BY:

DEPUTY CLERK

BANGOR BAPTIST CHURCH, et al.,

Plaintiffs

vs.

STATE OF MAINE, et al.,

Defendants

CIVIL NO. 81-0180-B

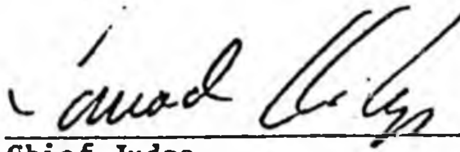
ORDER FOR ENTRY OF JUDGMENT

In accordance with the Court's 'Findings of Fact and Conclusions of Law', entered this date, judgment shall enter: (1) for the defendants against the plaintiffs on plaintiffs' claims for declaratory and injunctive relief, except as otherwise provided in clauses (3) and (4) hereof; and (2) dismissing plaintiffs' claims, except as otherwise provided in clauses (3) and (4) hereof; (3) for the plaintiffs as against the defendants on plaintiffs' claim for a judicial declaration that the bringing of actions against the plaintiff pastors, administrators or church schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children would violate the rights secured to the plaintiffs by the First and Fourteenth Amendments of the United States Constitution; (4) for the plaintiffs against the defendants on plaintiffs' claim for injunctive relief ENJOINING the defendants from bringing actions against the

plaintiff pastors, administrators or schools on the ground that they have induced habitual truancy through their statements to parents that the education of their children is a religious duty and that the state should have no role in regulating the education of Christian children; (5) for the plaintiffs as against the defendants on defendants' counterclaim; and (6) dismissing the counterclaim.

SO ORDERED.

Dated at Bangor, Maine this 20th day of December, 1983.



Chief Judge

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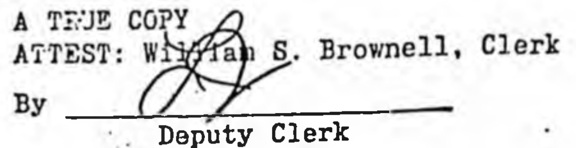
ATTEST: William S. Brownell, Clerk



By ______________
Deputy Clerk

SB
362

4/11

COMMITTEE REPORT

HOUSE

HEALTH, EDUCAT
AND SOCIAL SERVI(

(6)

FURTHER:

2/22/84

Date: 4/10/84

The Committee on HOUSE SPECIAL COMMITTEE ON STATE LOANS has had SB 362

"An Act relating to the applicability of the scholarship loan program to students attending more than one postsecondary educational institution; and providing for an effective date."

under consideration and recommends:

[X] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for ____________ [ ] same title [ ] new title

and recommends ____________

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note [ ] Zero Fiscal Note Attached

[ ] reports it back without recommendation

[ ] referred to the ____________ Committee

MEMBERS SIGNING DO PASS:

Rick Uehling
Walt Furnace
[illegible]
[illegible]
Sam Cotten
[illegible]

MEMBERS HAVING OTHER RECOMMENDATIONS:

Rick Uehling
CHAIRMAN

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST
Bill/Resolution No.: SB 362
Title: Re: Scholarship Loans

Sponsor: Kerttula
Requestor: Senate HESS
Date of Request: 2/1/84

FISCAL DETAIL
Agency Affected: Education
Program Category Affected: Postsecondary Education Commission
BRU, Program or Subprogram(s) Affected: Student Loans

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	N.A.	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
GENERAL FUND	N.A.	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
FULL-TIME	N.A.	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

ANALYSIS: Attach a separate page for analysis

Prepared By: Kerry D. Romesburg Phone: 465-2854
Division: Commission on Postsecondary Education Date: 2/2/84

Approved by Commissioner: Date:
Agency:

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3777

4/30/84

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

STAFF REVIEW

SB 362, "An Act relating to the applicability of the scholarship loan program to students attending more than one postsecondary educational institution; and providing for an effective date," introduced by Senator Kerttula, makes a change in AS 14.43.160 (2), the Scholarship Loan Program, that allows students attending more than one postsecondary educational institution, one or more of which may not be associated with an eligible consortium of postsecondary education institutions, to be eligible to particpate in the state's student loan program.

The bill provides for an immediate effective date.

SB
373

Asbestos: Still a Danger in Schools

By Elaine S. Knapp, editor

For Phyliss Adams and Ann Gibbs the last year has been a frustrating one—trying to get their local school board to remove asbestos from the school their children attend.

"It's frustrating, our children are being poisoned and there's not anything we can do," Mrs. Gibbs declared. What the Lexington, Kentucky, housewife has done is work through the PTA, form a group of concerned parents, go door-to-door telling parents of the danger, gather hundreds of signatures on petitions, read volumes on asbestos, call and write federal agencies and confront the school administrator and board.

After a year of parental pressure being applied and at least a decade after school authorities knew of the asbestos hazard, Mrs. Gibbs said, "We don't think anything will be done until the government makes them (the school board)." School authorities maintain the asbestos will be cleaned up if money is available for renovation next year.

Ironically, the major government effort to control asbestos lies in Mrs. Gibbs and others like her. Telling parents and teachers that their school has asbestos and relying on them to pressure local action is the heart of the U.S. Environmental Protection Agency's (EPA) strategy to rectify the nationwide problem of asbestos in the schools.

No effective federal program exists to protect school children from asbestos, state efforts vary widely and local schools often ignore the danger due to the cost of cleanup.

Asbestos Dangers

[illegible] exposure to asbestos [illegible] some health [illegible] according to the Congress, the EPA and the scientific community. Children are especially vulnerable, according to the EPA guidance document on asbestos sent to schools. [illegible] remaining life expectancy provides the 20 to 50 years it takes for disabling and fatal asbestos-related diseases to develop. Large numbers of children may be exposed in a contaminated school and exposure is continuous during the school year. Children are active and breathe more frequently than adults possibly inhaling more asbestos fibers. Smoking can increase the cancer risk due to asbestos exposure.

Most hazardous is friable asbestos that can be crumbled. It sends deadly fibers into the air which may lodge in the lungs indefinitely, according to EPA's guidance document. Asbestos workers often develop a chronic and debilitating lung disease called asbestosis. Lower and shorter exposures are linked to lung and other cancers. Even brief exposure can result in death many years later.

Asbestos diseases include: 1) asbestosis, a disease in which asbestos clogs the lungs, 2) pleural calcification, a deposit of calcium salts in the lung lining, 3) malignant tumors of the lung, 4) mesothelioma, a rapid and fatal cancer of the lung, and 5) intestinal and uterine cancers.

Where It Is, What to Do

Use of asbestos materials was common in schools and other buildings from the mid-1940s until EPA banned sprayed asbestos in 1973. Friable (or soft) asbestos-containing material was used for fireproofing,

insulation or decoration. It was usually sprayed on overhead surfaces, steel beams, ceilings, walls and pipes.

As friable asbestos material ages, it breaks down and releases fibers into the air. School activities can damage or disturb asbestos, such as a ball hitting a gym ceiling. Asbestos material can be disturbed by maintenance activities, vandalism, water damage or vibration from people or machinery and release fibers into the air.

Many experts believe removal of asbestos is the only final and satisfactory solution to asbestos exposure. However, removal may cost more initially and be more complicated. Temporary measures include encapsulation by spraying asbestos with a sealant or enclosing the asbestos. EPA and other experts warn that such temporary measures make removal more difficult and dangerous later on, and must be constantly monitored.

The EPA guidelines call for asbestos work only after construction of sealed containment barriers and worker protection as mandated by OSHA. All but asbestos workers should be kept out of the sealed area and worker change rooms are required.

Hot Potato

Asbestos in the schools has been a "hot potato" tossed among various levels of government and federal agencies. One reason is that removal of asbestos can be quite expensive, especially if large areas of buildings are affected. Funding is basically up to local schools as is asbestos detection and control. No federal funds are available and state aid varies.

The U.S. EPA requires schools to inspect for asbestos and notify parents and employees of asbestos hazards. The EPA doesn't require removal or abatement. "The theory is that PTAs and employees would pressure local districts to take remedial action," said Terrell Hunt, assistant to EPA Deputy Administrator Alvin Alm.

However, a recent internal EPA report found that many schools did not meet EPA's June 1983 deadline for asbestos detection, record keeping and notification.

No Federal Funds

Federal funds of $172 million authorized by the Asbestos School Hazard Detection and Control Act of 1980 were never appropriated. Grants were promised for schools to identify asbestos hazards and loans for mitigation of asbestos hazards. But funds were never requested by the Department of Education, reported John Bennett, aide to U.S. Rep. George Miller, D-California, who sponsored the act. In 1983, a $50 million recommendation by the House was omitted in a House-Senate conference.

The U.S. Department of Education had a task force which set standards for state grants in 1980, according to W. Stanley Kruger, deputy director for state and local education programs. However, when the program wasn't funded, the department "deferred to EPA," Kruger said.

Under pressure from Congress, the department reactivated its task force in October 1983 and is gathering information on asbestos to send to chief state school officials, Kruger said. The department also reactivated its requirement that states file plans for asbestos in the schools' programs and report on their progress every six months. All but two states have filed.

EPA's Program

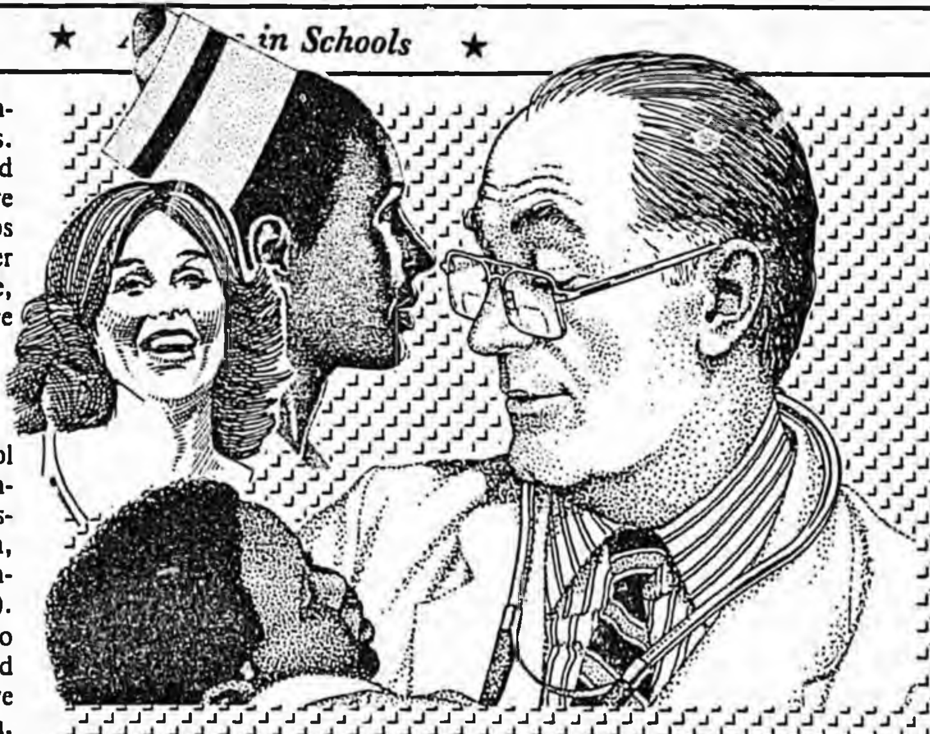
The federal effort has largely been a requirement by the EPA that schools inspect for asbestos hazards, sample and analyze material to determine if asbestos is present, keep records of the inspection, post notices, and notify parents and employees if asbestos is found. Although schools were to comply with the rule by June 1983, the EPA doesn't know how many did. It does not require schools to report to it and must send federal inspectors to schools to check their records. EPA staff said when the EPA regulation was written that the administration opposed imposing a data reporting requirement. The EPA recently doubled its field force of inspectors by adding 16 people through a contract with the American Association of Retired Persons, Hunt said. These include retired architects and engineers. Primarily, EPA staff look at school records and physically inspect some schools. However, there's not enough inspectors to cover but a small portion of the nation's schools.

In providing technical advice, EPA can help schools determine the best strategy for evaluating the risk and responding to asbestos, Hunt said. He said that anything short of removal is considered a short-term solution.

Connie Derocco, environmental protection specialist with EPA, said that out of 1,527 schools inspected in 468 districts, some 60 percent did not comply with EPA rules. Most failed

cont'd pg. 6

to notify and warn PTAs and employees of asbestos materials. Schools know they will be pressured once the word is out, and they are hesitant to deal with the asbestos problem, Derocco explained. After receiving a notice of noncompliance, schools have 30 days to act before the EPA files a civil complaint.



Labor Union Concern

An estimated 3.24 million school children and 648,000 school employees are potentially exposed to asbestos, according to Kitty Conlan, research analyst with the Service Employees International Union (SEIU).

The SEIU is lobbying Congress to fund the 1980 act for grants and loans to schools Schools don't have the money to cleanup on their own, Conlan said. "It's definitely a federal responsibility," Conlan said. "It's a nationwide problem which affects the health of millions of people."

SEIU is suing the EPA to require schools to cleanup flaking asbestos. "Schools say if EPA thinks asbestos is so bad, then EPA would require them to get rid of it," Conlan commented.

EPA does give schools good technical advice on how to get rid of asbestos, Conlan noted. But some schools accept the lowest bid rather than follow EPA guidelines. If the cleanup is not done right, the asbestos danger can be worsened.

Conlan said SEIU doesn't think suing asbestos' manufacturers is worthwhile, citing lack of action on suits filed by asbestos workers. "We're hesitant to have our members litigate themselves to death," she said.

Conlan added that school districts can also be held responsible for asbestos. "They can face a big liability," she commented.

Lawsuits Filed

A number of lawsuits on behalf of school boards and building owners in Kentucky, Mississippi, New Hampshire, Florida, South Carolina, Alabama and Tennessee, have been filed by a South Carolina law firm.

Daniel Speights noted that legal theories available to school boards against manufacturers of asbestos include: contract (the products were not fit for the uses intended), negligence (the manufacturers were negligent in informing users of the risks associated with the products), strict liability (manufacturers should be strictly liable for failing to warn of asbestos hazards), and restitution (manufacturers have a duty to abate the hazard).

A civil action filed on behalf of the Barnwell, South Carolina, school district notes that school districts and public officials could be held liable for failing to abate a health hazard.

A September 1981 report by the U.S. attorney general to Congress recommended that school authorities seek to recover asbestos abatement expenses from asbestos manufacturers. The report said federal litigation would be inefficient unless Congress imposed liability on asbestos manufacturers.

Asbestos manufacturers are being sued by at least 20,000 people on the grounds that the companies knew of asbestos hazards and covered them up, according to a September article in the *National Journal*.

A 1983 report from the Rand Institute says that asbestos litigation and compensation has cost an estimated $1 billion over the past decade. Only 37 cents of every dollar went for actual compensation to plaintiffs. Estimates of the number of deaths due to asbestos over the next 30 years range from 74,000 to 265,000.

Future Problems

Generally, 15-40 years can elapse between asbestos exposure and manifestation of certain diseases. For instance, shipyard workers exposed during World War II may only now be filing claims, according to the Rand study. Despite this knowledge, no attempt is being made to monitor school children exposed to asbestos.

An internal EPA memo written in November 1978 called for long-term surveillance of children who are exposed. The memo noted that when they reach adulthood these children could then be informed and notified of their childhood exposure. They could be medically examined more frequently for respiratory diseases and cancer.

EPA Regions, States

Because no one tracks data on asbestos in the schools on a national basis, *State Government News* interviewed asbestos coordinators in five of the 10 EPA regions and several state asbestos coordinators.

Generally, the federal regional EPAs have switched their emphasis from providing technical assistance on identifying and dealing with asbestos in the schools to checking school records on asbestos inspections. Most found a high percentage of schools either had not inspected or had not notified parents and employees of asbestos in the schools as required by the EPA.

State programs differ widely in scope and authority. While a few states fund asbestos removal and cleanup, most simply help schools identify asbestos or provide other technical assistance.

Region I

"Compliance is terrible," said Paul Heffernan, asbestos coordinator for EPA Region I covering Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

Five full-time EPA inspectors have visited 160 districts covering 400 schools and issued 58 notices of noncompliance. Of the EPA violations, 37 percent had not even inspected and 53 percent had not notified parents or employees of asbestos found. Many school administrators didn't want to be "bothered," others had not read the regulation and others simply refused to post a warning in the building.

Oddly enough, schools in states which had asbestos programs in the late 1970s were most difficult to convince they neede[illegible] to inspect for asbestos in way[illegible] [illegible]ot done in earlier years. For ins[illegible] the latest regulations require in[illegible]tion of pipes and boiler rooms.

With 3,300 [illegible]ool districts in the region, there [illegible] way EPA can inspect them all, Heffernan said. However, press releases announce schools found in violation, so the hope is that other schools will inspect rather than see themselves in the headlines.

Asbestos abatement efforts vary widely even in the same school district and among neighboring school districts, Heffernan said. He said West Haven, Connecticut, had an effective program while North Haven, next door, had none. While Hartford, Connecticut, spent $6 million on big problems in five schools, it had not tackled "mini-disasters" in 37 others. The same situation existed in Boston.

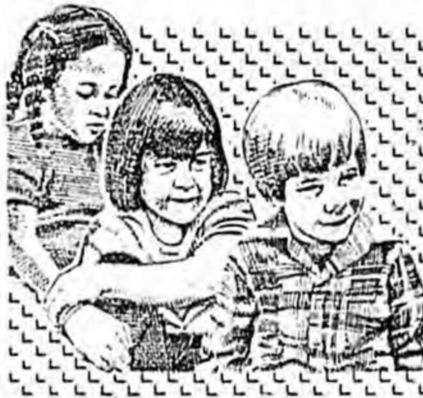
In the region, New Hampshire sent a checklist of EPA requirements plus abatement actions to help schools comply with the EPA.

Connecticut has granted $6.5 million since 1976 to localities for asbestos control in schools, reported Richard Krissinger, coordinator of school facilities, state Department of Education. State grants range from 40 to 80 percent of cost, depending on the aid formula the town qualifies for. If asbestos is found, the "chances are good it will be removed," Krissinger said. "We treat it as a health violation."

The state "accepts encapsulation" as an abatement measure, but doesn't encourage it. Krissinger said, "We believe removal is the only answer."

Al Siniscalchi, acting chief of the toxic hazard section of the Connecticut Department of Health Services and Education, noted that the state also provides technical assistance to schools. Schools were sent EPA guidelines and seminars were co-hosted by the state and EPA Region I.

A job freeze has reduced a former staff of nine to four and most inspec-



tions are now done by local health departments. Connecticut does follow-up inspections after asbestos removal to make sure the school is safe. Safe disposal of large amounts of asbestos is supervised by the state Department of Environmental Protection.

Maine is in good shape, according to Roy Nisbett, director of the Division of School Facilities. Most of the asbestos found was confined to pipe wrapping and boiler rooms. The state notified schools of the EPA rule and 90 percent complied with inspection requirements, Nisbett said. The Division of Industrial Safety trained school personnel to conduct asbestos inspections.

A proposed bill in Maine would authorize a bond issue to reimburse local schools for the cost of asbestos removal and repair.

In spite of the fiscal contraints caused by Proposition 2 1/2, public pressure has spurred asbestos abatement in Massachusetts, said Mike Malchik, assistant engineer, Division of Occupational Hygiene. "Parents and teachers are adamant about getting it (asbestos) down," Malchik said. The legislature allocated $2 million in 1983-84 to repay part of school removal costs if removal is recommended by the state.

Massachusetts inspects public buildings and schools, samples, analyzes samples and recommends abatement measures. There are at least five engineers and a project engineer available. The schools are being re-surveyed based on new guidelines, as inspections in 1978 only covered sprayed-on asbestos in public areas.

Region II

EPA Region II asbestos coordinator, Arnold Freiberger, has seven inspectors to check some 3,000 schools in New York and New Jersey. Out of 108 districts inspected, only 13 were in compliance with EPA rules, 32 had minor violations and 63 had either failed to inspect or identify asbestos or to post notices and notify parents and teachers.

New York has provided funds for asbestos control, reported Henry Binzer, associate in school business management, state Department of Education. In addition to state grants of $1.75 million annually for the past four years, school districts may tap state building aid for asbestos control.

An annual state survey of schools revealed 509,000 square feet of potentially hazardous asbestos.

The New York State School Asbestos Safety Act of 1979 required schools to identify asbestos and, if it is hazardous, take control measures. Encapsulation is most popular with schools. "The problem is that still has to be watched," Binzer noted. Removal is permanent, but expensive.

The state does not give advice on specific jobs, but provides an educational program for contractors and information to schools.

cont'd pg. 8

New Jersey doesn't provide specific aid for asbestos removal, but schools can get assistance through the foundation aid program, said Dr. Irving M. Peterson, manager, Facility Planning Services, state Department of Education.

In 1979, a governor's Task Force on Asbestos set minimum specifications for removal of friable asbestos. The specifications, which contractors must follow, require notification of state and federal agencies prior to the start of a project, require documentation of the contractor's qualifications, and require the contractor to follow stringent procedures for removal. The standards do not permit encapsulation (by coating the asbestos-containing layer) in New Jersey.

The state must approve all construction projects, plans, make field inspections to assure the work area is set up properly so contamination doesn't spread and check at the end of the project. Contractors, agents and workers must all attend a one-day state-EPA seminar and carry certification cards on the job.

Out of 2,400 public schools in New Jersey, asbestos removal projects have been approved in 350. Costs have totaled $46 million, for an average of $131,000 per school. It's up to local districts to remove the asbestos and as many as 100 more may not have acted yet.

EPA's new rule requiring parental notice "triggered a lot of work," Peterson said. As many projects were approved last year as in the previous four years.

Region IV

EPA doesn't have the resources to inspect school compliance with asbestos regulations, declared Dwight Brown, asbestos coordinator for Region IV covering Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.

Most commonly, schools have either failed to inspect or to notify parents, Brown noted. He added that common law requires building owners to identify and notify occupants of hazards, and to provide medical surveillence if there is evidence of exposure.

Region IV also provides technical assistance and its intensive seminars on asbestos are attended by many from outside the region.

Most of the asbestos found in Georgia schools was in boiler rooms or pipe wrapping and has been corrected, said Levett Fletcher, asbestos coordinator. State environmental, health and education departments worked with the U.S. EPA to provide information and hold seminars for superintendents. In addition, 70 environmental health specialists were trained to assist local systems. Schools with acute problems could get matching state aid through the state capital outlay, Fletcher said.

Kentucky helps schools comply with EPA inspection requirements, but has no money to aid them, said Jim Judge, unit director of property insurance, Department of Education. Asbestos cleanup was estimated to cost $26 million last year, but a survey now underway could change that estimate. Judge noted that the EPA doesn't require removal and many schools "are hesitant to post a warning." Asbestos problems in the state's 180 districts range from major ones with ceilings to boiler rooms.

Affected schools mostly include those built from World War II to the early 1970s. Judge said certain architects used lots of asbestos while others didn't.

South Carolina selected the critical points of EPA's regulations in requiring public and private schools to inspect, sample and analyze for asbestos, said Lee Bacot, asbestos coordinator, Department of Health and Environment. Results of the school surveys and health hazard assessments were required to be publicized in meetings and by notifying parents.

Out of 1,200 public schools, 1,080 or 90 percent complied with EPA's rule and 270 found friable asbestos. Only about 30 percent of the 450 private schools complied.

Asbestos inspectors must be certified by the state and must send survey results to the state. A one-day course is offered by the state to consultants and state and local staff. Schools are provided information, but the state does not provide specific advice or any funds.

Tennessee had a governor's task force on asbestos in 1978, according to Robert Foster, chief, technical services, Division of Air Pollution Control, Bureau of the Environment.

Out of 1,773 schools, 150 reported potentially hazardous asbestos.

The state provides free analysis of suspected asbestos materials, provides information to schools, and conducts training sessions. Because there is a shortage of EPA inspectors, Tennessee Gov. Lamar Alexander wrote the EPA offering to help enforce the inspections. However, EPA has not responded. The state plans to proceed to develop the data anyway, Foster said.

"We're convinced asbestos in the schools is one of the more important health problems," Foster declared. "It's an absolute human carcinogen. It causes serious irreversible health effects. Even brief exposure can cause painful disease. Children are

even at more risk."

The goal should be to eliminate the hazard, Foster continued, while the EPA only requires inspections and warnings which can lead to panic and make schools vulnerable to unscrupulous contractors. People need to be educated on how to abate the hazard, he said. He added that although "most want to do the best, it's hard to convince them that a little dust out of the ceiling will kill them."

"I've gone in schools where the material (asbestos) was hanging off chairs," Foster said. In that case the superintendent closed the schools upon the state's recommendation. More troublesome are marginal situations, Foster noted, where schools don't understand the potential hazard. "They look to the state or federal government," he said. "But hope for federal or state aid is a loser."

Region V

"There's quite a few violations of EPA's rule," said Anthony Restaino, asbestos coordinator for Region V covering Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.

Many school officials thought asbestos "was a low priority, didn't take time to inspect, didn't touch asbestos-materials to see if it crumbled or didn't notify parents or employees," Restaino said. Out of 43 school districts inspected, 29 were in violation. The Region V inspection staff was recently doubled to eight.

Illinois treats asbestos as a health and public safety issue, said Ralph Morrisette, architect, school facilities and organization section, State Board of Education.

Under Illinois law, school boards can hire an architect to determine if school building conditions endanger lives. After a survey of the cost to remove the asbestos, the local district can levy a tax for the amount without a referendum. Because schools are able to raise the funds, most of those with asbestos are having it removed, Morrisette said.

Most Wisconsin schools have inspected for asbestos, reported Nori Roden, school asbestos program coordinator, Department of Health and Social Services.

Out of 3,027 schools, 3,006 inspected and 1,089 found friable asbestos. Corrective action was taken by 583: 395 rewrapped pipes, 94 removed asbestos, 33 enclosed it and 61 encapsulated it.

Wisconsin has had an asbestos program since 1980. The Department of Industrial Labor and Human Relations conducted asbestos inspections when it conducted fire and other safety inspections. Samples were analyzed by the state lab. The Department of Public Institutions targeted schools for the free inspections, helped with record keeping, and provided technical assistance and consultation services. The health department computerized and coordinated the data and consults on health effects of asbestos.

A position paper being developed by the health department will most likely recommend removal of all friable asbestos, Roden said. "We're cautious of encapsulation and enclosure," she said. Advantages of the temporary measures include less cost and time, but the disadvantage is the "asbestos is still in the building," Roden said.

Minnesota in 1983 authorized a $25 per pupil unit capital expenditure levy and aid for asbestos removal or encapsulation and PCB cleanup with Department of Education approval.

Region VIII

The major violation found in Region VIII is that schools "aren't willing to put up notices," said Steve Farrow, EPA asbestos coordinator for Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming. Instead, schools are trying to remove or encapsulate the asbestos first, he said.

Of the states, Farrow said that Utah's problems were with pipes and boiler rooms, North Dakota was making progress and Wyoming had few major problems.

Chuck Johanningmeier, technical advisor for the region, said, "Many people hoped it would go away. Medically, it is just getting worse." A Fargo teacher had contacted the EPA after discovering asbestos debris left in a school storeroom. Not long afterwards, the lawyer for the teacher's estate reported the man had died of mesothelioma (a rare cancer associated with asbestos exposure).

Unqualified contractors can do more damage than if the asbestos was left alone, Johanningmeier said. A proposed measure before the Colorado Legislature will require contractors to be certified to work on asbestos.

In another case, a contractor left asbestos which students and teachers dusted up. As a result the EPA is helping write specifications in a contract for cleanup which will be available to others as well.

There are some bright spots as well. Johanningmeier praised the work of Gill Johnson, the asbestos coordinator for a Jefferson County, Colorado, district. Johnson overcame school resistance and succeeded in cleaning up the asbestos in the district's schools.

No Cavalry in Sight

Although asbestos was recognized as a nationwide health problem by the Congress in 1980, there's no real federal effort to protect the health of exposed school children. Even though most states have asbestos coordinators, few states mandate cleanup or provide funds for removal. Essentially, asbestos removal or cleanup is left up to local school districts. Local school officials may not be willing or understand how to inspect for asbestos. Some may not understand the health dangers or legal liability they incur by allowing asbestos to remain. Apparently, many refuse to adequately notify parents or teachers if asbestos is found. Even then, students have no choice but to attend the school and teachers may be fearful of retribution if they take action. Many schools don't have or don't want to spend the money it takes to remove or cleanup asbestos.

Alvin L. Alm, deputy administrator of the EPA, recently acknowledged that the agency was reconsidering its approach to asbestos in the schools.

* * *

ALASKA STATE SENATE

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May 22, 1984

Speaker Joe Hayes
Representative Ramona Barnes
Representative Mae Tischer
House of Representatives
Pouch V
State Capitol Building
Juneau, Alaska 99811

Re: Asbestos Abatement

Dear Colleagues:

1. Today, I informed Tom Freeman of the Anchorage School District (ASD) of the status of SB 373, amended, relating to the asbestos abatement program and the issue of a shortened school term temporarily for Bartlett High School.

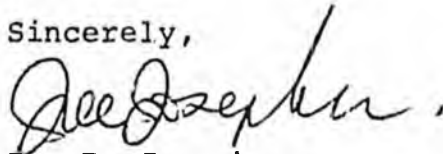
2. ASD, through Peter Partnow, its lawyer, and a Washington, D.C. law firm, is preparing to join in a suit brought by school districts against asbestos manufacturers (see enclosed newspaper article). SB 373 could be amended in the House to include a provision that any school district getting state financial aid would reimburse the state, to the extent of litigation proceeds, out of any proceeds of such litigation. Thus the state would be subrogated to the interests of the school district where proceeds are collected to the extent of the state's aid for asbestos abatement. This seems to be a fair proposition which ASD, according to Mr. Freeman, would be willing to support, and which would perhaps make it easier to move appropriations through this legislature. I have already discussed this proposal with Senator Sackett.

3. Senator Sackett asks that SB 373, as amended by the House, also direct the Department of Labor and/or the Department of Law to survey all public facilities of the state regarding asbestos problems, and to report to the next

legislature with regard to its findings regarding the asbestos hazards in all facilities, not just schools; the issue of public liability if the hazards are not abated; the probable cost of abatement; a timetable for abatement; and the possibility of the state recouping some of the abatement costs through litigation like that described in paragraph 1 above and the enclosed news article. I strongly concur. I would be glad to assist either with additional information or in drafting amendments.

With best wishes, I am

Sincerely,



Joe P. Josephson
State Senator

JPJ:rak
Enclosure

cc: Senator John Sackett

35 U.S. School Boards Sue to Force Manufacturers to Remove Asbestos

By JAMES BARRON

With the Environmental Protection Agency stepping up its campaign against asbestos in schools, more than 35 school boards around the nation have filed lawsuits to get asbestos manufacturers to pay for removing the potentially hazardous material from their buildings.

The agency says 62 percent of the school districts it has inspected violate some of the Federal regulations that require local school officials to inspect and report on asbestos. Alvin Alm, Deputy Administrator of the E.P.A., said the figure dropped as low as 50 percent earlier in the year but climbed recently as the inspections continued.

To improve the compliance rate, the environmental agency has proposed fines of more than $300,000 against 16 school districts where Federal inspectors found problems.

Four of the school districts fined were in New Jersey: Brick Township, South Orange, Springfield Township and Dunellen. The largest fine was $102,000 against the Waterbury public schools in Connecticut. There, the agency said it had found that 16 of 26 schools contained asbestos that could become airborne.

Some Call E.P.A. Rules Vague

Some local school officials say the agency's rules are vague and subjective and its inspectors interpret them arbitrarily. But others have turned to the courts because of the high cost of removing asbestos, more than $100,000 a school by some estimates.

One case in South Carolina was settled last month when U.S. Gypsum agreed to pay $875,000 to the school district in Lexington County. One in Pennsylvania may be used as the basis for a suit that would consolidate all the claims against manufacturers by school boards around the country.

Asbestos was widely used as fireproofing insulation between World War II and the late 1970's. It has since been found to pose a threat of a variety of serious diseases, including mesothelioma, a cancer of the lining of the lungs that is often fatal.

The E.P.A. says it cannot estimate how many children face possible future health problems from attending classes in schools containing asbestos or how much exposure causes a health hazard. The National Education Association, which maintains that children are more susceptible to asbestos-related diseases than adults, says there are asbestos problems in 14,000 schools. The teachers' union has threatened to make asbestos removal a bargaining issue this year.

Under the Federal rules, more than 121,000 public and private schools with more than 50 million pupils are required to notify parents and school employees if asbestos is found by inspectors. In most cases, there are two types of asbestos in schools: asbestos in ceiling insulation and asbestos wrapping on plumbing and heating equipment.

The environmental agency's inspectors are supposed to check for asbestos that crumbles or can be pulverized at a touch, but they may also cite school districts for failing to keep detailed records on their own inspections.

"The unsettling thing is I'm afraid that is sidetracking the E.P.A.'s attention from the real issue, which is what's hazardous," said William Anderson, a lawyer who represents the National Association of School Boards. "It's also creating an adversarial situation. The E.P.A. is making enemies of many school districts as a result of what the schools see as nit-picking and unfair enforcement."

The Syracuse public schools complied with New York state regulations before the Federal environmental inspectors arrived. Ernest Rookie, the system's facilities supervisor, said the Federal inspectors questioned whether there was asbestos in an auditorium ceiling at Fowler High School.

"We had already taken samples in nine different spots," he said. "They were proved to be not asbestos. The E.P.A. came through and demanded a lab analysis. It cost $450, and we were sure that stuff wasn't asbestos."

Fine Is Called 'Unreasonable'

In Waterbury, Thomas G. Parisot, an assistant corporation counsel, called the proposed fine "unreasonable" and questioned how the agency had determined it. Long before the Federal inspectors showed up, he said, Waterbury made plans to have the asbestos removed.

"The E.P.A. inspected only four schools before it lowered the boom," he said. "They were not really familiar with the makeup of our school system when they issued their complaint. We say any asbestos-containing material is limited in comparison to other districts. We don't have any spray-on be[illegible]n insulation, wall insulation, or the kinds of materials that are a great deal more friable."

He said samples taken before the E.P.A. inspection "indicated there was no exposure problem for airborne concentrations."

Many school boards are divided on how to proceed with the suits, stalled since Federal District Judge James M. Kelly ruled in Philadelphia that all the cases should be combined and tried there.

After lawyers representing many of the other districts with pending cases protested, he scheduled a hearing on whether to go ahead with the merged legal actions. The case before him originally concerned only the schools in Lancaster, Pa., which had sued the Lake Asbestos Company, a Canadian company, among others.

"To require thousands of lawsuits to be tried in one forum means that each individual school district will be lost in the mass," said Daniel Speights, a Hampton, S.C., lawyer handling more than a dozen cases. "Historically, parties in a class action do not get the amount in damages that they would get if they tried their cases separately. Many of them could file locally and try the case in a year or less."

David Berger, one of the lawyers who represented the Lancaster districts when the case began, said individual trials would prove "costly, repetitive and duplicative."

"If everyone operates independently," he said, "that might make it impossible for anyone to recover. There is no way this industry could withstand $4 billion or $5 billion in judgments relating to school claims, which is what would happen if we used the tremendously ineffective case-by-case basis."

Ruckelshaus En

By PHILIP SHABECOFF

Special to The New York Times

WASHINGTON, May 19 — One year after his return as Administrator of the Environmental Protection Agency, William D. Ruckelshaus is widely credited with restoring morale, stability, purpose and credibility to an agency he found in a state of chaos.

But his critics, including members of Congress and environmentalists, charge that he has failed in leadership on such important environmental issues as emissions into the air of sulfur and nitrogen oxides that fall in particles called acid rain, killing aquatic life and threatening forests; that he is seeking to weaken environmental regulation by weighing risks to health against other social values: that he is serving as a benign front for what the critics call the anti-environmental policies of the Reagan Administration.

In an interview in his office overlooking the Potomac, Mr. Ruckelshaus denied that the Administration was anti-environment.

"It is a fair criticism of this Administration that the environment is not one of its high priorities — it has not been a high priority of the President in his career," he said. But he added that "the Administration has much more sympathy for the environment than the Nixon Administration," though many major environmental laws were passed in that Administration's tenure. IN th

ALASKA STATE SENATE

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22 May 1984

Honorable Mae Tischer
Chair
Committee on Health, Education and Social Services
House of Representatives
Alaska State Legislature
Juneau, Alaska

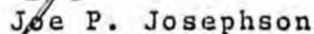
Dear Mae:

Re: SB 346; SB 373

In the light of our common interest in the problems of the mentally ill, and all of the work our committees have done on this subject, I am hopeful that your committee will soon submit its report on SB 346. I believe the bill will pass the House if the House has the opportunity. In addition, I do not object to your amendment, if I understand it rightly, about nutritional testing and programs, and I would urge the Senate to concur if the House passes SB 346 with that amendment.

On another subject, the Senate has passed SB 373 relating to asbestos abatement. An amendment I offered on the Senate floor is designed to avoid double-shifting of Bartlett High School students, by giving the Commissioner of Education the authority to ease the 180-day school term requirement if the school district submits a plan for a shorter term (not less than 150 days) which will give approximately equal education, e.g., by lengthening the school day. This would permit work to be done at Bartlett High School during interims between the spring and fall terms, so that double-shifting will not be necessary. Superintendent Gene Davis has asked for this. I am hopeful, again, that the House of Representatives will have an opportunity to consider SB 373 as amended. If you need additional information, please advise.

Sincerely,



Joe P. Josephson

Mae - as per our chat this a.m. Thanks. JPJ

Alaska State Legislature

REP. MAE TISCHER
CHAIRMAN

POUCH V
STATE CAPITAL
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(907) 465-3777

House of Representatives
HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

M E M O R A N D U M   May 24, 1984

TO: Members of the House HESS Committee
FROM: Representative Mae Tischer, Chairman, House HESS MT

RE: Proposed House CS for CS for Senate Bill 373 (HESS)

Attached please find a copy of the proposed House CS for CS for Senate Bill 373 (HESS), "An Act establishing an asbestos health hazard abatement program; and providing for an effective date."

The proposed amendments to the bill, indicated on the attached draft, are found on the pages and lines indicated below. Please note that, for the ease of the members, page and line references are to CS for Senate Bill 373 (Finance), amended, offered May 3, 1984. A brief explanation of the effect of each amendment is provided.

1. Page 1, line 9: The catch line for Section 1 of the bill is amended by deleting "FINDINGS AND" in order to reflect changes made to this section in amendment 2.

2. Page 1, lines 9 - 25: This amendment deletes the "Findings" portion of Section 1 of the bill, leaving only the "Purpose" portion. Legal counsel has advised that this amendment will have no legal effect on the bill.

3. Page 3, line 24: In conformity with amendment 4, this amendment deletes paragraph 9 of the new AS 18.28.020 and renumbers the remaining paragraphs accordingly.

4. Page 4, line 4 - Page 5, line 5: This amendment deletes establishment of the proposed Department of Labor Certification Programs, and renumbers remaining sections of the Act accordingly.

5. Page 6, line 15: This amendment inserts new language to read:

> "Sec. 18.28.080. RIGHT TO SUBROGATION. When the state has expended funds to abate asbestos health hazards under AS 18.28.030, the state shall be subrogated to all of the rights of a municipality or borough to recover damages for asbestos health hazards in a school building. The right to subrogation is limited to the amount of funds the state has expended to abate asbestos health hazards in a school building that is the subject of a legal action by a municipality or borough seeking to recover damages. A municipality or borough shall deposit in the general fund, to the extent of the related state expenditures on its behalf, damages awarded in a legal action under this section."

The amendment, suggested by Senator Josephson, would require school districts which successfully sue for costs associated with abatement and which get state financial aid to reimburse the state, to the extent of litigation proceeds, out of any proceeds of such litigation; thereby "subrogating the state to the interests of the school district where proceeds are collected, to the extent of the state's aid for asbestos abatement."

/wtl

BACKGROUND ON ASBESTOS HEALTH HAZARDS

FOLLOWING WORLD WAR II, ASBESTOS WAS RECOGNIZED AS THE "MIRACLE" MATERIAL - NOT ONLY AN EXCELLENT INSULATOR BUT ALSO FIREPROOF. THEREFORE, IT WAS WIDELY USED IN ALL CONSTRUCTION PROJECTS.

ASBESTOS WAS KNOWN TO BE DANGEROUS LONG BEFORE IT CAME TO THE NOTICE OF THE PUBLIC IN THE EARLY SEVENTIES. CONGRESS HAD NUMEROUS HEARINGS ON THE HEALTH ASPECTS OF ASBESTOS, AND PASSED IN 1980, LEGISLATION TO REMOVE ASBESTOS FROM SCHOOLS BECAUSE IT WAS RECOGNIZED THAT CHILDREN ARE MORE SUSEPTIBLE TO THE INGESTION OF ASBESTOS FIBERS THAN THE GENERAL PUBLIC. CASES WERE DOCUMENTED WHERE ASBESTOSIS WAS CONTRACTED BY PEOPLE LIVING IN PROXIMITY TO FACTORIES AND SHIPYARDS WHERE ASBESTOS WAS IN HEAVY USE, AND BY FAMILY MEMBERS OF ASBESTOS WORKERS. HEALTH RELATED DISEASE DOES NOT APPEAR FOR 20 - 40 YEARS AND IS ALWAYS TERMINAL.
THE FEDERAL LAW REQUIRING ASBESTOS IDENTIFICATION AND REMOVAL IN SCHOOL BUILDINGS, UNFORTUNATELY, WAS NOT ACCOMPANIED BY ANY APPROPRIATION TO AID SCHOOLS IN CARRYING OUT THE MANDATE. THE E.P.A. PUT OUT REGULATIONS REQUIRING IDENTIFICATION AND TESTING OF ASBESTOS BY SCHOOLS BY JUNE 30, 1983. DWIGHT BROWN, DIRECTOR OF THE E.P.A.'S ASBESTOS IN SCHOOLS PROJECT APPEARED ON CNN TWO WEEKS AGO, STATING THAT THE E.P.A. HAS DONE VERY LITTLE, AND WHAT HAS BEEN DONE IS INEFFECTIVE.

SCHOOLS CONTACTING OUR OFFICE ABOUT THESE BILLS, AND PARTICULARLY THOSE IN RURAL AREAS, STATED THAT THEY HAD DIFFICULTY GETTING ASSISTANCE FROM THE E.P.A. AND ATTEMPTED TO CARRY OUT THE REGULATIONS AS BEST AS POSSIBLE WITH VERY LITTLE INFORMATION. THE E.P.A. HAS .1 PERSON WORKING ON ASBESTOS IN ALASKA.

THE LAW ALSO REQUIRED SCHOOLS TO NOTIFY PARENTS AND EMPLOYEES OF ASBESTOS LOCATED IN BUILDINGS - PLACING THE SCHOOLS IN A PRECARIOUS POSITION BY RAISING PUBLIC CONCERN ABOUT AN OBVIOUS HAZARD THAT, FINANCIALLY, THEY WERE IN NO POSITION TO ADDRESS.

THESE BILLS ARE AN ATTEMPT TO PROVIDE FUNDING FOR ASBESTOS REMOVAL IN SCHOOLS IN A SAFE, ORDERLY FASHION THAT WILL GUARANTEE THE PROTECTION OF THOSE EMPLOYED TO REMOVE THE MATERIAL.

THE SUPERINTENDENT FROM KODIAK CONTACTED ME WITH AN ISSUE NOT ADDRESSED IN THE BILL, AND THAT IS THE DIFFICULTY OF FINDING A PLACE TO DUMP THE ASBESTOS AFTER REMOVAL. HE STATED THAT THEY HAD RENOVATED THEIR JUNIOR HIGH SCHOOL AND DUMPED THE MATERIAL IN A COAST GUARD AREA WHICH HAS NOW BEEN CLOSED. PERHAPS THE DEPARTMENT OF LABOR WOULD BE ABLE TO ADVISE SCHOOLS ON THIS MATTER.

MEMORANDUM

TO: JOE JOSEPHSON
FROM: NANCY DEITRICK
RE: SB 374 - ASBESTOS ABATEMENT APPROPRIATION BILL

E.P.A. REQUIREMENTS

The E.P.A. regulations mandated: (47 FR 23360-23389)

1. Testing for asbestos in every school district by June 30, 198
2. Notification of parents and school board about asbestos healt hazards discovered.
3. Notification of school employees of hazards with instructions on how to minimize exposure to asbestos.
4. Maintenance of records on asbestos testing and notification.

Since 1979, the EPA has put forth technical assistance to districts concerning asbestos hazards and abatement. This has consisted of manuals and workshops for school officials in the major areas of the state. Kathy Pazera, of the Juneau EPA office, told me that the EPA has so far applied sanctions in two states for non-compliance with these regulations, and that there is heavy public pressure concerning a more aggressive stance on asbestos in schools. The EPA has just rewritten regulations for demolition and renovations of asbestos containing materials.

Although the $172 million authorized for the Asbestos School Hazard Detection and Control Act of 1980 was never appropriated, there is speculation that the regulations requiring public knowledge of asbestos hazards were designed to bring pressure on states for funding asbestos removal.

A civil suit filed on behalf of a South Carolina school district notes that school districts and public officials could be held liable for failure to abate a health hazard.

Tues. 5-15-84

JOHN:

re: Asbestos Health Hazard problem (SB-373, SB-374)

Per your request, I have talked with Alison Elgee in Dept. of Education.

In general the problem is a recent one in terms of public awareness of the potential hazards of asbestos materials used in construction of school and public buildings.

In Alaska only Anchorage and to some degree Fairbanks have been able to identify asbestos hazards in their schools. Anchorage has done the most extensive survey of hazards.

In Anchorage, for example, their first estimate of removal of asbestos from Bartlett High School was roughly $6 million. TODAY, the business manager for the school district reports the estimate has now shot up to somewhere between $13 and $22 million. Bartlett's problems are that when the school was constructed asbestos was sprayed on the walls as a fire safety/prevention measure. This type of asbestos is called "friable" and means that the substance releases fibers in the air which are breatheable by humans and subsequently can cause health hazards (cancer, lung problems, etc.). The Bartlett case is a little unique in that apparently the federal government would provide for some funds necessary to remove the hazardous asbestos, but their is a question as to how much the feds would put up.

Other school districts HAVE NOT identified their asbestos hazards either because they lack the necessary funding, expertise and/or personnel to do the job...or simply have not been made aware of the serious nature of the problem and as a result have felt no (or little) pressure to act on the matter.

DOE received $2.5 million in HB-691, passed earlier this year, to survey the asebestos hazard problems throughout the public school system (i.e., the more rural school districts).

Getting a handle on the overall costs to remove hazardous asbestos in schools is not easy because it is a new problem, there is insufficient data from all school districts and estimates seem to vary from week-to-week, as in the case of Bartlett school in Anchorage.

MORE DETAILED INFORMATION could possibly be provided from D.O.E if they were permitted to use the $2.5 million they already have to identify the problem areas and report back to the legislature with funding requests for next year.

DOE says that their cost estimates to remove hazardous asbestos would far exceed the $17 million currently proposed in SB-374, which is a companion to SB-373, creating an asbestos health hazard program to remove hazards... but they cannot give a relatively accurate figure until they've had time to assess the problems throughout Alaska.

MG

ASBESTOS IN SCHOOLS

The following needs have been identified from the Senate HESS Committee's request for information:

District	Amount	Note
Kodiak	$1,138,507	
Petersburg	107,000	
Delta Greely	99,700	
Cordova	120,000	(In progress)
Nenana	15,000	($5,000 already spent)
Anchorage	14 - 16.6 million	($6,101,300 in SB 403)
Fairbanks	1,385,000	($1,385,000 in SB 403)
Skagway	25,000	
Kuspuk	5,296	
Mat-Su	105,959	(expended)
Ketchikan	5,000,000	(estimate)
Juneau	300,000	(expended, estimate several million)

**There is $2,500,000 in HB 691 for statewide asbestos removal

The Department of Labor has estimated that there are 220 schools that remain to be tested. They estimate the cost for sampling and testing to be $296,100 for those schools, this amount has been included in SB 374.

5/2 4:45pm. Mike Scott said they will do a Finance CS with these amendments

Mick Coltran, of the Laborers Union, has requested more stringent sanctions for violations. A memo from Vic Fischer was sent to Senator Ferguson, but I don't know if these recommendations are to be included in a Finance CS. They are:

Insert page 4, line 14:

(e) A contractor who violates (b) of this section is guilty of a class A misdemeanor.

(f) A contractor who violates (c) of this section is guilty of a class B misdemeanor.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M May 28, 1984

SUBJECT: Emergency closure days (AS 14.03.030(2))

TO: Representative Mae Tischer
Chairman, House HESS Committee

FROM: Keith B. Levy KBL
Legislative Counsel

You have asked whether AS 14.03.030(2) permits a school district to use an "emergency closure day" to conduct an asbestos abatement program. AS 14.03.030 provides that the school term is at least 180 days in session, except that, subject to the approval of the Commissioner of Education,

> ...an "emergency closure day" may be substituted for a day in session because of conditions posing a threat to the health or safety of students.

The answer to your question turns on whether the condition sought to be remedied by the asbestos abatement program poses a threat to the health or safety of students.

I have reviewed the memo you received from Ron Lorenson of the Department of Law as well as the memo from William Thompson of the Department of Education. The Department of Education memo concludes that if an inspector certifies that a building should not be occupied because the asbestos poses a threat to the health or safety of the children, an emergency closure day is authorized. The Department of Law disagrees to the extent that it believes an emergency closure day is authorized only if it is the result of "bona fide emergency situations which school officials could not reasonably anticipate in advance." In other words, under the Department of Law's interpretation, emergency closure days are not authorized for a planned abatement program, even if the program presents a threat to the health or safety of students.

Although the Department of Law's interpretation of AS 14.03.030(2) is not unreasonable, I disagree that the statute does not authorize emergency closure days for asbestos abatement programs. Although the statute uses the word "emergency," the plain language of the definition does not require anything but a threat to the health or safety of the students. If an abatement program is used to remedy conditions posing such a threat, it would appear to authorize an emergency closure under AS 14.03.030(2).

It should be noted, however, that under AS 14.03.030(2), all emergency closure days are "subject to the approval of the commissioner." Therefore, even if an emergency closure is authorized under AS 14.03.030(2), the Commissioner of Education has the power to veto a school district's determination that an emergency closure day is called for.

If I may be of further assistance, please contact me.

KBL:ojb
J8/009

MEMORANDUM

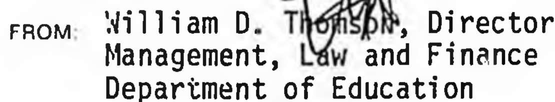
State of Alaska

TO: The Honorable Representative Mae Tischer
Alaska State Legislature
House of Representatives

DATE: May 25, 1984

FILE NO: 4203M

TELEPHONE NO: 465-2865



FROM: William D. Thomson, Director
Management, Law and Finance
Department of Education

SUBJECT: Emergency Closure/
Shortened School Year

Per our telephone conversation this morning, the 1983 Legislature amended AS 14.03.030. School Term by adding a section where an emergency closure day may be substituted for a day in session because of conditions posing a threat to the health or safety of students.

If an inspector certifies that because of friable asbestos a threat to the health of children occupying a school exits, therefore, the building should not be occupied, this would constitute an "emergency closure day" until the condition could be corrected, if alternate arrangements for the childrens' education could not be accomodated.

If you have further questions, please feel free to call.

02-001 (Rev. 5/75)

of concern your legal liability as "owner" of your school buildings. Following federal regulations scrupulously won't protect your schools against a potential lawsuit if an asbestos removal worker should die from cancer, so you should be very careful in hiring a contractor, says attorney Luis Nido, of Brace and Patterson, a Washington, D.C., law firm that does asbestos work. Hire a highly specialized firm whose technicians are able to testify in court, adds attorney James B. Bedingfield of Coos Bay, Ore., who represents several school systems involved in asbestos abatement. And keep careful daily records to document your efforts to ensure the safety of workers, as well as students and staff, while asbestos abatement work is being done in your schools. On these and other issues related to asbestos, "Uncovering the Asbestos Hazard," published by the National School Boards Association's Council of School Attorneys, provides comprehensive legal, legislative, and medical background on asbestos in the schools. (It's available for $100 by writing to the council at 1055 Thomas Jefferson St. N.W., Washington, D.C. 20007.)

And, perhaps most important, know what you're getting into before you launch a program of asbestos containment or removal. George Harris, assistant superintendent in Montgomery, Ala., advises setting up an interdisciplinary team composed of board members, administrators, your school attorney, perhaps parents or other community members, and the architect and engineer you select to help do the job. (See article below.) Asbestos expert Dwight Brown suggests that this interdisciplinary team (or at least one member of it) should attend one of the seminars on asbestos in the schools conducted by E.P.A. and private consulting groups. These seminars have as speakers doctors, engineers, architects, attorneys, contractors, and others knowledgeable about asbestos. (For more information, contact Brown at A.H.P. Research, Inc., 3763 Vineyard Way, Marietta, Ga. 30062; 404/973-8689.)

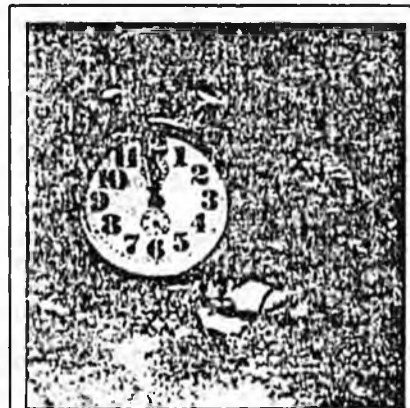
Asbestos in schools is a wrenching, emotional issue—and it no longer is lying dormant. School board members and school administrators need to take action and take action *now*. □

Sidestep asbestos hysteria: Explain the risk (and your response) to the public

By George Harris

WE ALL WANT safe schools, but when it comes to the risky business of removing asbestos, school board members and school administrators sometimes bear the brunt of community criticism. At least, that's what happened in the Montgomery County (Alabama) Public Schools (K-12; enr.: 35,000) when we were faced with the difficult task of removing asbestos from about half of our 52 schools. Perhaps there's a lesson for you in the way we handled this emotional issue.

We knew little about asbestos until we read *Asbestos in schools: Walls and halls of trouble*, in the November 1978 issue of the JOURNAL. We knew even less about potential asbestos hazards in our own schools, other than that asbestos-containing materials had been required by the architects who designed many of our buildings. Consultation with those architects revealed that Yes, the ceilings in most of the classrooms were coated with cementitious, sprayed-on asbestos products. Materials used in the walls and halls of the schools we were so proud of when they were built in the 1950s and '60s were fireproof, attractive, and acoustically satisfactory. They also were potential causes of cancer and other life-threatening diseases.



'Our slide show and public talks about asbestos set the stage for a calm resolution of the problem'

We immediately began to gather samples from some of our buildings with sprayed-on ceilings. Laboratory tests confirmed what we had not wanted to believe: We had asbestos in our buildings—in far greater amounts than we had suspected. By January 1979, we knew we had more than 300,000 square feet of the stuff only a few feet above the heads of approximately 15,000 students. By this time, other school systems in Alabama were becoming aware of the problem, and the state superintendent of education called for a statewide report on asbestos in schools.

Publicity was widespread, and within months, we began to feel the uncomfortable effects of public awareness. The state PTA president wrote to local PTA officials, urging their support of federal legislation to provide funding to help school systems inspect buildings for asbestos-containing materials. With our local PTAs alerted to the danger of asbestos, we soon were receiving letters from legislators and from worried parents who wanted to know what the Montgomery schools were doing to protect their children. Public criticism peaked when a local newspaper published an editorial entitled "Silent Death." Next to the editorial was a cartoon showing a distressed mother sending her children off to school with gas masks on their faces. From then on, I knew the asbestos problem had to be Number One on my agenda. We had been waiting to see if any state agencies would

George Harris is assistant superintendent in Montgomery, Ala.

Schools are required to post warnings wherever friable asbestos exists. When asbestos is removed, areas are quarantined and workers wear protective suits.

recommend a course of action, but now we knew we were on our own.

In January 1982, the Montgomery school board passed a resolution making asbestos cleanup a matter of top priority and directing the staff to develop an asbestos control program immediately. We formed a committee composed of the superintendent, the board attorney, two board members, and me. Here, briefly, is how our committee confronted the issue:

Our first step was to request proposals from architectural firms. After carefully interviewing all the applicants, we chose an architectural/engineering firm that had proven experience in asbestos abatement and removal. We then presented our selection to the board, which approved our recommendation.

Before we could begin actually solving our problem, though, we needed more background on the hazards of asbestos and the medical and legal risks of removing it from our buildings. So we attended a seminar on asbestos in schools held in Atlanta. The seminar was conducted by, among others, the regional asbestos coordinator for the Environmental Protection Agency (E.P.A.). Seminars like the one we attended are a good source of comprehensive, accurate information on such matters as how to approach specific asbestos problems, how to hire a competent lab to test samples, and how to inspect and monitor the asbestos contractor's work to ensure a safe and thorough job.

Not long after we returned from the Atlanta seminar, the situation heated up at home. Several PTA members at one school began distributing leaflets urging parents to call and find out when asbestos abatement contracts would be awarded and when the asbestos-containing materials would be removed from their schools. The group broadcast their concerns over local radio stations, intensifying the pressure on us to speed up the process.

By early summer 1982, the surveys confirmed that a total of 24 school sites (some with more than one building) contained more than 500,000 square feet of dangerous, friable (or loose, crumbling) asbestos-containing materials. The boiler coverings, water heater jackets, and pipe coverings in these schools and 16 others were coated with asbestos that would have to be removed. We had hoped to award cleanup contracts for a number of the schools that summer; unfortunately, although a bond issue for school construction already had been approved by the state legislature, the funds were not made available to local school systems because of the state's tight economic situation. It became clear we couldn't complete the work by the opening of the 1982-83 school year. The local news media incited a public outcry with charges that the schools were moving too slowly, suggesting we somehow were negligent in solving the crisis.

The board and administration decided positive public relations measures were in order, so I put together a slide presentation illustrating how the Montgomery schools had responded to the asbestos hazard since we first became aware of it. The 40-minute, narrated presentation explained why asbestos posed health risks, where it had been found in our schools, how the press and community had reacted to the discovery of hazardous materials, and what we were doing to make the schools safe. One of our board members presented the slide show, along with a speech on the school board's responsibility in removing asbestos, at a regional school board association meeting. The presentation was such a success that we used the slide show at subsequent PTA and community group meetings. These discussions have gone a long way in garnering support for our efforts and reassuring parents, staff, and community members that we are, indeed, on top of the problem—and moving as quickly as possible to make schools safe.

Community support is important, but it takes money to get the job done, so we continued to fight for funding from the state. Finally, in January 1983, we received more than $1 million from the state for asbestos abatement. We immediately awarded contracts for asbestos removal in four schools, to be completed during the spring recess. Soon after, we received an additional $2.4 million in state bond money; that amount should allow us to complete the project. By the end of last summer, we successfully had removed 360,000 square feet of asbestos-containing materials from 17 schools. We currently are advertising for bids on the abatement jobs yet to be done, and we anticipate that the Montgomery schools will be completely free of asbestos-containing materials and their accompanying hazards by this summer.

Our slide presentation, meanwhile, has traveled many miles. In the past year, I've shown it at seminars conducted at several universities and at a National School Boards Association Council of School Attorneys' asbestos seminar held last summer.

If your schools haven't yet dealt with the asbestos problem, it's time you did. It's an emotional issue, and it requires delicate handling if you want to avoid hysterical accusations from the community. We've found that our slide show and discussions with the community have helped set the stage for a calm and constructive resolution of the problem.

If you'd like more information on how to put together a presentation for parents and community members on asbestos abatement, write to me at the Montgomery Public Schools, P.O. Box 1991, Montgomery, Ala. 36197. □

HB 246

CS FOR HOUSE BILL NO. 246 (L&C) by the Labor and Commerce Committee, entitled:

> "An Act relating to the deregulation of interest rates; and providing for an effective date."

was read the first time and referred to the Labor and Commerce Committee and the Judiciary Committee.

STANDING COMMITTEE REPORTS

SB 79

The Resources Committee considered SENATE BILL NO. 79 (toxic and hazardous substances in the workplace) and recommended it be replaced with

CS FOR SENATE BILL NO. 79 (RES)

with a majority do pass. The report was signed by Senator Fahrenkamp, Chairman and concurred in by Senators Vic Fischer, Eliason, Ziegler, Paul Fischer and Sturgulewski. Senator Mulcahy signed "no recommennation".

The committee attached:

SENATE RESOURCES COMMITTEE
LETTER OF INTENT, SB 79

The purpose of this legislation is to inform employees of the identity of and the health hazards and proper handling procedures for hazardous and toxic substances in their workplace through a communication and safety education program adopted by employers. While this legislation is designed to cover most employers in the state utilizing substances defined in the bill, it is not the intent to require employers to be responsible for the generation or creation of the information required to be posted or communicated to employees. Rather, the bill is designed under the assumption that federal regulations will be promulgated in the near future by the Occupational Safety and Health Administration (OSHA) which will require manufacturers to develop and distribute information for all the substances covered by the bill. The provision requiring that such information accompany substances imported into the state and the provision requiring the State Department of Labor to keep information on file for all substances covered by the bill are designed to aid employers in readily obtaining the required information.

ADEC NEWS

PRESS RELEASE FROM THE PUBLIC INFORMATION OFFICE
ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION
JUNEAU, ALASKA 99811 (907) 465-2606

Bill Sheffield, Governor Richard A. Nevé, Commissioner
Joe Ferguson, Information Officer

FOR IMMEDIATE RELEASE April 20, 1983

ASBESTOS IN ALASKA

by Jana Baumann, Information Officer
Department of Environmental Conservation

JUNEAU--Twenty years ago the word "asbestos" meant progress, indestructibility; a nearly perfect component for building materials to insulate and to fireproof.

Today the mention of asbestos may bring a grim response and thoughts of cancer and lung diseases. What was once thought of as a miracle material is now known to be extremely harmful, especially when it is dispersed into the air and inhaled.

What is asbestos?

Asbestos is a naturally occurring mineral that can be separated into fibers. It is very lightweight and nearly industructible. Before the early 1970s, asbestos was widely used as a component in thermal, electrical, and acoustical insulation, fireproofing, ceiling tiles, and decoration. These applications were most cost effective in large buildings like schools, factories and office buildings.

What are the harmful effects of asbestos?

The danger to human health from asbestos occurs when minute fibers are breathed and become lodged in the lungs. Asbestos containing materials are often friable which means the fibers can be readily separated from the material in which it is

-MORE-

used and become airborne. Fireproofing or insulation which is damaged and crumbling can release invisible asbestos fibers into the air.

Cancers of the chest and lungs and other organs have been positively associated with asbestos exposure. There is no known "safe" exposure. Even brief contact could result in irreversible damage that may not be detected until many years after exposure.

When the health effects of asbestos exposure were documented, many corrective programs were initiated for workers who handle it and for the public who may be unknowingly exposed at their school or workplace. In Alaska, several state and federal agencies regulate asbestos exposure, handling and disposal. Following is a brief summary of agency responsibilities.

Schools and Public Buildings

The U.S. Environmental Protection Agency regulates inspection of schools for identifying asbestos containing materials. The superintendent of each school district in Alaska has been instructed to inspect all school buildings in the district for friable asbestos by June 23, 1983. Each type of friable material located in the school buildings must be tested for asbestos content. Samples must be tested using Polarized Light Microscopy.

School districts are required to keep a record of all the inspections and results from each school building. If asbestos containing material is found in a school, additional information on the location and quantity of this material must be kept on file at the administrative office of the school and at the school district office. The school district must notify employees and the parent-teacher association about the presence of asbestos containing materials.

-MORE-

Instruction is available on how to inspect public buildings and schools which may contain friable asbestos. Booklets and video tapes may be borrowed from the Alaska Operations Office of the U.S. Environmental Protection Agency in Juneau or from the Alaska State Library.

Asbestos emissions to the air inside the work place

The Alaska Department of Labor, Division of Occupational Safety and Health, regulates exposure of workers to airborne asbestos fibers inside the work place. The regulations also govern asbestos exposure during demolition and renovation work.

The regulations set standards for exposure levels of asbestos fibers in the air, and specify work practices such as ventilation and clothing and engineering controls for most workers in the state. Exposure criteria for federal employees and workers on offshore oil rigs or seafood processors are regulated by the U.S. Department of Labor, Occupational Safety and Health.

Questions regarding asbestos exposure or work practices in the work place should be directed to Alaska Department of Labor, Division of Occupation Safety and Health. Sampling of our materials in the work place is also done by this agency.

Asbestos emissions to the outside air

The U.S. EPA has established standards to limit emissions of asbestos to the outside air. These rules govern manufacturing plants which produce cement, fireproofing materials, insulation, and other materials which include asbestos as a component. The rules also govern materials used in roadway surfacing and emissions from asbestos milling operations. These regulations also limit release of asbestos to the air during renovation and demolition activity and fabricating operations that utilize commercial asbestos.

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Asbestos Disposal

The U.S. EPA has regulations which regulate handling and disposal of asbestos. Materials containing friable asbestos must be specially contained and wetted. Landfills or disposal sites must meet certain specifications in order to accept the material. Operators of the disposal site must cover it and post warning signs.

Following is a list of agencies which regulate some aspect of asbestos in Alaska, the situations for which they are responsible, and the person to contact.

-MORE-

Responsible Agency	Asbestos Situation
U.S. Environmental Protection Agency Alaska Operatoins Office 3200 Hospital Drive, Suite 101 Juneau, Alaska 99801 Phone: 586-7619 Contact: Kathy Pazera or Steve Torok	Emission to the outside air Disposal of materials containing friable asbestos Rules for landfill or disposal site handling Exposure in public buildings and schools
U.S. Department of Labor Occupational Safety and Health Administration Federal Building and U.S. Courthouse 701 C Street Box 29 Anchorage, Alaska 99513 Phone: 271-5125 Contact: Leonardo Limitiaco	Federal employees Offshore oil rig or floating seafood processor employees
Alaska Department of Labor Division of Occupational Health and Safety 3301 Eagle Street, Suite 303 Pouch 7-022 Anchorage, Alaska 99510 Phone: 264-2597 Contact: Stan Godsoe	Asbestos in the air at the work place Work practices for handling asbestos

PRIVATE LABORATORIES WHO TEST SAMPLES FOR FRIABLE ASBESTOS

NHS Incorporated
Environmental Health Sciences Lab
805 Goethals Avenue
Richland, Washington 99352
Phone: (509) 376-6980

Chemical & Geological Labs of Alaska
5633 B Street
Anchorage, Alaska 99502
Phone: (509) 562-2343

Microlab Northwest
7609 140th Place, N.E.
Redmond, Washington 98502
Phone: (206) 885-9419

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U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION X
ALASKA OPERATIONS OFFICE
3200 HOSPITAL DRIVE
SUITE 101
JUNEAU, ALASKA 99801

REPLY TO
ATTN OF:

February 1, 1984

Joe Cladouhos, Director
Division of Environmental Quality Management
Alaska Department of Environmental Conservation
Pouch O
Juneau, Alaska 99811

RE: Senate Bill No.'s 373 and 374 introduced on 1/25/84

Dear Mr. Cladouhos:

As a result of a request by your staff, we have provided a review of the current asbestos regulations and our comments on Senate Bills 373 and 374. We strongly support the concept of both these Bills. The EPA Alaska Operations Office (AOO) has been actively involved in 1) providing guidance to schools on school regulation 40 CFR Part 763, 2) providing information to contractors conducting demolition/renovation of friable asbestos, 3) inspecting asbestos demolition/renovation projects and 4) responding to all complaints in this area. The AOO also notifies the State Department of Labor (SDoL) on each demolition/renovation asbestos project for which we receive a notification.

Our staff in Alaska is limited to .1 of a person year for asbestos activities; therefore, we strongly support efforts from state agencies which supplement our efforts. We feel that Senate Bill 373 in conjunction with the present EPA, U. S. Department of Labor (DoL), and SDoL regulation would provide for a more complete asbestos program for Alaska; however, appropriations in Bill 374 may not be adequate to fulfill all the designated tasks for the asbestos program.

Background:

At the present time the U. S. Environmental Protection Agency (EPA) requires the identification of friable asbestos in schools in accordance with regulations (40 CFR Part 763) promulgated under the Toxic Substance Control Act (TSCA). In addition, all projects involving the demolition and/or renovation of friable asbestos in buildings are regulated by EPA in accordance with 40 CFR Part 61, Subpart B. These regulations were promulgated under the authority provided to EPA in the Clean Air Act (CAA). The U. S. Department of Labor and the SDoL also have regulations addressing removal and demolition of asbestos from structures (29 CFR 1910.1001 and OH&EC 04.0102 respectively).

Unlike regulations promulgated under the CAA, the school regulations promulgated in accordance with TSCA cannot be delegated to state or local governing agencies. This does not prevent a state or local governing agency from developing its own asbestos program for schools. For the most part Senate Bill 373 would supplement the present EPA school regulations; however, some overlap occurs in the requirement to establish guidelines for schools to identify asbestos health hazards [18.28.050 (5)]

Detailed Comments:

According to Section (1) (b) of Senate Bill 373 there are three main purposes for the Act. Our comments on each of these is discussed in the following text:

1) We support the testing and analysis of friable materials for asbestos content. According to the Bill, the Alaska Department of Environmental Conservation (ADEC) would provide this service. In accordance with EPA regulations (40 CFR Part 763) all local education agencies were to complete the following tasks by June 28, 1983:

-conduct inspections of schools for friable materials

-collect samples of all materials identified as friable.

-have each sample analyzed by Polarized Light Microscopy (PLM) for asbestos content.

During 1984 the EPA will be conducting inspections of three major school districts in Alaska; however, there have been no inspections of Alaska schools conducted to date. As a result it is not known which schools in Alaska are in compliance with the EPA regulation and therefore some schools may require sampling.

There are approximately 550 schools in Alaska. Each specific friable material type is required to be sampled in three separate areas. Assuming only one type of asbestos is present in each school, 1,650 samples would be representative of the total schools. The information that schools have voluntarily supplied to EPA on their compliance status indicates that schools have more than one type of friable material. Depending on the laboratory, sample analysis costs range from $25.00 to $45.00 per sample. Based on this information the appropriation of $75,000.00 to ADEC may not be adequate to accomplish the analysis of samples from schools and public facilities in Alaska if commercial laboratories are utilized.

2) We support the dissemination of information pertaining to friable asbestos material. Both U. S. Department of Labor and EPA have information and videotapes available that pertain to identification and removal of friable asbestos. The U. S. Department of Health and Human Services has information available on the health effects resulting from asbestos exposure. There is a need for coordinating the distribution of the current and newly generated asbestos publications to the public. Again, the present Bill assigns this responsility to ADEC but the $75,000.00 allocation may be inadequate.

3) Section 18.28.050 (5) of Senate Bill 373 requires ADEC to establish quidelines for determining asbestos health hazards. These quidelines would be used by school officials to establish a sampling plan for friable asbestos. This overlaps with EPA requlations 40 CFR 763.105 and 763.107 on the inspection and sampling of friable material.

We support the correction of identified asbestos health hazards in schools and public facilities. Senate Bill 373 goes one step beyond the EPA school regulations by requiring schools that have the potential to release asbestos fibers, to eliminate friable asbestos material . (It is our understanding that elimination includes an action which would correct the asbestos hazard, but does not necessarily require removal).

We strongly support the appropriations to the Department of Community and Regional Affairs (CRA) for correcting identified asbestos hazards in schools and public facilities. The EPA has not been successful in acquiring an appropriation from Congress for schools requesting financial support for abatement of friable astestos.

If you should have any questions on our comments please contact Kathryn Pazera of my staff.

Sincerely,

Ronald A. Kreizenbeck, Director
Alaska Operations Office

cc: S. Hungerford ✓

Asbestos fibers temporarily halt work at Baranof

By CHRISTOPHER JARVIS
The Juneau Empire

Repair work at Juneau's historic Baranof Hotel was halted May 11 so state inspectors could be sure no hazardous amounts of asbestos fibers were floating in the air.

Work resumed last week after tests on air samples taken from the hotel revealed the amount of asbestos was far below minimum state safety standards, said state Department of Labor Safety Consultant Douglas Wahto.

In fact, Wahto said the amount of asbestos fiber floating in the air in Los Angeles probably far exceeds the amount found at the Baranof.

The Division of Labor Standards and Safety of the state Department of Labor was asked to evaluate the amount of asbestos by Wick Construction, the firm hired to repair damage caused in an April 27 fire that gutted most of the hotel's main floor.

Minimal safety levels for airborne asbestos fibers is .2 percent per square centimeter, Wahto said, and air samples taken from the basement of the hotel resulted in levels of .005 percent of asbestos, "which is absolutely nothing, minimal," Wahto said. The basement had the highest level of airborne fibers, Wahto said.

Asbestos in building materials was banned by the federal Environmental Protection Agency in 1978, said Richard Arab, deputy director of the Division of Occupational Safety and Health.

Construction materials made in part with asbestos is common in buildings constructed or remodeled prior to 1978, Arab said.

The Baranof work stoppage was "a precaution you have to take in any of these old buildings," Wahto said. Asbestos is frequently found when doing any renovation or demolition work in older buildings, Wahto said, and materials containing asbestos are either disposed of by following federal guidelines or are "encapsulated" using a sealer "that's indestructible, practically," Wahto said.

RESOLUTION No. 84 - 10:

SUBJECT: ASBESTOS ABATEMENT IN ALASKA SCHOOLS

WHEREAS, friable asbestos, similar to that which was discovered in schools in the Anchorage School District, exists in numerous other schools in school districts throughout the State; and

WHEREAS, an Asbestos Technical Panel, convened in Anchorage by the Anchorage School Board, reviewed thoroughly health hazards associated with asbestos in Anchorage schools; and, as a result, recommended that friable asbestos be removed from Anchorage schools as an unacceptable health hazard[1]; and

WHEREAS, many Alaskan school children in school districts other than Anchorage may be exposed to health hazards from asbestos that are preventable; therefore

BE IT RESOLVED, that the Anchorage Medical Society urges passage of Senate Bills 373 and 374; and

BE IT FURTHER RESOLVED, that the Anchorage Medical Society urges the Governor to form a special task force with representatives of Department of Health and Social Services, Department of Labor, Department of Education, Department of Transportation and Public Facilities, Department of Environmental Conservation, parents of school children, and teachers to implement an asbestos abatement program in all Alaskan schools in accordance with recognized standards for asbestos abatement[2]; and

BE IT FURTHER RESOLVED, that the Anchorage Medical Society urges implementation of an asbestos abatement program which will include the following tasks:

1. Implement and insure completion of a comprehensive survey to identify and categorize asbestos in all Alaskan schools.
2. Evaluate health hazards associated with any asbestos (friable asbestos and asbestos in other forms) discovered in the survey and make recommendations for appropriate medical surveillance of students, teachers and workers exposed to asbestos.
3. Insure notification of teachers, parents, and students of the presence of friable asbestos identified in Alaskan schools in accordance with guidelines established by the EPA.
4. Recommend a plan for removal of friable asbestos, where necessary, and develop appropriate bid specifications and guidelines so that school districts can be assured that asbestos will be removed according to established standards which protect workers, students, parents and teachers during the removal process as well as insure that asbestos is removed totally and is adequately disposed of in approved sites.
5. Increase awareness of the health hazards associated with asbestos and protect against future problems by making sure that asbestos containing materials are not used in new construction.

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1. Asbestos Technical Advisory Panel Recommendations, ASD Memorandum #534(82-83), Anchorage School District, Anchorage, Alaska, May 23, 1983.
2. Asbestos-Containing Materials in School Buildings: A Guidance Document, Part 1 and 2. U.S. EPA, Office of Toxic Substances, Washington, D.C., March 1979.

ASBESTOS

The clock is ticking in your schools, and inaction could prove to be devastating

By Kathleen McCormick

ALL TALK AND no action: That's the way the asbestos-in-schools game has been played in the past several years by the federal government and thousands of U.S. school systems. It's time—past time—to respond to the potentially fatal hazards of asbestos in our schools. The ante has been raised in recent months, and from the look of things, school boards that haven't complied yet with federal regulations concerning inspection, notification, and record keeping could be in for a rough time. And even if you *have* made the inspections, posted the required notices, and notified parents and staff of potential health risks in your schools, you still might be the target of a lawsuit should a student or staff member become ill or die because of an asbestos-related disease.

That's not exactly reassuring news, but you can take some steps to meet federal regulations and protect your students and staff. Prudent school leaders would do well to consider carefully some of the recent developments in medical research, federal enforcement, and legal actions. Read on:

The medical risks

As far back as the 1930s, manufacturers of asbestos knew the substance was a killer. But the American public first became aware of the hazard when the Environmental Protection Agency (E.P.A.) banned some uses of sprayed-on asbestos in 1973, after research concluded that thousands of shipyard workers who had handled the substance during World War II were dying (or had died) of asbestos-related diseases. Five years later, an award-winning article in this magazine broke the disconcerting news to school leaders that U.S. schoolchildren faced imminent danger from asbestos. In schools built between 1946 and 1973, tens of thousands of tons of asbestos products were used for fireproofing, soundproofing, and insulating ceilings, walls, pipes, and boilers. As friable (loose or flaking) asbestos materials age, they release tiny particles into the air; if enough particles are inhaled, they can cause cancer and a variety of respiratory ailments. And if these materials get wet (say, from a roof that leaks) or are disturbed (perhaps by maintenance workers who fix electrical wiring in the ceiling), countless particles are dispersed, presenting an even greater health hazard.

Kathleen McCormick is assistant editor of the JOURNAL.

The asbestos ante has been raised in recent months, and boards that don't respond could be in for trouble

What are the risks? Cancer, for starters: The most common form of asbestos-related cancer is lung cancer. Next is mesothelioma, a rare and fatal tumor of the membrane linings in the chest or abdominal cavities; its only known cause is asbestos. Exposure to the deadly mineral filaments released by asbestos also has been proved to cause cancers of the colon, rectum, stomach, esophagus, kidney, larynx, and pharynx. An associated disease is asbestosis, a scarring of the lungs that progressively robs the victim of breath and sometimes of life. The effects of asbestos are pervasive even among people who don't work directly with the stuff: Research has shown that among the immediate families of asbestos workers, 1 percent of the family members died from an asbestos-related cancer, and one-third were afflicted with asbestosis.

The number of airborne asbestos particles in your schools, of course, is considerably smaller than what asbestos workers once were exposed to on a daily basis. But that doesn't reduce the overall risk—nor does it absolve you from the responsibility of dealing with the problem. Dr. Edwin C. Holstein, clinical assistant professor at the Environmental Science Laboratories of Mount Sinai School of Medicine in New York, explains: "All scientific evidence suggests there is no safe dose of asbestos. Any exposure, no matter how small, will increase the risk of cancer." Dr. Holstein and his colleagues at Mt. Sinai, the preeminent U.S. institution for medical research on asbestos, have concluded the substance is a public health problem that must be remedied as soon as possible.

"For any one person, the risk is low," says Dr. Holstein. "But for a school system, sheer numbers tell you that you have a problem. It's like the half-full/half-empty glass of water," he notes. "The optimists say the health risks of asbestos are tiny; the pessimists—including public health authorities—know some people are going to die from exposure to asbestos."

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