

SCHOOL DISTRICT LIABILITY FOR INDOOR AIR QUALITY CONDITIONS

A REVIEW OF SELECTED LEGAL ISSUES

A Research Report by
The Environmental Law Institute



School District Liability for Indoor Air Quality Conditions

A Review of Selected Legal Issues

Prepared by the
Environmental Law Institute
August 2005

Acknowledgements

This report was prepared with support from the U.S. Environmental Protection Agency's Office of Radiation and Indoor Air, Indoor Environments Division, under Assistance Agreement #XA-83113601-0. The views expressed herein should not be attributed to EPA, nor should any official endorsement be inferred.

About ELI Publications—

ELI publishes Research Reports and briefs that present the analysis and conclusions of the policy studies ELI undertakes to improve environmental law and policy. In addition, ELI publishes several journals and reporters—including the *Environmental Law Reporter*, *The Environmental Forum*, and the *National Wetlands Newsletter*—and books, which contribute to education of the profession and disseminate diverse points of view and opinion to stimulate a robust and creative exchange of ideas. Those publications, which express opinions of the authors and not necessarily those of the Institute, its Board of Directors, or funding organizations, exemplify ELI's commitment to dialogue with all sectors. ELI welcomes suggestions for article and book topics and encourages the submission of draft manuscripts and book proposals.

School District Liability for Indoor Air Quality Conditions: A Review of Selected Legal Issues

Copyright © 2005 Environmental Law Institute®, Washington, D.C. All rights reserved.
ISBN No. 1-58576-094-3, ELI Project No. 0341-02

An electronic retrievable copy (PDF file) of this report may be obtained for no cost from the Environmental Law Institute Website www.eli.org, click on "ELI Store," then "Research Reports," then "Indoor Environments" to locate the file. [Note: ELI Terms of Use will apply and are available on site.]

(Environmental Law Institute®, The Environmental Forum®, and ELR® – The Environmental Law Reporter® are registered trademarks of the Environmental Law Institute.)

Table of Contents

Report Summary.....1

Analysis of Legal Issues

Part One: State Workers' Compensation Laws.....11
 I. Background.....11
 II. Key Elements in a Workers' Compensation Claim.....11
 III. Summary.....16

Part Two: Tort Law.....17
 I. Defenses to Tort Actions.....17
 II. Causes of Action: Negligence and Intentional Torts.....29

Part Three: Federal Disability Rights Laws.....41
 I. Education of Children with Disabilities.....42
 II. Non-discrimination in Employment.....54

REPORT SUMMARY

Over the past several years, the public has become aware of the ways in which poor indoor air quality can affect health, well being and productivity. Mold, though not the only significant indoor pollutant, is pervasive and has been a driver in the recent increase in media attention, governmental programs and private sector activity addressing indoor air quality (IAQ). Along with this increased attention has been a wave of litigation by parties seeking remedies for damage to health and property caused by poor indoor air quality. Although the lion's share of the litigation has involved claims against insurance companies, school districts have been sued as well. Many more schools districts are grappling with school facility problems that present the possibility of litigation. Consider the following:

Hardy Woods Elementary School, in the fast-growing suburbs of Arbor City, was built in 1974. Over a year ago, the principal began receiving complaints from parents whose children were having more frequent asthma attacks. Three other students who were otherwise healthy had been coming home for weeks with a variety of symptoms – runny noses, coughs, headaches, sinus infections, fatigue. At around the same time, two teachers at the school made complaints about the ventilation in the school and asked the facilities department to investigate a number of stained ceiling tiles in their classrooms. In response to the complaints, the school district hired a company to investigate the air quality at Hardy Woods. The company replaced the ceiling tiles and presented a report to the school stating that air testing revealed no contaminants outside the normal range.

Parent and teacher complaints continued during the school year. In fact, one student was pulled out of the school by her parents and taught at home. One teacher has missed numerous days on sick leave and has requested a transfer. Some parents asked the school to create an indoor air quality committee with community and staff members to identify solutions to the school's environmental problems. School officials informed them that situation was under control and that the district would be conducting regular inspections of the school to identify future problems.

Variations on this hypothetical scenario take place every year in school districts around the country. Often concerns over a school's indoor air quality continue for years. In some cases, the end result is a lawsuit on behalf of children or by teachers who are suffering from physical ailments that appear to be caused or exacerbated by poor indoor air quality in their school. While the wave of IAQ lawsuits may be receding somewhat, litigation continues to play a role in the resolution of indoor air quality problems.

Background

Studies of the environmental conditions in schools suggest the magnitude of the problem confronting school facilities officials. In a 1995 U.S. General Accounting Office survey of 10,000 schools, for example, approximately 27 percent of the schools reported unsatisfactory ventilation, and almost 22 percent reported unsatisfactory indoor air quality generally. U.S. General Accounting Office, America's Schools Report Differing Conditions 62 (1996), *available at* GAO/HEHS-96-103. These conditions are not only expensive to fix, but they may result in health problems for students and staff, as well as decreased productivity due to impaired learning, absences, and relocation of students during repairs. See U.S. EPA, Indoor Air Quality and Student Performance (2003), *available at* http://www.epa.gov/iaq/schools/images/iaq_and_student_performance.pdf.

There is a wide range of health effects associated with indoor biological and chemical contaminants and with building conditions such as poor ventilation and dampness. These include upper and lower respiratory disease and symptoms, headaches, skin problems and fatigue. See Office of the Under Sec'y, U.S. Dep't of Educ., A Summary of Scientific Findings on Adverse Effects of Indoor Environments on Students' Health, Academic Performance and Attendance app. 2 (2004), *available at* <http://www.iehinc.com/pdf/Effects%20on%20Students.pdf>; Inst. of Med. of the Nat'l Acad., Damp Spaces and Health 10 (2004). Individual pollutants such as radon and asbestos have been designated as known carcinogens by the federal government; EPA finds that radon contributes to over 20,000 deaths from lung cancer in the U.S. each year. See U.S. EPA, Pooling of North American Residential Radon Studies (2005) *available at* http://www.epa.gov/radon/images/radon_pooling_studies.pdf. The serious impacts of lead, particularly on young children, have been widely documented. See U.S. EPA, Lead in Paint, Dust and Soil: Basic Information, *available at* <http://www.epa.gov/lead/leadinfo.htm#health>. For a comprehensive review of the health effects of indoor pollutants, see Cal. Air Res. Bd., Indoor Air Pollution in California Executive Summary 2-9 (Draft 2005), *available at* <http://www.arb.ca.gov/research/indoor/ab1173/ab1173.htm>.

The health effects of a particular indoor environmental problem vary from person to person. Otherwise healthy people may develop symptoms, and children generally are more vulnerable to certain pollutants. See Minn. Dep't of Health, Healthy School Environments *at* <http://www.health.state.mn.us/divs/eh/schools/index.html> (last modified Feb. 4, 2005). IAQ problems may exacerbate health problems in people with suppressed immune systems or people who suffer from asthma or other respiratory impairments. See *id.*; Am. Lung Ass'n, Why IAQ is Important to Your School (2000), *at* <http://www.lungusa.org/site/apps/s/content.asp?c=dvLUK900E&b=34706&ct=67147>. This is particularly important, given the number of people who suffer from asthma in the U.S. According to a report published by the U.S. Centers for Disease Control and Prevention, an estimated 9 million children under 18 years old – or about 13% of the children in the U.S. – have had asthma diagnosed at some time in their lives. A. Dey & B. Bloom, CDC, Summary Health Statistics for U.S.

Children: National Health Interview Survey, 2003 (10 Vital Health Stat. 223, 2005), available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_223.pdf.

Over the past several years, governmental and non-governmental programs and activities have advanced significantly our understanding of indoor air contaminants and environmental conditions. Nevertheless, as recent federal government reports have noted, much research is needed to clarify the relationship between exposure to indoor pollutants and specific health outcomes. This research will undoubtedly affect the approaches to managing indoor environmental quality. As the science, policy and practice evolves, so too will the role of litigation in addressing these problems.

Purpose and Structure of the Report

The primary purpose of this report is to provide an overview of the central legal issues at the heart of current litigation involving IAQ in schools, as well as the ways in which courts have addressed those issues. The report describes the principal types of legal actions brought by students and employees against public school districts to address injuries related to school IAQ problems.

The report analyzes selected legal issues in IAQ-related claims brought against public school districts by parents or school staff in three areas of the law: (1) state workers' compensation schemes; (2) common law tort; and (3) federal disability rights/non-discrimination statutes. The report analyzes statutes and court decisions, but not administrative decisions, in these areas. This chapter includes a summary of the analysis undertaken in the report, while the following three chapters present the analysis for each of the three types of lawsuits covered. (Citations are omitted from the summary in this chapter and are provided throughout the legal analysis in the following three chapters.) In discussing these causes of action, the report focuses on selected legal issues that are particularly relevant to IAQ-related claims. For nearly all of the legal issues discussed here, application of individual state laws to the facts of the particular case is necessary in order to resolve the issue. While the report does not focus on a particular state, it provides the background for undertaking the state-specific analysis required in individual situations.

Other types of lawsuits that address school IAQ problems are not covered in this report. For example, the report does not discuss lawsuits involving building contractors or architects. Such lawsuits have been brought by both school districts and parents over the design, construction, repair, or maintenance of school facilities. Nor does the report include a discussion of individual state laws or constitutional provisions that may provide other causes of action particular to that state. Finally, it is important to keep in mind that there are myriad substantive and procedural legal issues that can affect the outcome of any lawsuit. One example of such an issue is whether a case may proceed as a class action. This report is not intended as a guide to litigation, and parties involved in or considering lawsuits should consult an attorney for legal advice.

In discussing legal actions against “school districts,” the report includes lawsuits that are brought against school districts, boards of education, school superintendents, and other public school entities. The facts of a particular case and the relevant law will determine which parties are named in a lawsuit and which parties may be sued. This report does not discuss considerations for filing suit against the various parties who are responsible for educational facilities at the local level, and the following chapters use the term “school district” to refer generally to those parties.

Summary of Legal Issues

Two of the principal causes of action in IAQ-related lawsuits against school districts are common law tort claims and claims based on federal laws establishing rights and remedies for disabled students and employees. Lawsuits are also filed under state workers’ compensation laws, seeking review of an administrative determination regarding compensation. An analysis of federal and state statutes and court decisions in these areas of the law suggests a number of obstacles as well as opportunities for using the law to address IAQ problems and resulting injuries to students and employees.

Students. For students who are injured as a result of school IAQ problems, common law tort claims may provide a means of obtaining monetary damages or other relief in certain circumstances. One potential obstacle to bringing a tort suit for damages is the possibility that the school district will be shielded from the lawsuit by the doctrine of sovereign immunity. The nature and scope of a school district’s immunity from suit are derived from state statutes and court decisions. The circumstances in which a school district may claim immunity vary considerably from state to state.

In some states, immunity is broad and school districts will likely be shielded from most IAQ-related tort lawsuits seeking monetary damages. Texas law, for example, establishes immunity for school districts except in cases involving automobile accidents. In most states, however, the inquiry is more complex. Most state laws set forth a variety of different, and sometimes overlapping, circumstances in which immunity is granted or waived (eliminated). Many states that waive immunity in some or most circumstances still retain immunity for “discretionary” functions, in contrast to purely “ministerial” tasks. Some states that establish governmental immunity provide an exception for certain cases involving injuries that result from building conditions. To determine how these types of statutory provisions apply to an IAQ-related case, it is necessary to examine the language of the particular statute. In all cases, interested parties need to consult both their laws, which provide the basic framework for making the sovereign immunity determination, as well as state court decisions that interpret how those laws are applied.

Even if sovereign immunity presents a barrier to obtaining monetary damages against a school district, a student might nonetheless be able to pursue a case for non-monetary relief. While there are limitations as to when injunctive relief is appropriate, some school IAQ cases that have been filed in recent years have sought injunctions ordering the school district to take certain actions –

e.g., to place children in a different school building, or to correct the IAQ problem. In some states, the laws governing sovereign immunity specifically do not limit actions for non-monetary relief.

In those states in which sovereign immunity does not preclude a lawsuit, plaintiffs face other challenges. Perhaps the most significant is proving that the school's indoor environmental conditions actually caused the student's injuries, a required element of any tort case. In IAQ-related cases, as in most "toxic tort" cases, causation is difficult to prove because the plaintiff must present sufficient scientific evidence of the relationship between the injury and the exposure to specific pollutants (*e.g.*, mold or volatile organic chemicals). Although much has been learned in recent years, there is still considerable scientific uncertainty regarding the precise relationships between exposure to mold or other indoor pollutants and specific health outcomes. An added challenge exists for plaintiffs with multiple chemical sensitivity, a diagnosis that is itself the subject of some medical uncertainty and disagreement.

The standards for acceptance of scientific evidence in toxic tort cases have received considerable scrutiny in federal and state courts in recent years. Nevertheless, while there have not been any reported court decisions discussing causation in school IAQ tort cases, there have been some high-profile cases involving housing and public buildings that have upheld the sufficiency of the causation evidence and resulted in significant monetary awards for the plaintiffs. While the reasoning in those cases may be applicable in the school context, the fate of any individual case will be determined largely by the facts of the case and the evidence introduced regarding the extent and nature of the environmental problems, the actions taken by the school district, and the injuries suffered by the student.

Outside of the tort realm, students whose health is impaired by indoor environmental conditions may have recourse under federal laws designed to ensure that disabled students receive appropriate educational services. The Individuals with Disabilities Education Act (IDEA) guarantees a "free appropriate public education" to disabled students and requires the provision of special education and related services to those children. In cases where indoor environmental conditions pose an obstacle to a student who has an impairment that requires special education services, the IDEA provides a possible vehicle for incorporating changes to the child's physical environment as part of the required services.

For children who are disabled but do not require special education services, two other federal laws may come into play. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 prohibit discrimination against disabled students in public education and other programs. Those laws also require that public schools ensure a free appropriate public education to disabled students. The laws have a somewhat broader definition of disability; students who do not require special education may still qualify for services under Section 504/ADA, provided that their impairment substantially limits them in breathing, walking, learning, or another major life activity.

Regardless of whether the school building has actually caused the student's health problems or the student comes into the building with a medical concern that is impacted by the indoor environment, the school district's responsibility is to determine to what extent, if any, the student qualifies as disabled under these federal laws and to respond accordingly.

One of the key issues in lawsuits under the IDEA, ADA and Section 504 is the type of remedy available to address a situation where a disabled student is impacted by indoor environmental conditions. All three laws envision a collaborative process among school officials, parents, and other interested parties to create a plan that includes appropriate services for the student. Through this process, and through formal administrative review of the results of the process, there is considerable opportunity to craft solutions to facility-specific barriers. Physical modifications to a classroom or other changes in facility practices, for example, might be included in a school district's plan to ensure a free appropriate education pursuant to the law.

Nonetheless, the law and legal doctrine in this area establish some limitations on what a court might be required to order in any particular case. For example, a court might not always require services or accommodations that enable placement in a disabled student's regular school; while such placement is preferred in the statutory scheme, in some circumstances a school district will have discretion to place a child in another school that can meet the child's needs. The extent to which a school district will be required to make changes in a particular school building is uncertain and will involve a case-by-case analysis.

Another limitation in remedies exists with respect to monetary damages. While reimbursement for certain expenses may be possible, federal courts disagree on whether monetary damages are available for injuries resulting from the failure to comply with these laws.

Employees. Some distinct considerations apply to lawsuits involving school staff whose health is affected by indoor environmental conditions in school facilities. Most notably, school employees may be covered by state workers' compensation laws. Those laws differ from state to state, but incorporate some common principles. They typically provide the exclusive mechanism for obtaining monetary compensation for workplace injuries, without regard to whether the employer was at fault. In exchange for this limited compensation, employees relinquish their right to bring a lawsuit against the employer for damages. Lawsuits involving workers' compensation claims and indoor air quality often raise questions of whether the employee's injury was in fact connected to the workplace to the extent required by the relevant state law in order to be covered by the program. In general, the clearer the connection between the injury and the increased exposure to specific contaminants at the school facility, the more likely a court is to find that the employee should receive compensation.

There are a limited number of situations in which a state workers' compensation scheme may not be the exclusive remedy for a school workplace injury. First, there may be cases in which an

employee's IAQ-related injury does not fall within the scope of the injuries covered by the state law. This determination requires examination of the terms of the particular state statute, as well as the facts of the case. Second, some state workers' compensation laws give the public employer and/or the employee the right to opt out of the system. Finally, most state laws include an exception to the general rule that workers' compensation is the exclusive remedy for compensating an employment-related injury. This exception covers cases where the employer intentionally caused the employee's injury. The scope of this exception – including what is required to prove intent – varies from state to state, as elaborated in state statutes and court decisions interpreting those laws.

Where an employee is not covered by workers' compensation, or where there is an exception to the rule of workers' compensation exclusivity, an employee might be able to bring a tort action against the employer to recover for workplace-related injuries. For this reason, a number of IAQ-related cases brought by school employees have included claims for *intentional* torts, which often are not barred by workers' compensation exclusivity. Beyond the question of whether workers' compensation is applicable, a case involving a school employee will raise the same key issues as arise in tort lawsuits brought by students – namely, whether the district is immune from suit and, if not, whether the plaintiff can meet his burden in proving that the school's indoor environmental conditions causes his injuries.

School employees, like students, are protected from discrimination on the basis of disability under the ADA and Section 504. These laws require that, in order to qualify for protection, an employee must establish that she is disabled within the meaning of the laws – that is, that her impairment substantially limits one or more major life activity. This requirement has presented an obstacle to applying the law in some cases involving indoor air quality problems, because it is generally not sufficient to show that the employee is limited only in her *specific workplace*. Thus, if a particular school building is the only environment in which the employee is substantially limited, a court will likely find that the ADA and Section 504 do not apply. On the other hand, if the employee demonstrates that her impairment substantially limits a major life activity (*e.g.*, breathing) outside of the workplace as well, the case may fall within the framework of the federal laws.

For employees who are disabled within the terms of the ADA or Section 504, the laws prohibit employers from discriminating and require that the employers provide "reasonable accommodation" for the disabled employee. There have been many court decisions interpreting what constitutes a reasonable accommodation. In the IAQ-context, three types of accommodations are likely to be raised: facility changes, job location changes, or changes in job duties.

With respect to the first category, a key question is whether and to what extent courts will require employers to make modifications to the workplace to address or correct an indoor environmental condition. Lawsuits typically claim that the accommodations proposed or carried out by the employer were not appropriate and that additional measures are both necessary and reasonable

under the law. There is no definitive standard for courts to determine the adequacy and necessity of accommodations proposed in a specific case. In a number of reported cases, though, courts have found that employers' actions to improve indoor air quality were sufficient to meet the requirement for reasonable accommodation. With respect to the second and third categories, an employee may be able to obtain a transfer to a new location or a new position, depending on a number of factors relating to the employee and the employer. These factors include whether a position is vacant and whether such a transfer is consistent with the employer's policies and practices.

Beyond the remedy of accommodation, the law is unsettled as to whether monetary damages are available as a remedy in cases involving public employers, though recent federal court decisions appear to have foreclosed this possibility against state employers under ADA Title I.

Litigation's Lesson: Prevention

Legal remedies exist for school students and staff whose health is affected by school IAQ problems, though relevant legal doctrines pose obstacles to bringing IAQ-related lawsuits. It is outside the scope of this report – and exceedingly difficult in any context – to accurately characterize the outcomes of school IAQ lawsuits that have been filed in court to date. This is mainly because very few cases result in a court order or jury verdict. Nearly all school IAQ lawsuits are ultimately settled before the court reaches a final decision. The reasons why cases are settled – and the terms of the settlement – are normally a matter of speculation, since most settlements are confidential. Reports of some recent settlements in cases involving tenants, homeowners and students indicate fairly substantial payments for personal injury damages.

While litigation is an avenue for resolving IAQ disputes, it is rarely the preferred course of action for the parties involved. Litigation imposes significant burdens on all sides in terms of time and resources, and can take a heavy emotional toll as well. The same is often true of pursuing formal administrative remedies, such as workers' compensation. Because the context for these disputes is the suffering of students and staff whose health has been impaired, the key to avoiding IAQ-related claims and lawsuits is avoiding the IAQ problem in the first place and addressing adequately any problems that do occur.

Prevention of IAQ problems is not a new concept, but it is one that raises ongoing policy considerations and practical challenges for school districts with limited budgets and competing educational priorities. Preventing IAQ problems requires the development of a management plan and assignment of the personnel and resources necessary to carry out the plan. Federal and state programs have created important educational and technical resources for school districts in this area. See, e.g., U.S. EPA, *Indoor Air Quality Tools for Schools (IAQ TFS) Program*, at <http://www.epa.gov/iaq/schools> (last updated June 1, 2005); Minn. Dep't of Health, *Indoor Air Quality Management Plan Development Package* (2002), at <http://www.health.state.mn.us/divs/eh/indoorair/schools/plan/index.html> (last updated Dec. 27,

2004). Guidance also exists for responding to IAQ problems once they arise. *See, e.g.*, Cal. Dep't of Health Servs., Mold in my School: What do I do? (2001), *available at* <http://www.cal-iaq.org//MoldinMySchool.pdf>; Minn. Dep't of Health, Investigating and Remediating Mold in Minnesota Public Schools *at* <http://www.health.state.mn.us/divs/eh/indoorair/schools/mold.html> (last updated Dec. 24, 2004).

Numerous school districts around the country – from large urban districts such as the Los Angeles Unified School District to small districts such as the Elk River (MN) Area School District – have responded to the challenge by putting in place programs to prevent and identify IAQ problems. U.S. EPA's *IAQ Tools for Schools Awards Program* provides incentives and public recognition to schools and school districts that are implementing effective IAQ management practices consistently, and many school districts have been recognized for outstanding achievement and leadership in improving indoor air quality. *See* U.S. EPA, *IAQ Tools for Schools Program Award Winners*, *at* <http://www.epa.gov/iaq/schools/iaqtfsawards.html> (last updated Mar. 18, 2005).

In addition to providing information and technical assistance, some states have enacted laws and regulations establishing requirements for addressing IAQ and other school environmental issues. *See generally* Env'tl. Law Inst., Database of State Indoor Air Quality Laws (2005), *available at* <http://www2.eli.org/research/iaqdatabases2004>. In Connecticut, for example, the state's school IAQ law requires school districts to adopt and implement an IAQ program that includes ongoing maintenance and facility reviews, and to report annually to the state on facility conditions and on actions taken to implement their IAQ program. Conn. Gen. Stat. Ann. § 10-220 (West, 2004). New York's education law and regulations require, among other things, the establishment of health and safety committees at the school district level consisting of representation from district officials, staff bargaining units and parents. N.Y. Educ. Law §§ 409-d, 409-e (McKinney 2004); N.Y. Comp. Codes R. & Regs. tit. 8, §§ 155.3--155.6 (2004). The effective use of such committees to identify potential IAQ problems and respond to IAQ-related complaints may help resolve disputes before they lead to the filing of lawsuits. For a discussion of state IAQ laws, *see* Env'tl. Law Inst., Healthier Schools: A Review of State Policies for Improving Indoor Air Quality (2002), *available at* <http://www2.eli.org/research/iaq.htm>.

The further development of state and local guidance and regulatory requirements is vital to clarifying school district responsibilities for preventing and remedying IAQ problems. Even in the absence of formal policies, however, technical information exists to enable school districts to implement comprehensive IAQ prevention and management practices. Such practices are critical not only to improving public health, but also to supporting educational achievement. In the absence of sound policies, programs and practices, lawsuits will continue to play a significant role in resolving indoor air quality problems and in shaping the legal landscape.

ANALYSIS OF LEGAL ISSUES

PART ONE: STATE WORKERS' COMPENSATION LAWS

I. Background

For teachers and other school employees who suffer injuries related to indoor air quality problems in school buildings, workers' compensation is a central avenue for obtaining a remedy. All 50 states have workers' compensation laws that set out a system for providing compensation to people with work-related injuries. See A. Larson, *Workers' Compensation Law*, § 2.08 (2004). Typically, state-level administrative commissions decide whether to award benefits to the employee, using rules of procedure and evidence that are more relaxed than in court cases. These administrative decision-makers have considerable discretion in weighing the evidence and making findings of fact. In reviewing administrative decisions awarding or denying benefits, a state court generally will be limited to determining whether the administrative findings of fact are supported by substantial evidence. See *id.* at §130.01.

Workers' compensation schemes arose in the early 1900s to address the inadequacies of the tort system for compensating injured workers. The fundamental premise underlying workers' compensation schemes is that injured workers receive limited benefits – *e.g.*, a portion of lost wages and medical expenses – regardless of whether the employer was at fault. In exchange, state laws typically provide that employers are not liable for damages in private lawsuits brought by employees. Thus, depending on the statute and the facts of the case, workers' compensation laws may be the principal – or only – legal recourse for school employees whose health is affected by poor indoor air quality. It is important to note, however, that in some states, the workers' compensation laws may exclude governmental employers such as school districts, or may give school districts the option of obtaining coverage. The question whether workers' compensation is the exclusive remedy for an injured worker, and the circumstances in which a tort remedy may be available, are discussed in Part Two.

II. Key Elements in a Workers' Compensation Claim

State workers' compensation laws are detailed, with numerous provisions governing how claims are processed and evaluated. Many of those provisions – how to file claims, the types of benefits provided, etc., – do not have special significance in IAQ cases, compared to cases involving other types of workplace injuries. This section discusses some of the key legal questions that arise in IAQ-related cases when determining whether a claimed injury falls within the state workers' compensation scheme. As discussed below, these legal issues may vary significantly, and be interpreted differently, from one state to another. Thus, similar IAQ-related claims for

compensation may have different outcomes depending on whether the claimant lives in Arkansas or California, New York or Florida.

Since workers' compensation schemes do not require proof that the employer was at fault, claims tend to focus on the nature of the employee's injury, rather than on the actions of school officials. There are two basic categories of injuries that are covered by workers' compensation laws: "occupational diseases" and "accidents." In either case, the central requirement for receiving benefits under most state laws is that the injury "arose out of and in the course of employment." See generally Larson, *supra*, chs. 3, 6. This general causation requirement, which the claimant is responsible for proving, means that the injury (1) must take place while the employee is performing his job at a place where the employee is expected to be ("in the course of"), and (2) must have a causal connection to the employment ("arising out of"). The latter requirement is subject to different interpretations from state to state, with some jurisdictions requiring that the injury be more directly connected to the employee's particular job. *Id.*

Thus, there are two main, often overlapping, inquiries in cases involving IAQ-related injuries; first, whether the injury is considered an occupational disease or accident, and second, whether the claimant has demonstrated a causal connection between the employment and the injury. The remainder of this chapter discusses considerations under state laws for answering these two questions.

A. Category of Injury: Occupational Disease Versus Accident

Occupational disease. State statutes define the concept of occupational disease differently, but a key question for IAQ cases is the nexus required between the employee's disease and the *nature* of the employment. Some state statutory definitions limit coverage to diseases that are characteristic of the specific occupation. See Larson, *supra*, § 52.03. Some laws may require that the incidence of the disease is significantly greater in the particular profession than in the general public – that is, that the disease is not one which people would be as likely to contract outside of their work environment. See *id.*; Modern Workers' Compensation §109:3 (2004). Thus, the fact that an employee's disease is caused by mold, poor ventilation, or another IAQ problem in the school facility may not be sufficient to show that the cause was related to the employee's particular *occupation* or work duties (*e.g.*, teaching).

For example, in Martin v. Fulton City Sch. Dist., 754 N.Y.S.2d 676 (N.Y. App. Div. 2002), a teacher claimed that she suffered from an occupational disease – chronic rhinosinusitis and upper airway irritation – which resulted from exposure to dust and mold in the newly constructed school building where she worked. A New York state court found that the teacher's disability was not an occupational disease because it "did not arise from 'some distinctive feature of her employment' as a teacher . . . but was instead the result of 'a specific condition peculiar to [her] place of work.'" *Id.* at 677 (citations omitted) (remanding for consideration of whether the injury could be considered

an accident). The same court had made a similar finding in an earlier case involving a reading teacher who claimed injury to her vocal cords due to continuous poor ventilation in the room where she taught. *In re Claim of Leventer*, 684 N.Y.S.2d 658 (N.Y. App. Div. 1999).

On the other hand, some state courts may interpret the term "occupational disease" more liberally. In *Crossett Sch. Dist. v. Gourley*, 899 S.W.2d 482 (Ark. Ct. App. 1995), the Arkansas Court of Appeals upheld the award of benefits to a teacher who suffered sinus difficulties as a result of mold that appeared in her classroom after the installation of a new HVAC system. The court stated that the test for finding an occupational disease was whether the nature of the employment exposes the worker to a greater risk of the disease than the risk experienced by the general public or workers in other employments." *Id.* at 483. The court further stated that there must be "a recognizable link between the nature of the job performed and an increased risk in contracting the . . . disease," and that this increased risk may be quantitative, as well as qualitative. *Id.* The court upheld the finding that although the teacher's development of sinus difficulties was not necessarily peculiar to the occupation of a teacher, the exposure was "certainly peculiar . . . in that claimant's . . . employment exposed her to a greater risk of that disease." *Id.* at 484.

Other cases reflect a broad concept of occupational disease as well. In *Googash v. Ohio Bureau of Workers' Comp.*, No. 20184, 20191, 2004 WL 2445236 (Ohio Ct. App. Oct 15, 2004), the state appellate court upheld a jury verdict in favor of a teacher who contracted various illnesses due to exposure to mold in her school building. The court noted that the key question in determining whether a disease is peculiar to the claimant's employment is "whether the claimant, in his own particular daily activities, was more apt than the general public to become so afflicted." *Id.* at *3. A Massachusetts court has held that the definition of "personal injury" in the state workers' compensation law is broad enough to include an injury such as multiple chemical sensitivity, because the statutory term "focuses on 'the nature of the claims, not the source of the injuries.'" *Niles-Robinson v. Brigham and Women's Hosp., Inc.*, No. CIV. A. 96-4260-D, 1997 WL 11735 at *3 (Mass. Super. 1997), *aff'd* by 711 N.E.2d 940 (Mass. App. Ct. 1999).

Accident. Even if an employee's asthma or other IAQ-related injury is determined not to be an occupational disease, the employee may still be able to obtain compensation if the injury is deemed an accident. Injuries due to accidents (arising out of and in the course of employment) are a common subject of workers' compensation claims. Many state laws contain separate definitions of the term accident, usually including the concept of a "sudden" and "unexpected" occurrence that produces an injury. See Larson, *supra*, § 37.20; see, e.g., Fla. Stat. § 440.02(1) (West 2004); Ala. Code § 25-5-1(7) (2004); Idaho Code § 72-102 (17) (Michie 2004). Because states have emphasized the unexpected or unintentional nature of the event, the line between accidents and other injuries may not be clear, and employees suffering from injuries due to cumulative exposures or traumas are potentially eligible for benefits based on the concept of a workplace accident. See Larson, *supra*, § 50.01.

Some courts have held that an employee who has suffered an IAQ-related injury may be eligible for compensation for an accidental injury, even where there is no qualifying occupational disease. In one case, a New York state court determined that the exacerbation of a worker's similar preexisting conditions by exposure to tainted air in the workplace may constitute a compensable accidental injury. *In re Claim of Taylor v. Niagara Mohawk Power Corp.*, 740 N.Y.S.2d 514, 515 (N.Y. App. Div. 2002). See also *Martin v. Fulton City Sch. Dist.*, 754 N.Y.S.2d at 677.

In an Arizona case, the state court found that although the employee's injury was not an occupational disease, it was a compensable accident. The court stated that an accident need not be the result of "sudden or external violence;" rather, an accident falls within the workers' compensation scheme when "either the external cause or resulting injury itself is unexpected." *Lorentzen v. Indus. Comm'n of Ariz.*, 790 P.2d 765, 767 (Ariz. Ct. App. 1990) (citations omitted). See also, *McCreary v. Indus. Comm'n of Ariz.*, 835 P.2d 469 (Ariz. Ct. App. 1992). In *Lorentzen*, the employee was a teacher who had a preexisting allergy to pesticides and who accepted her teaching position only after she was assured that she would not be exposed to pesticides. The court concluded that her subsequent exposure to pesticides and exacerbation of her condition was not foreseeable or expected. *Lorentzen* at 767. But see *Marks v. County of Tompkins*, 274 A.D. 2d 764 (N.Y. App. Div. 2000) (employee's multiple chemical sensitivity was not an accidental injury where condition developed gradually, there was no unusual workplace environmental condition assignable to an extraordinary event, and there were significant pre-existing medical conditions).

B. Causation

Regardless of whether an IAQ-related injury is characterized as an accident or a disease that is potentially covered under the workers' compensation law, employees still must prove that the injury was *in fact* caused by the employment. That is, the employee must demonstrate that the injury was causally connected to specific environmental conditions in the workplace. The standard of factual causation in workers' compensation cases is different from state to state, but the proof typically requires medical and other testimony to link the employment conditions to the injury. In at least one state, the workers' compensation statute describes the causation requirement explicitly: "An injury or disease caused by exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of the employment, unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee." Fla. Stat. Ann. § 440.02(1) (West 2004).

In cases where an employee has a pre-existing physical weakness or disease, most state schemes will allow compensation if the employee proves that the employment contributed to the risk or aggravated the injury. See *Larson, supra*, § 9.02. For example, in *McCreary v. Indus. Comm'n of Ariz.*, the court held that the employee's alleged chemical sensitivity was compensable where the

employee's preexisting allergies combined with exposure to chemicals from construction activities, provided that the work-related exposure contributed to the injury. 835 P.2d at 476.

Some state courts have found that causation requirements were satisfied and have upheld the award of benefits in cases where claimants suffered IAQ-related injuries in the school environment. For example, in Googash v. Ohio Bureau of Workers' Comp., the court refused to overturn the jury verdict in favor of a teacher whose school building contained mold, determining that the claimant had provided "sufficient evidence to establish a causal connection between her diseases and her employment." No. 20184, 20191, 2004 WL 2445236 at *3 (Ohio Ct. App. Oct 15, 2004). In a Pennsylvania case, a school secretary was awarded benefits after demonstrating that her injuries were "causally connected to her work" at the school. Gray v. Workman's Comp. Appeal Bd. (Pittsburgh Bd. of Educ.), 657 A.2d 77, 83 (Pa. Commonw. Ct. 1995). The state court in that case determined that the claimant's medical experts established unequivocally that her allergic thyroiditis was caused by exposure to chemicals from the industrial arts classrooms at her school. *Id.* at 82-83. *See also* Duhaime v. Ind. Sch. Dist. #709/Duluth (Mn. Workers' Compensation Court of Appeals, Aug. 30, 2002), <http://www.workerscomp.state.mn.us/2002/Duhaime-08-30-02.htm> (upheld award based on work-related allergic reaction, finding no requirement for identifying the exact substance in the work environment that triggered the reaction).

Other state court decisions illustrate the difficulty that claimants in school IAQ cases may face in proving causation. In Knapp v. Vestal Central Sch. Dist., 668 N.Y.S.2d 718 (N.Y. App. Div. 1998), the court upheld the administrative denial of benefits, finding that a school teacher had failed to establish a causal connection between her employment and her disability. The court held that "none of [the teacher's] witnesses could point to a particular chemical or toxin to which she was exposed during the course of her employment as a music teacher that triggered her multiple chemical sensitivity." *Id.* at 720. Similarly, in a recent North Carolina case, the state court upheld an administrative decision that there was insufficient evidence from which to find a causal connection between plaintiff's long term asthmatic condition and her employment. Smith v. Gold Kist, Inc., No. COA02-1031, 2003 WL 1701566 (N.C. Ct. App. Apr. 1, 2003). The court determined that there was insufficient evidence about "what, if any, exposure plaintiff may have had with dust, molds or formaldehyde while employed by defendant-employer, or evidence that such exposures, if any, aggravated her condition." *Id.* at *2. *See also* Nicholson v. Mohawk Valley Cmty. Coll., 711 N.Y.S.2d 542, 543 (N.Y. App. Div. 2000) (claimant's witnesses unable "to identify the specific allergen(s) allegedly present in, and exclusive to, claimant's work environment which caused her symptoms").

Because most school IAQ cases do not involve conditions that are unique or particular to the school environment, state courts may require claimants to demonstrate that exposure to particular contaminants (*e.g.*, mold, dust or other allergens) is significantly greater in the work environment than in the non-work environment. *See, e.g.*, Champion v. Beale, 833 S.W.2d 799, 800-801 (Ky. 1992) (upholding denial of benefits where gym teacher with preexisting allergies to common environmental substances failed to present conclusive proof comparing her exposure to irritants in

the school's new gym to those at her home or other places); Weekly v. Indus. Comm'n, 615 N.E.2d 59 (Ill. App. Ct. 1993) (upholding denial of benefits where employee with allergies and chemical sensitivities had symptoms prior to employment and did not present conclusive evidence that remodeling of workplace posed greater risk than that to which general public is exposed); Condradt v. Mt. Carmel Sch., 539 N.W.2d. 713 (Wis. Ct. App. 1995) (upholding administrative denial of benefits where claimant failed to show that her multiple chemical sensitivity was related to environmental conditions in the workplace).

III. Summary

While they vary by jurisdiction, state workers' compensation laws generally feature common principles and procedures, and school employees suffering from IAQ-related injuries have been awarded monetary benefits under these laws to compensate for a portion of their lost wages and medical expenses. Nonetheless, the success of an IAQ-related claim depends on the nuances of state law and on the facts of the case. In general, the clearer the connection between the injury and the increased exposure to specific contaminants at the school facility, the more likely it is that the employee will be awarded benefits. In situations where a school IAQ-related injury is determined to be one that is not within the scope of the state's workers' compensation scheme, employees may be able to pursue a private lawsuit for damages, as discussed in Part Two.

ANALYSIS OF LEGAL ISSUES

PART TWO: TORT LAWSUITS

This chapter discusses some of the central legal issues that arise in tort actions brought against school districts by teachers or on behalf of students, seeking compensation for injuries resulting from indoor air quality problems. A tort is a “civil wrong for which a remedy may be obtained, usually in the form of damages.” 74 Am. Jur. 2d Torts §1 (2004). Plaintiffs who file tort lawsuits allege that they have been harmed by these wrongs and seek relief for their injuries. Monetary damages, the principal type of relief awarded in tort actions, may include lost wages, medical expenses, pain and suffering, loss of consortium and punitive damages. *See generally*, Restatement (Second) of Torts §§ 901-917 (1965). In certain circumstances, a court may determine that injunctive relief is appropriate to require that the defendant cease its wrongful conduct or take affirmative actions. *See id.* §§ 933-943.

Tort lawsuits concerning mold and related IAQ problems involve some legal issues that are common to "toxic tort" lawsuits, as well as some issues that relate specifically to IAQ problems and to school facilities. This chapter is divided into two main sections. Section I addresses two principal defenses that could be raised to seek dismissal of an IAQ lawsuit before the merits of the claim are considered. Following discussion of these defenses, Section II reviews some of the key legal issues that arise when a court evaluates the merits of a school IAQ tort claim.

I. Defenses to Tort Actions

Statutory provisions and court decisions may establish defenses to tort actions involving school IAQ problems. Two such defenses are particularly likely to be raised in these cases, depending on the jurisdiction involved and facts of the case. In lawsuits brought by school staff, the defense of workers' compensation exclusivity poses a significant obstacle. In employee cases and in cases brought on behalf of children, the defense of sovereign immunity may protect a state or local government agency from liability in certain jurisdictions and in certain circumstances.

A. Workers' Compensation Exclusivity

1. Introduction

As noted in Part One, state workers' compensation laws were enacted in order to provide a statutory scheme for compensating workers who are injured during the course of their employment. Although they generally do not compensate employees to the full extent of their losses, workers' compensation systems were established to replace the private tort system as the mechanism for compensating workplace injuries, thereby creating an “underlying tension”

between the two systems. See Note, Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 Harv. L. Rev. 1641, 1642 (1983); Thomas A. Eaton & David B. Mustard, Report of the Governor's Workers' Compensation Review Commission, 38 Ga. L. Rev. 1241 (2004).

Most workers' compensation laws contain explicit provisions stating that employers participating in the system are not liable outside of the workers' compensation scheme for damages related to workplace injuries. On its face, this "exclusivity" doctrine would bar a school employee from bringing a tort suit against a participating school district to recover damages for an IAQ-related injury. There are, however, certain circumstances in which workers' compensation laws might not preclude private litigation. Three such circumstances are particularly relevant in the school IAQ context. The first is where the state workers' compensation scheme does not cover the school employee, either because the law excludes the employee, or the employee or employer has opted out of the workers' compensation system. The second is where the employee's injury falls outside the scope of the workers' compensation law. The third situation is where the injury falls within an "intentional tort" exception to workers' compensation exclusivity.

The following discussion provides a general overview of these exceptions to workers' compensation exclusivity, along with examples from specific cases decided by state courts. It is important to note that not all states recognize these exceptions. Whether or not any of these factors apply in a particular case depends on the state workers' compensation statute, court decisions interpreting the law, and the facts of the case. The question is typically raised when the defendant makes a motion for summary judgment, asking the court to rule in its favor based on the workers' compensation exclusivity doctrine.

2. Exceptions to Workers' Compensation Exclusivity

Employee not covered by workers' compensation. Although workers' compensation statutes vary from state to state, they are generally compulsory for most private employers with some exceptions. See 82 Am. Jur. 2d Workers' Compensation § 39 (2004); 1 Modern Workers Compensation § 101:1 (2004). Some statutes exempt certain types of employers, such as sole proprietors, or certain types of employees, such as farm laborers or baby-sitters. See Robert J. Nobile, Human Resources Guide § 4:25 (2004).

Similarly, most state workers' compensation schemes establish compulsory coverage for public employers as well. See generally, *id.*; Larson, *supra*, § 78.01. Some states, however, make coverage of most public employees optional. See, e.g., Del. Code Ann. tit. 19, § 2309 (2004); Tenn. Code Ann. § 50-6-106 (2004); Mass. Gen. Laws ch. 152, § 69 (West 2004). In addition, a small number of states cover public employees, but establish specific, limited exceptions to this rule. See, e.g., Idaho Code § 72:212(12) (Michie 2004) (workers' compensation is compulsory for all public employment except officials of athletic contests involving secondary schools); Ala. Code § 25-5-50 (2004) (not compulsory for municipalities with populations less than 2,000). Because state laws vary in their

coverage, it is necessary to analyze individual state laws and cases to determine whether school district employees are covered in a particular state. In general, where the workers' compensation scheme extends to public employment such as schools, teachers are considered covered employees. 82 Am. Jur. 2d Workers' Compensation § 159 (2004); Larson, *supra*, § 78.04. Even where teachers are covered by workers' compensation, however, it is possible that individuals hired as contract employees may not be covered. See, e.g., Alicia Fabbre, St. Charles East Teachers Can't Sue District Over Mold, Chicago Daily Herald, July 23, 2003, at 1 (court rules that lawsuit by contracted employees not barred by exclusivity doctrine, though teacher's tort suit is barred). *But see* N.J. Stat. Ann. § 34:15-3 (West 2004).

Just as some state laws make coverage optional for employers, state laws may also allow *workers* to opt-out of coverage under the employer's workers' compensation plan. See, e.g., 820 Ill. Comp. Stat. Ann. 305/2(c) (West 2004); Ky. Rev. Stat. Ann., § 342.395 (Michie 2004). If permitted by statute, opting out of the compensation scheme must be voluntary and the opt-out notice must be given prior to the injury. 82 Am. Jur. 2d Workers' Compensation § 40 (2004). Where employers or employees have opted out of the workers' compensation system, employees retain common law remedies to recover for injuries. See, e.g., Ariz. Rev. Stat. § 23-906 (2004) ("it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law.").

Injuries outside the scope of the workers' compensation scheme. In some cases, an employee whose specific injury falls outside the scope of the workers' compensation scheme may be able to pursue a private lawsuit against the employer to recover damages. Such cases are different from those in which employees have been denied workers' compensation because they failed to prove a particular element of their claim. Rather, where a particular type of injury is not *coverable* under the workers' compensation law, the case might be considered outside the workers' compensation scheme and the exclusivity provision inapplicable.

Along these lines, some state courts have found that an employee who does not have a possible remedy under the workers' compensation law should not be deprived of the right to seek a remedy under the common law or other statutory causes of action. For example, a Montana court stated that "the employer cannot receive the benefit of the exclusive remedy provision when the Act's definition of 'injury' precludes any possibility of recovery for the particular injury at issue." Stratemeyer v. Lincoln, 915 P.2d 175, 181 (Mont. 1996). Similarly, Pennsylvania courts have held that "there can be [tort] recovery for a disease which is not a disease for which compensation recovery can be held." Greer v. U.S. Steel Corp., 380 A.2d 1221 (Pa. 1977) (summary judgment denied where there was a factual question of whether disease was covered by workers' compensation act); see also Boniecke v. McGraw-Edison Co., 401 A.2d 345 (Pa. 1979). Some courts, however, have declined to extend this principle. A California court, interpreting the state's fairly stringent exclusivity provisions, determined that "there is no exception to the exclusive remedy rule

simply because an injury suffered on the job is not compensable under the [the] workers' compensation law." Lenk v. Total-Western, Inc., 108 Cal. Rptr. 2d 34, 43 (Cal. Ct. App. 2001).

Whether or not the nature of a particular injury removes it from the exclusive coverage provisions of a workers' compensation scheme depends on the particular state statute and the facts of the case. In states with fairly broad exclusivity provisions, courts may be more likely to view the injury – and employer liability – as falling within the scope of the workers' compensation scheme. *See, e.g.*, Cal. Lab. Code, § 3600, 3602 (2004); Livitsanos v. Superior Court, 7 Cal. Rptr. 2d 808 (Cal. 1992) (stating that exclusivity is not necessarily abrogated where there is a noncompensable injury, and noting potential exceptions to exclusivity where employer's conduct contravenes public policy or exceeds the inherent risks of the employment).

Nevertheless, courts have determined that specific injuries may fall outside the scope of the state scheme for a variety of reasons. For example, some courts have allowed tort claims for emotional distress or other non-physical injuries to proceed, either because they are not covered under workers' compensation or because they were independent from the underlying physical injury addressed by workers' compensation. *See, e.g.*, Stratemeyer, 915 P.2d at 180 (“mental” injuries not covered by workers' compensation scheme); Hinman v. Yakima Sch. Dist. No. 7, 850 P.2d 536 (Wash. Ct. App. 1993) (claim for damages for emotional distress not barred); *but see* Livitsanos, 7 Cal. Rptr. 2d at 816 (purely emotional injuries not outside the workers' compensation system). In a recent Oregon case, a tort action was allowed where employment was not the “major” contributing factor in the employee's injury, and thus the injury not covered under workers' compensation scheme. Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Or. 2001).

Intentional torts. Perhaps the most common exception to the exclusivity doctrine exists for intentional torts, the general category of personal injury claims that require proof of intent on the part of the defendant. One theory behind this exception is that an employer's intentional injury of an employee should not be considered part of the employment relationship. Although some states do not recognize the intentional tort exception, most workers' compensation laws do allow private lawsuits to recover damages in some circumstances where an employer intended to cause the workplace injury. *See generally*, James Lockhart, Cause of Action Against Employer for Intentional Exposure of Employee to Hazardous Condition in Workplace, in 7 Causes of Action Second Series § 197 (2004); Larson, *supra*, ch. 103.

The definition of what constitutes intentional conduct in a workplace injury case differs from state to state. Some state workers' compensation laws explicitly define the necessary elements for proving intentional injury. In other states, it is the courts that interpret a general statutory exception for intentional torts. In some states, the workers' compensation law is silent as to an intentional tort exception, but the state courts have interpreted the law's exclusivity provisions to include such an exception. *See, e.g.*, Suarez v. Dickmont Plastics Corp., 639 A.2d 507 (Conn. 1994). Thus, to determine whether the intentional tort exception applies in a workplace injury case, it is

necessary to analyze the particular state workers' compensation statute and court decisions interpreting that law.

In general, there are two alternate standards for showing that an injury was "intentional" in the workplace context: proof of actual intent to injure, or proof of the employer's substantial certainty that the injury would occur as a result of the employer's conduct. Many state workers' compensation laws only provide for employer tort liability in cases where the employer "actually" or "deliberately" intended to cause the worker's injury. *See, e.g.*, Md. Code Ann., Lab. & Empl. § 9-509 (2004); Or. Rev. Stat. § 656.156 (2004); Ariz. Rev. Stat. § 23-1022 (2004). Such laws establish a high level of proof that an employer intended to harm the employee, in order to overcome workers' compensation exclusivity.

Some states allow recovery in intentional tort cases that involve less than an actual intent to injure. This standard is articulated and interpreted differently from state to state, but it typically allows an employee to prove intent by showing that the employer had knowledge that injury was substantially certain to occur as a result of its actions. In a few states, the workers' compensation law itself includes this definition of intentional tort. *See, e.g.*, Fla. Stat. ch. 440.11(1)(b) (2004) (intent defined as situation where employer knew of danger that was virtually certain to result in injury and employee was not aware of danger); W. Va. Code § 23-4-2(c)(2)(i)(ii) (2004) (intent includes situations where employer knew that an unsafe working condition posed a risk of harm and allowed employees to be exposed to the condition nonetheless). In most cases, though, the courts have interpreted a statute's general intentional tort exception to include situations involving some type of constructive intent. *See, e.g.*, Suarez, 698 A.2d at 851 (employer "must have intended the act and have known that the injury was substantially certain to occur from the act"); Armstead v. Schwegmann Giant Super Markets, Inc., 618 So. 2d 1140 (La. Ct. App. 1993) (test is whether employer believed injury was "substantially certain to follow from his conduct").

The following recent cases involving IAQ-related workplace injuries illustrate different interpretations of "intentional" tort that may be applied depending on state statutes and case law.

Peaspanen v. Bd. of Educ. of Ashtabula Area City Sch. Dist., 669 N.E.2d 284 (Ohio Ct. App. 1995). In this Ohio case, the state court denied the school district's motion for summary judgment, finding that the plaintiff – the school librarian – had established a question of fact as to whether the school district knew that injuries were certain or substantially certain to result from its actions. The school district had remodeled the librarian's office using an industrial finish that required ample ventilation. Responding to the librarian's complaints that the fumes were causing respiratory problems, the district installed some ventilation ducts, but when the librarian's condition did not improve, it refused her request for a transfer to another building. To support her intentional tort claim, the librarian argued that the school district knew that the varnish that was used should only be applied in a well-ventilated area. The school district also disregarded the librarian's warning that

the insulation it was planning on installing with the ventilation fan would only aggravate her condition. *Id.* at 287-88.

Upsher v. Grosse Pointe Pub. Sch. Sys., 285 F.3d 448 (6th Cir. 2002). In this Michigan case, the court granted the school district's motion for summary judgment, finding that the plaintiffs (school custodians) had not established a question of fact as to whether the school district had "actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* at 456. The school had required the custodians to remove carpet from asbestos tiles, even though the school had been informed that such removal might disturb the asbestos. The school district was later cited for violations of federal environmental and labor laws in connection with the incident. The court determined that the state's intentional tort exception to workers' compensation exclusivity was not met, however, because there was no evidence that the school "*knew* this condition would cause injury and *refrained* from informing the plaintiffs." *Id.* at 455.

McClanahan v. State of Florida, 854 So. 2d 793 (Fla. Dist. Ct. App. 2003). In this Florida case the court granted the state's motion for summary judgment, finding that the plaintiffs (state employees) had failed to raise a question of fact as to whether the employer should have known that its conduct was substantially certain to cause injury. The case involved the employees' exposure to mold contamination in the recently built juvenile detention center where they worked. The court found that while the allegations might suggest that the state was negligent in overseeing construction and addressing the resulting problems, the facts could not support the conclusion that the agency's actions were substantially certain to result in injury or death. *Id.* at 796. Subsequently, the state amended its law to make the intent standard even stricter, adopting a "virtually certain" test. See 2003 Fla. Sess. Law Serv. 412 (West) (S.B. 50-A).

Jensen v. Amgen, Inc., 129 Cal. Rptr. 2d 899 (Cal. Ct. App. 2003). In California, the statutory exclusivity provision is very broad. Rather than providing an exception for intentional torts generally, the law establishes an exception for a specific tort – the employer's fraudulent concealment of the employee's injury. Cal. Labor Code § 3602(b)(2) (2004). In this case, the court found that a fraudulent concealment tort claim based on mold exposure was barred, since the employee herself knew of her symptoms before the employer did. An employer's intentional conduct will not necessarily abrogate the exclusivity provisions, provided that the conduct was within the scope of the employment relationship. See Livitsanos, 7 Cal. Rptr. 2d at 816; Vacanti v. State Comp. Ins. Fund, 24 Cal. 4th 800 (Cal., 2001).

Finally, states differ as to whether plaintiffs may pursue intentional tort claims in addition to workers' compensation claims, or whether employees must choose between workers' compensation and tort recovery. For example, in Arkansas, a court found that a teacher who was injured after exposure to mold could not bring an intentional tort lawsuit because she had already applied for and received workers' compensation benefits for her injuries. Gourley v. Crossett Pub. Schs., 968 S.W.2d 56 (Ark. 1998). See also, e.g., Boulware v. Mills, 362 S.E.2d 184 (S.C. Ct. App.

1987); Ky. Rev. Stat. Ann. § 342.610(4) (Michie 2004); Md. Code Ann. Lab. & Empl. § 9-509 (2004). Some courts have ruled that where an employee receives such “double recovery,” the tort damages must be offset by any workers’ compensation benefits received for the injury. Gagnard v. Baldrige, 612 So.2d 732 (La. 1993); Woodson v. Rowland, 407 S.E.2d 222, 233-4 (N.C. 1991). On a more procedural level, at least one state requires that its workers' compensation commission make the determination whether the injury was accidental or intentional before a court may decide the tort case. See Logan v. Sho-Me Power Elec. Co-op., 122 S.W.3d 670 (Mo. Ct. App. 2003).

B. Sovereign Immunity

1. Introduction

A state and its agents may be shielded from private lawsuits by the doctrine of sovereign immunity. Under the Eleventh Amendment of the United States Constitution, states may be protected from lawsuits alleging violations of federal law. States may also be protected from common law tort lawsuits under state sovereign immunity doctrine. In some jurisdictions and in some circumstances, this immunity may extend to local governmental entities, such as school districts. The immunity of local governmental entities is sometimes referred to as governmental immunity. See Clark Boardman Callaghan/Thompson Legal Publishing, Civil Actions Against State and Local Governments - Its Divisions, Agencies and Officers, § 1:1 (2005).

The courts of most states adopted sovereign immunity through their early judicial decisions, and most states retained fairly broad sovereign immunity for almost 200 years, until the 1960s, when courts began to rethink and revise their positions. See Matthew Bender & Co., Personal Injury Defense Techniques §37.03 (Mark A. Dombroff ed., 2004). Many courts abolished judge-made, absolute sovereign immunity in light of the growing role of government in modern society and the public policy argument that individuals should not bear the burden for the government's negligent acts. Subsequently, many state legislatures that had not already done so passed sovereign immunity statutes to assert and to clarify such protections. *Id.* Many legislatures also chose to broaden their citizens' rights by explicitly waiving (eliminating) immunity in at least some circumstances. Such waiver provisions vary considerably from state to state. In interpreting these statutes, some courts have found implied exceptions to immunity as well. *Id.*

Thus, the determination whether or not immunity is available to a school district as a defense in a specific IAQ-related tort lawsuit involves analysis of the nuances of state statutes and case law. While a state-by-state analysis is beyond the scope of this report, the remainder of this section provides an overview of these laws (often known as Tort Claims Acts or Immunity Acts) and points out some of the principal factors that affect whether school districts will be immune from suit.

It is important to bear in mind that the sovereign immunity established under state law might not apply if a lawsuit seeks only non-monetary relief. For example, a lawsuit that seeks a court order

requiring a school district to take specific actions to prevent future injury to plaintiffs may fall outside the scope of the immunity statute. *See, e.g.*, N.J. Stat. Ann. § 59:1-4 (West 2004) (tort claims act does not affect right to obtain relief other than damages against public entity); Wyo. Stat. Ann. § 1-39-116 (Michie 2004) (tort claims act does not prohibit proceedings for mandamus or injunction); 745 Ill. Comp. Stat. Ann., 10/2-101 (West 2004) (immunity act does not affect right to obtain relief other than damages against local public entity). *See also* City Council of Philadelphia v. Greene, 856 A.2d 217 (Pa. Commw. Ct. 2004) (state immunity protects Commonwealth against monetary liability for personal injury or property damage); Univ. of W. Va. Bd. of Tr. v. Graf, 516 S.E.2d 741 (W. Va. 1998) (discussing exceptions to sovereign immunity for certain actions seeking injunctions, declaratory relief or mandamus).

It is also important to note that, while this chapter discusses tort lawsuits, state sovereign immunity doctrines may also shield governmental agencies from lawsuits raising state statutory claims. In a recent case, a Texas court held that a state law requiring school districts to provide a safe workplace does not establish a private cause of action and does not override the state immunity law. Foster v. Denton Indep. Sch. Dist., 73 S.W.3d 454 (Tex. App. 2002).

2. General Grant or Waiver of Immunity

An initial inquiry regarding school district sovereign immunity is whether a state law's general grant or waiver of governmental immunity applies specifically to school districts. In some states, the immunity statute explicitly includes school districts. For example, the Colorado Governmental Immunity Act includes school districts under the definition of 'public entities' that are shielded generally by sovereign immunity. Colo. Rev. Stat. § 24-10-105 (2004). The Idaho Tort Claims Act waives immunity for negligent acts for political subdivisions, which the law defines to include school districts. Idaho Code §§ 6-902, 903 (Michie 2004). *See also* Kan. Stat. Ann. §§ 75-602, 603 (2004).

In other states, school districts are explicitly excluded from a general statutory waiver or grant of immunity. For example, the Texas Tort Claims establishes liability of government agencies, but excludes school districts from liability except in cases involving the operation of a motor vehicle. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (Vernon 2004). Similarly, the Virginia Tort Claims Act authorizes tort suits against government agencies, but specifically excludes school districts from coverage under the statute. Va. Code Ann. § 8.01-195.2 (Michie 2004). Both Texas and Virginia courts have determined that school districts retain immunity to suit based on the state constitution. *See* Croghan v. Fairfax County Sch. Bd., 59 Va. Cir. 120 (2002); Foster, 73 S.W.3d at 460 (takings claim may provide exception to immunity under state constitution). *See also* Ga. Code Ann. § 50-21-22 (2004).

Where the state immunity statute does not specifically mention whether school districts are covered, a court will analyze the statute to determine whether it applies to school districts. This

determination often turns on whether the school district is considered to be part of the state, part of the local government, or a mix of both. *See, e.g., Dermott Special Sch. Dist. v. Johnson*, 32 S.W.3d 477 (Ark. 2000) (constitutional grant of immunity to state not applicable to school districts). Courts may also draw on common law doctrine to determine the extent of a school district's sovereign immunity. *See, e.g., Heigl v. Bd. of Educ. of New Canaan*, 587 A.2d 423, 425-26 (Conn. 1991) (Connecticut school district's establishment of open campus policy immune from suit under common law doctrine of governmental immunity).

3. *Scope of the General Grant or Waiver of Immunity*

In general, laws that waive immunity establish governmental liability for "acts or omissions" of public entities and their employees, provided those actions are within the scope of employment or public duty. Such laws make the government potentially liable for the acts of its employees, to the extent that a private individual would be liable under similar circumstances, subject to any limitations provided in the state immunity law. *See e.g.,* N.J. Stat. Ann. § 59:2-2 (West 2004); Tenn. Code Ann. § 29-20-205 (2004); Cal. Gov't Code § 815, 815.2 (West 2004). Nevertheless, state laws differ in defining the circumstances in which governmental entities may or may not be sued.

To determine whether and to what extent a government entity is liable in a specific situation – for example, the liability of a school district for a particular injury related to poor indoor air quality – it may be necessary to analyze a number of provisions of the state immunity law that create exceptions to the general rule of immunity or liability. In some states, the approach is to create exceptions to governmental immunity; in others, the laws create exceptions to liability. While some laws contain very few exceptions, others establish numerous exceptions that require overlapping considerations. The remainder of this chapter describes some of the exceptions commonly found in state laws that may be particularly relevant to IAQ-related cases against schools districts. Ultimately, it is the state courts that interpret how these and other statutory provisions apply to the facts of a particular case. While there are numerous court decisions concerning the immunity of school districts, few of those reported cases concern liability for injuries resulting from IAQ problems in school facilities.

Discretionary functions. Most states that waive sovereign immunity in some or most circumstances still maintain immunity for "discretionary functions." This exception has been created mainly by legislation. Although many states have enacted such statutory language, the way these provisions are interpreted varies widely from state to state. Even in states that interpret the provisions similarly, their application will depend heavily on the facts of the particular case.

Many state laws do not define the term "discretionary," nor do they describe what type of behavior is immune from suit. State courts have examined the issue with varied results. A Nebraska court has held that "the purpose of the discretionary function exemption is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political

policy. . ." and that the exemption "extends only to basic policy decisions and not to the exercise of discretionary acts at an operational level." Norman v. Ogallala Pub. Sch. Dist., 609 N.W.2d 338 (Neb. 2000). In that case, a shop teacher's decisions regarding supervision and materials for a welding class were deemed operational and thus not shielded by immunity. In Oregon, to be protected, decisions must be policy decisions at the planning level, not routine ones. Therefore, in one case, a principal's decision regarding the general allocation of security guards was discretionary and immune, but his decision whether or not to intervene in a particular security instance was not. Mosley v. Portland Sch. Dist. No. 1J, 843 P.2d 415 (Or. 1992).

In contrast, some state courts have interpreted the exception for discretionary acts very broadly, as encompassing most actions that would be carried out within the scope of employment. In another case involving a school shop class, an Illinois court found that the teacher's decision to remove the safety shield on a saw was a discretionary act for which the district was immune from suit. Courson ex rel. Courson v. Danville Sch. Dist. No. 118, 775 N.E.2d 1022, 1023-27 (Ill. App. Ct. 2002). Alaska defines discretionary acts of the state as those that are policy based and not operational, but defines discretionary acts of a municipality or its officials as any requiring "personal deliberation, decision or judgment." Alaska Stat. § 09.65.070(d)(2) (Michie 2004). Therefore, a principal's decision to release a child to his mother was held to be discretionary and immune. Pauley v. Anchorage Sch. Dist., 31 P.3d 1284, 1285-86 (Alaska, 2001). In Wisconsin, acts by government officials are discretionary unless the action "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." Lodl v. Progressive N. Ins. Co., 646 N.W. 2d 314 (Wis. 2002) (citations omitted). *See also* Nejedlo v. School Dist. of Wausaukee, 2005 WL 1283929 (Wis. App., 2005) (finding that the school district was immune because its actions to remediate mold required judgment, and were thus discretionary.)

Building maintenance. Many states explicitly grant or waive immunity from lawsuits relating to the condition of buildings or property owned by the government. This factor is particularly relevant to school IAQ cases, which involve the condition of public buildings.

Many state laws create liability for situations involving the condition of government property. These laws vary somewhat from state to state, often providing that government entities can be held liable for "dangerous" or "defective" conditions. Colorado's immunity statute defines a dangerous condition as

a physical condition of a facility or the use thereof that constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity or public employee in constructing or maintaining such facility.

Colo. Rev. Stat. § 24-10-103, 105 (2004). *See also* Mich. Comp. Laws § 691.1406 (2004); N.J. Stat. Ann. § 59:4-2 (West 2004).

Using different language, several states create liability for negligent operation or maintenance of public buildings. For example, Maine's statute eliminates immunity for the operation and maintenance of public buildings, unless the action involved is a legislative, judicial or discretionary function. Me. Rev. Stat. Ann. tit. 14 §§ 8104-A, 8104-B (West 2004). Maine's courts have found this statutory waiver of immunity to apply to school buildings. Lightfoot v. Sch. Admin. Dist. No. 35, 816 A.2d 63 (Me. 2003). *See also* W. Va. Code § 29-12A-4(c)(4) (2004) (liability for injuries due to negligent acts within or on the grounds of public buildings); N.M. Stat. Ann. § 41-4-6 (Michie 2004) (liability for negligence in operating and maintaining a building); 840 Ill. Comp. Stat. § 10/3-102 (2004) (liability for injury relating to maintenance of property if the public entity had actual or constructive notice of unsafe condition).

A small number of states grant immunity from suit for certain actions associated with hazards or dangers in public buildings. In Nevada, the legislature has immunized itself from suit regarding failures to inspect or discover a hazard. The Nevada courts, however, have carved out an exception to this immunity for failure to act reasonably where there is actual knowledge of danger. Nardozzi v. Clark County Sch. Dist., 823 P.2d 285 (Nev. 1992). Ohio law excuses from liability discretionary decisions regarding the use or acquisition of equipment, supplies, materials or facilities. The Ohio Supreme Court held, however, that such decisions do not include the principal's decision on how to repair a school drinking fountain. Perkins v. Norwood City Schs., 707 N.E.2d 868 (Ohio 1999).

Willful, wanton or gross misconduct. Several states that grant immunity to the government provide an exception where the alleged acts of negligence have been willful, wanton, or gross. For example, South Carolina law provides an exception to its grant of governmental immunity in cases where a government employee's actions constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude; the law also allows suits when the government has exercised its duty with respect to students in a "grossly negligent" manner. S.C. Code Ann. § 15-78-60 (17), (25) (Law. Co-op. 2004). *See also* Del. Code Ann. tit. 10, §§ 4001, 4003 (2004) (sovereign immunity not granted for acts of "gross or wanton negligence").

On the other hand, some states specifically *shield* the government from suit in cases involving intentional torts. *See e.g.*, 42 Pa. Cons. Stat. § 8542(a) (2004) (waiver of school district immunity only for negligent acts, not for willful acts). In Ohio, this doctrine recently came into play in an intentional tort suit filed by a teacher who claimed injuries relating to mold exposure. In Thayer v. West Carrollton Bd. of Educ., No. 20063, 2004 WL 1662198 (Ohio Ct. App. July 23, 2004), the court stated that Ohio law establishes governmental liability where injuries are due to physical defects in a government building and employee negligence is involved. The court held, however, that intentional torts are not covered by this statutory exception to immunity, and that political subdivisions retain immunity for intentional torts. *Id.* at *2-3; *see also* Hubbard v. Canton City Sch.

Bd. of Educ., 780 N.E.2d 543 (Ohio, 2002) (school districts retain immunity for intentional infliction of emotional distress; immunity waived for cases involving negligence on grounds of public buildings). The establishment of sovereign immunity for intentional torts is particularly significant for school employees who may be precluded from filing negligence actions under the doctrine of workers' compensation immunity, as discussed earlier.

Damage caps. Several states limit the liability of government agencies by placing a cap on the dollar amount that may be recovered in a private lawsuit. For example, Rhode Island law caps the dollar amount on damages for cases involving government functions. R.I. Gen. Laws § 9-31-2 (2004). Oregon places a dollar limit on liability and precludes punitive damages. Or. Rev. Stat. § 30.270 (2004). Hawaii law disallows punitive damages, as well as interest before judgment. Haw. Rev. Stat. § 662-2 (2004). In Maryland, state law allows school boards to raise the defense of sovereign immunity in cases involving over \$100,000 in damages, or up to the limit of the board's insurance coverage. Md. Code Ann., Cts. & Jud. Proc. § 5-518 (2004). Florida law limits recovery on an individual claim to \$100,000 and caps the amount the government must pay on all claims arising out of a single incident to \$200,000, although the law does allow the legislature to approve payments above the statutory caps. Fla. Stat. ch. 768.28(5) (2004). Depending on the amount of the damage cap, these provisions could discourage some plaintiffs from pursuing a costly and lengthy lawsuit against a school district.

Liability insurance. A few states waive immunity only to the extent that the school district is covered by liability insurance. For example, under Arkansas' statute, school districts are generally entitled to immunity "except to the extent that they may be covered by liability insurance." Ark. Code Ann. § 21-9-301 (Michie 2004). In North Carolina, a school district is deemed to have waived immunity if it purchases liability insurance that covers the acts in question. N.C. Gen. Stat. § 115C-42 (2004). Minnesota requires school districts to procure liability insurance provided that the cost of the insurance does not exceed the amounts specified in the statute. Minn. Stat. § 466.12 (2004). In Florida, the law placing caps on damages allows the government to settle a suit for a higher amount, up to the limit of the agency's liability insurance. Fla. Stat. ch. 768.28(5) (2004).

Special procedural requirements. Some states have established procedural requirements that are specific to suits against the government. For example, state immunity statutes may establish a specific amount of time within which plaintiffs must serve notice of the lawsuit on the government. *See, e.g.*, S.D. Codified Laws § 3-21-2 (2004) (notice of injury required within 180 days of injury). State immunity laws may also establish an alternate forum for hearing claims against the government, giving the state more control over potential liability. In Kentucky, state law establishes a Board of Claims with primary and exclusive jurisdiction over certain negligence claims against governmental entities. Ky. Rev. Stat. Ann. § 44.073 (Banks-Baldwin 2004). In other states, such as Iowa, a plaintiff must file a tort action against the government with the State Appeals Board prior to bringing a claim in state court. Iowa Code §669.5 (2004). *See also* Conn. Gen. Stat. §§ 4-142, 4-160 (2004) (establishes Claims Officer, who may authorize suit against the state).

II. Causes of Action: Negligence and Intentional Torts

The preceding section discussed two potential legal barriers to bringing a private tort lawsuit against a school district – sovereign immunity and workers' compensation exclusivity. There are, however, many jurisdictions and a variety of circumstances in which these and other defenses will not preclude tort actions against school districts for IAQ-related injuries.

Indeed, tort lawsuits against school districts continue to be filed by school employees and students around the country. [See box, next page.] It is difficult to analyze the outcome of IAQ-related lawsuits, because most cases that survive motions for summary judgment result in settlement, rather than a jury verdict or court decision. Published court decisions determining liability are rare. Settlement agreements between parties typically include promises to keep the settlement details confidential, though some large settlements in IAQ-related tort cases have been reported. *See, e.g., Landlord Agrees to Pay \$550,000 to Tenant to Settle Calif. Case*, Courtroom News, Jan. 25, 2005; *Mold Personal Injury Case Settles 'On the Courthouse Steps'*, Courtroom News, Jan. 25, 2005 (\$748,000 settlement in Kansas City new home construction case); Tom Gooning, *School Settles in Mold Suit*, Bangor (Me) Daily News, June 15, 2004 (\$90,000 settlement in case involving student exposure to mold); Kevin Garcia, *Settlement Reached in Moldy Schools Case in Brownsville, Texas*, Brownsville Herald, Dec. 2, 2004 (school builders and designers settle with 600 plaintiffs for undisclosed amount).

This section describes the principal legal claims made in school IAQ-related tort cases and reviews court decisions that have been issued on the subject. The section briefly describes intentional torts, but focuses on negligence, the central claim in most lawsuits.

A. Intentional Torts

Intentional tort claims require a higher level of proof than negligence actions. As noted earlier, plaintiffs may be more likely to bring an intentional tort claim in situations where the state law establishes an intentional tort exception to sovereign immunity or workers' compensation exclusivity.

The preceding section discussed the legal standard for demonstrating intent in cases claiming an exception to workers' compensation exclusivity. In those cases, state workers' compensation statutes and related court decisions delineate the requirements for establishing intent. In cases that do not involve questions of workers' compensation exclusivity, plaintiffs must also demonstrate intent according to the common law standard defined by state courts. In general, an act is intentional if the defendant brings about harm either purposefully (desiring harm to occur) or knowingly (believing that harm is substantially certain to result). *See* Restatement (Second) of Torts § 8A (1965). Where a defendant intends the resulting harm, the rules of proximate causation (discussed below) may be more relaxed, so that the defendant may be liable for a wider range of

Sample School IAQ Lawsuits

IAQ-related tort lawsuits have been brought against school districts around the country. The following examples of cases that have been filed provide a sense of the types of situations giving rise to these lawsuits. While mold dominates the litigation, it is not the only indoor contaminant cited in recent cases.

Pennsylvania. Parents of a middle school student sued the school district for failing to provide and maintain a safe environment and for failing to make adequate repairs. The case alleges that mold contamination caused the student's respiratory and pulmonary problems. District Sued Over Mold, York Daily Record, Apr. 7, 2005.

Florida. In Broward County, more than 20 lawsuits have been filed against the school board by staff and students, with plaintiffs claiming that faulty design and construction of the schools led to mold growth. Steve Harrison, Mold Problems Spawn Lawsuits, The Miami Herald, Sept. 30, 2003. In Miami, a teachers' union sued the school district claiming that problems at several schools with mold, rodents, sewage gas and other indoor environmental contaminants have affected the health of students and teachers. The lawsuit seeks a court order requiring the school district to fix the problems. Nikki Waller, Lawsuit: 4 Schools Unhealthy, Miami Herald, June 22, 2004.

Louisiana. Parents of students at a Louisiana elementary school sued the school district for failing to prevent or correct the spread of mold that allegedly caused the students' health problems, including allergies and headaches, and led to the school's closure. Matthew Brown, Pupils Sickened by Mold, Suit Says; School District Accused of Ignoring Problem, Times-Picayune, June 24, 2004. In another Louisiana case, a public school secretary brought suit against the school district claiming that exposure to mold in ceiling tiles caused her to suffer injuries including gastritis, breathing difficulties and lung infection. Public School Employee Sues School Board, Courtroom News, Sept. 23, 2003.

New Jersey. Parents of more than two dozen students attending middle school in Washington Township, New Jersey, filed suit against the school board alleging that mold contamination exacerbated students' existing health problems. The lawsuit seeks compensatory and punitive damages, an injunction allowing the students to attend another school, medical monitoring of the students, and an order that the district create a committee to address IAQ problems in the school. Tim Zatzariny, Jr., Parents File Suit Over Mold, Courier-Post, Aug. 10, 2004.

North Carolina. Five families sued the school district claiming that the district has not dealt properly with long-standing mold problems at a number of schools. The lawsuits allege that the mold problems caused a variety of physical symptoms, including severe headaches, nausea, allergies and upper respiratory problems. The lawsuits seek monetary damages as well as an injunction requiring the provision of alternative educational opportunities until the problems are corrected. Sam Scott, Pender Schools Mold Lawsuits Expanded, Wilmington Star-News, Nov. 15, 2004; Two Class Actions Filed Against County Board of Education for Mold-Related Students' Injuries, Courtroom News, Nov. 19, 2002.

harms than in a comparable negligence case. See Restatement (Third) of Torts § 1, cmt. a. (Discussion Draft 1999).

Following is a description of two types of intentional torts that have been alleged in school IAQ cases.

Intentional infliction of emotional distress. This claim, which may also be referred to as the tort of “outrage,” addresses situations where a defendant “by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.” 86 C.J.S. Torts § 69 (2004). The basic elements of a claim for intentional infliction of emotional distress are: (1) defendant’s extreme and outrageous conduct; (2) defendant’s intentional or reckless conduct; (3) causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. See Restatement (Second) of Torts § 46 (1965); Gedrich v. Fairfax County Dep’t of Family Serv., 282 F.Supp.2d 439 (E.D. Va., 2003); Stratmeyer v. Engberg, 649 N.W.2d 921 (S.D. 2002) (citations omitted). This tort is generally reserved for extreme cases, and the standard has been described as requiring conduct “so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Restatement (Second) of Torts § 46, cmt. d (1965).

Whether a claim for intentional infliction of emotional distress may be maintained in a case involving IAQ-related injuries depends on the facts as interpreted within the framework of state court decisions. For example, in Acevedo v. Consolidated Edison Co. of N.Y., 596 N.Y.S.2d 68 (N.Y. App. Div. 1993), a New York court upheld the dismissal of plaintiff’s claim for intentional infliction of emotional distress, where plaintiffs alleged that their employer ordered them to clean up asbestos without warning of the dangers or providing protective equipment. On the other hand, in Deutsch v. Tillery, 833 S.W.2d 760 (Ark. 1992), an Arkansas court refused to dismiss a similar claim brought against a school district by a school employee and parents of school children. That case involved allegations that the school district knew of the presence of asbestos in the school, concealed that information, and failed to follow appropriate procedures to remove the asbestos. The court found that the allegations were sufficient to allow the claim of outrage to proceed to trial. See also Amica Mut. Ins. Co. v. Henderson, 2003 WL 21196261 (N.D. Ill. 2003) (summary judgment denied on emotional distress claim where plaintiff alleged contractors knew of mold but did not take proper remedial precautions or notify plaintiff of condition).

Intentional or Fraudulent Misrepresentation. Fraudulent misrepresentation is another claim that has been raised in school IAQ lawsuits. The tort has been described as follows: “One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.” Restatement (Second) of Torts § 525 (1965). In one case involving employee exposure to asbestos, a Tennessee court dismissed plaintiff’s fraudulent misrepresentation claim. Coltraine v. Fluor Daniel

Facility Serv. Co., No. 01A01-9309-CV-00419, 1994 WL 279964 (Tenn. Ct. App. 1994). According to the court, allegations that the employer said the asbestos was of low grade and of no danger were insufficient to support a finding of intent to cause a harmful result. Reported decisions involving misrepresentation and IAQ problems often involve parties to a real estate transaction. *See, e.g., Broida v. McGlumphy*, No. 20975, 2002 WL 31015563 (Ohio Ct. App. 2002); Gray v. Conrad, No. C4-96-1182, 1996 WL 665992 (Minn. Ct. App. 1996); Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995).

A related tort, fraudulent concealment, involves cases where the defendant conceals information or intentionally prevents the plaintiff from acquiring important information. *See* Restatement (Second) of Torts § 550 (1965). As noted earlier, the workers' compensation law of at least one state (California) establishes an exception to the exclusivity doctrine for cases involving fraudulent concealment, and the law spells out the required elements of such a claim. Cal. Lab. Code § 3602 (b)(2) (West 2004); *see also Jensen v. Amgen, Inc.*, 129 Cal. Rptr. 2d 899 (Cal. Ct. App. 2003) (dismissing fraudulent concealment claim in case involving alleged injuries due to exposure to mold in the workplace).

B. Negligence

Negligence is a common basis for tort claims. In contrast to intentional torts, negligence involves not an intention to cause harm, but rather a "lack of ordinary or due care, or more simply, careless conduct." 57A Am. Jur. 2d Negligence § 5 (2004). Put more formally, negligence is defined as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) Torts § 282 (1965). Common law negligence involves "the existence and violation of a legal duty to use care, proximately causing injury to another." *Id.*

Whether a defendant will be found negligent and liable for damages in a particular situation depends on the facts, as considered by a judge or jury. While there are few, if any, reported decisions on the question of negligence in a school IAQ case, there have been some recently published decisions in IAQ-related tort cases involving other types of buildings. For example, in New Haverford Partnership v. Stroot, 772 A.2d 792 (Del. 2001), two Delaware tenants brought suit against their landlord alleging he was negligent for failing to maintain safe and sanitary conditions in their apartments. The tenants claimed that exposure to mold in their apartments had caused increased severity of asthma, permanent allergies to Penicillium and other molds, permanent upper respiratory problems, and significant cognitive impairment in the areas of attention, concentration, memory and executive functions. The jury awarded one tenant over \$1 million dollars and the other \$40,000 for personal injuries and property damage, and the Delaware Supreme Court affirmed the jury awards. *Id.*

School districts that are not immune or otherwise shielded from private lawsuits are normally subject to the same legal standard for negligence as are private parties, although some states may have statutes that set forth the required elements for finding a governmental entity negligent. *See generally* 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §99 (2004). In general, a defendant will be held liable and the plaintiff entitled to damages in a negligence case if the plaintiff can prove four main elements: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach of the duty caused the plaintiff's injury; and (4) the plaintiff actually sustained an injury. 57 Am. Jur. Trials 395 § 11 (2004); 57A Am. Jur. 2d Negligence § 71 (2004); 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §99 (2004).

1. Duty

An initial inquiry in negligence cases is whether the relationship between the defendant and plaintiff imposes any legal duty on the defendant for the benefit of the plaintiff. 57A Am. Jur. 2d Negligence § 81 (2004). In school IAQ-related tort cases, the duty will typically exist both because the defendant (school district) and the plaintiff (student or employee) have an existing formal relationship, and because the plaintiffs are invited to be on premises that are controlled by the school district. This duty on the part of the school district has been characterized generally as the duty to make the premises "reasonably safe." *See* 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §511 (2004); *see also* Moore v. Greensburg High Sch., 773 N.E.2d 367, 370 (Ind. Ct. App., 2002) (school district owes highest duty to invitees – duty to exercise reasonable care for their protection while on the school premises); Richardson v. Corvallis Pub. Sch. Dist. No. 1, 950 P.2d 748 (Mont. 1997) (school district has duty "to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers").

The duty owed by a school district to its students and staff on school premises may be articulated in state statutes, particularly those that establish the framework for governmental liability or immunity from suit. For example, Illinois law requires that as a "local public entity," a school district "has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." 745 Ill. Comp. Stat. 10/3-102, 10/1-206 (2004). Michigan law provides that governmental agencies are liable "for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge." Mich. Comp. Laws § 691.1406 (2004).

This theory of premises liability is likely to be raised in negligence lawsuits involving school indoor air quality. For example, in a case filed in 2003, a secretary sued the school district where she worked, claiming that the failure to correct a defect that caused mold contamination in the ceiling tiles was a breach of the district's duty to maintain the premises in a safe condition. Plaintiff's Complaint, Bergeron v. Rapides Parish Bd. of Educ., No. 213,962 (La. Dist. Ct. 2003). *See also, e.g.,*

Plaintiff's Complaint, Dorsey v. Gary Cmty. Sch. Dist. of Gary, Ind., No. 45D03-0108-CP-1149 (Ind. Super. Ct. Lake County) (alleging district breached "common law duty as a building and land owner to protect" students and staff who were invitees on the premises).

2. Breach of Duty

The determination whether a defendant has *breached* its duty is governed by notions of "reasonable" or "ordinary" care and is dependent on the circumstances in the particular case. 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §99 (2004). A property owner can be held liable for violating the duty to protect invitees from physical harm caused by the condition of the property if the property owner "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm. . . (b) should expect that [those invited on the property] will not discover or realize the danger, or will fail to protect themselves against it and (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965). See also Ward v. Cmty Unit Sch. Dist. No. 220, 614 N.E.2d 102 (Ill. App. Ct. 1993); Gump v. Chartiers-Houston Sch. Dist., 558 A.2d 589 (Pa. Commw. Ct. 1989).

Some jurisdictions recognize the concept of negligence *per se*, which allows the plaintiff to prove both the duty and its breach by showing that the defendant violated a state or federal statute. 57 Am. Jur. Trials 395 § 11 (2004); see, e.g., Amick v. BM & KM, Inc., 275 F. Supp. 2d 1378 (N.D. Ga. 2003). In other jurisdictions, the violation of a statute only creates a *presumption* of negligence that the defendant would have to rebut in order to avoid liability. 57 Am. Jur. Trials 395 § 11 (2004); see, e.g., Bazzano v. Killington Country Vill., Inc., 830 A.2d 24 (Vt. 2003) (violation of safety statute creates *prima facie* case of negligence). A limited number of state laws and regulations establish IAQ-related requirements for schools that might be relevant in demonstrating that a school district has breached its duty of care in an IAQ-related tort suit. For example, New Jersey and California have adopted occupational health and safety regulations that require maintenance of HVAC systems, as well as certain general and specific maintenance practices related to mold and moisture. See N.J. Admin. Code tit. 12 § 100-13.1 (2004); Cal. Code Regs. tit. 8, §§ 5142-3, 3382 (2004). Connecticut and Massachusetts have laws or regulations requiring use of industry standards for protecting indoor air quality in school buildings under construction. See Conn. Gen. Stat. § 10-291(b)(3) (2004); Mass. Regs. Code tit. 603, § 38.03 (2004). For an overview of state IAQ laws, see Env'tl. Law Inst., Healthier Schools: A Review of State Policies for Improving Indoor Air Quality (2002), available at <http://www2.eli.org/research/iaq.htm>; Env'tl. Law Inst., Database of State Indoor Air Quality Laws (2005), available at <http://www2.eli.org/research/iaq.htm>.

Most state laws do not set specific standards for exposure to indoor air pollutants and do not prescribe specific building maintenance practices related to prevention or remediation of IAQ problems. Plaintiffs in IAQ tort cases may nonetheless be able to present evidence of industry guidelines or standards relating to building design, construction and maintenance to support their

argument that a defendant failed to exercise due care. While such standards may not be binding or dispositive, some courts have allowed plaintiffs to present evidence of widely-accepted industry standards to support their claim that defendant did not meet the duty of ordinary care. See generally 57A Am. Jur. 2d Negligence § 173 (2004); Daniel E. Feld, Annotation, Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association, 58 A.L.R.3d 148 (2004). For example, in a recent case involving an injury on school playground equipment, the Supreme Court of South Carolina held that industry standards for playground equipment safety could be considered in determining the school district's standard of care regarding its existing playground equipment. Elledge v. Richland/Lexington Sch. Dist. Five, 573 S.E.2d 789 (S.C. 2002) (CPSC and ASTM standards).

In addition to demonstrating that the defendant's conduct constituted a breach of its duty of care, the plaintiff must prove that the conduct caused her injuries – a more difficult showing in most IAQ-related tort cases.

3. Causation

In general, a defendant will only be liable if its conduct was a "proximate" cause of the plaintiff's injuries. The concept of proximate causation is not precise. One formal definition is the "cause which, in natural and continuous sequence, unbroken by an efficient, intervening cause, produces the injury, and without which the result would not have occurred." 57A Am. Jur. 2d Negligence § 411 (2004). Proximate causation is sometimes described as encompassing two separate concepts – legal and factual causation. Factual causation emphasizes the notion that defendant's conduct need not be the only cause of the plaintiff's injury, but it must be a "but for" cause. That is, but for the defendant's conduct, the plaintiff would not have suffered her injuries. See Restatement (Third) of Torts: Liab. for Physical Harm, § 26 (Tentative Draft Legal 2004). Legal causation requires proof that defendant's conduct "is a *substantial* factor in bringing about the harm. . . ." Restatement (Second) of Torts § 431 (1965) (emphasis added). Ultimately, determining proximate cause involves a basic fairness analysis. It is the line that the law draws so as not to impose legal liability on someone whose conduct is too far removed from the plaintiff's injury.

Plaintiffs in toxic tort cases present evidence of both "general" and "specific" causation. These are overlapping concepts. In the IAQ context, this means proving both that the indoor environmental conditions or contaminants in the building *could* produce the type of health effects alleged (general causation), and that plaintiffs *were in fact* exposed to those contaminants and suffered injuries as a result (specific causation). See generally, Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256 (2nd Cir. 2002); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 714-15 (Tex. 1997); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988).

As in many types of toxic tort lawsuits, the burden of proving causation poses a considerable challenge for plaintiffs in school IAQ cases. A plaintiff must present scientific evidence of a causal connection between the injuries suffered and the IAQ contaminants at the specific levels to which plaintiff was exposed. *See generally*, J. Hayward, The Same Mold Story? What Toxic Mold is Teaching Us About Causation in Toxic Tort Litigation, 83 N.C. L. Rev. 518 (2005); S. Henning & D. Berman, A Mold Claim Primer: Microbial Contamination Issues, 33 ABA Brief 22 (2003). *See also* Restatement (Third) of Torts § 28 cmt. c (Tentative Draft No. 3 2004) (discussing causation in toxic torts). While much progress has been made in understanding the relationship between IAQ contaminants and health, there are still uncertainties. *See, e.g.*, Inst. of Med. of the Nat'l Acad., Damp Spaces and Health 10 (2004) (discussing the state of scientific evidence of a causal relationship between exposure to mold and a variety of health outcomes). As stated in a recent report prepared for the federal government: "Sufficient information is not yet available to set health protective *exposure* standards for most measurable indoor contaminants in schools or other nonindustrial settings." Office of the Under Sec'y, U.S. Dep't of Educ., A Summary of Scientific Findings on Adverse Effects of Indoor Environments on Students' Health, Academic Performance and Attendance 3 (2004), *available at* <http://www.iehinc.com/pdf/Effects%20on%20Students.pdf>. The report goes on to note that "[a]t present, evaluation of good IEQ is based not on specific indoor exposure limits . . . but on good *practices* of design, maintenance and operation of buildings that are considered to provide conditions of acceptable IEQ." *Id.* at 4.

In individual cases, the nature of IAQ-related symptoms and illnesses makes proof of causation particularly challenging. Exposure to indoor air pollutants may produce a broad range of conditions that are not unique to these exposures – *e.g.*, coughs, eye irritation, headaches, asthma episodes, allergic reactions, lethargy, shortness of breath, itching eyes, nausea, dizziness, and airborne infectious diseases. Univ. of Minn., Dep't of Env'tl. Health & Safety, School Indoor Air Quality Questions § 1.3 (1997), *at* <http://www.dehs.umn.edu/iaq/school/quest13.html#1.3.6>; *see also* U.S. EPA, *et al.*, Indoor Air Pollution: An Introduction for Health Professionals (1994) *available at* <http://www.epa.gov/iaq/pubs/hpguide.html>. Moreover, exposure to indoor pollutants may produce very different consequences for different people – some people may suffer significant effects while others may not be affected. *Id.* In addition, the causation issue may be further complicated by the existence of a variety of contaminants in the school environments.

IAQ-related tort cases involve expert testimony to establish causation, and courts vary in how they evaluate and weigh this testimony. Some states use the *Frye* test, which requires that the evidence to be presented by the expert must have gained "general acceptance" in the field. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The federal courts and many state courts use the *Daubert* test, which requires that the evidence be empirically tested, subject to peer review, have an acceptable rate of error, and be generally accepted in the scientific community. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-96 (1993). For a more detailed discussion of these evidentiary standards, see J. Eggen, Toxic Torts, Causation, and Scientific Evidence After Daubert,

55 U. Pitt. L. Rev. 889 (1994), and N. Miltonberg & A. Roisman, “Two Strikes and You’re Out!”: How to Prevail in Daubert Challenges, 32 Env. Law Rptr. 10980 (2002).

Despite the difficulties in proving causation, there have been some high-profile mold cases involving housing and public buildings, in which the courts have upheld damages awards and determined that plaintiffs met their evidentiary burden. For example, in Mondelli v. Kendel Homes Corp., 631 N.W.2d 846, 853 (Neb. 2001), the trial court had granted a directed verdict for the defendant home builder on the ground that the plaintiffs had not proven that the mold in their home – the result of defendants’ negligence – caused their injuries. The trial court had excluded the testimony from plaintiff’s environmental toxicologist, finding that her testimony would not have the general acceptance of the scientific community required by the *Frye* test given the lack of standards for sampling mold spores or acceptable levels of mold in residences. *Id.* at 854. The Supreme Court of Nebraska reversed this decision, finding that the admissibility of an expert’s testimony depends on whether the principle on which the opinion is based is generally accepted within the relevant scientific community. Here, the court found that the literature, on which the expert had based her opinion, showed “the scientific community has generally accepted the principle that a connection exists between the presence of mold and health.” *Id.* at 856.

In another case, the defendant landlord argued that the trial court should not have admitted expert testimony that showed that the mold in the plaintiffs’ apartments had caused their injuries. New Haverford Partnership v. Stroot, 772 A.2d 792 (Del. 2001). The Supreme Court of Delaware affirmed the trial court’s decision to allow the testimony, finding that the methodology used by the expert was sufficiently reliable for purposes of the *Daubert* test and that the thoroughness of the expert’s air quality testing bears only upon the weight of the testimony, not its admissibility. *Id.* at 800. The defendant also challenged the admissibility of testimony by the plaintiff’s doctor, claiming that the doctor had not ruled out the possibility that plaintiff’s injuries were caused by something other than the mold. The court ruled that the doctor had followed “scientifically accepted procedure” in diagnosing that plaintiff’s health problems had been caused by her extended exposure to the mold in her apartment. *Id.* See also Centex-Rooney Constr. Co. v. Martin County, Fla., 706 So. 2d 20, 25 (Fla. Dist. Ct. App. 1998) (upholding damages award for county in courthouse construction case, noting that “several experts attested to the accepted scientific principle linking exposure to these . . . molds with health hazards”); Caldwell v. Curioni, 125 S.W.3d 784, 793 (Tex. App. 2004) (“the lack of any established [mold] standards does not confirm that the levels of mold present were not dangerous”).

4. Injury

Lastly, plaintiffs must be able to prove their injuries. This is generally accomplished by submitting medical records and testimony. There is a maxim in the law that the defendant takes the plaintiff as he finds him – that is, the negligent defendant is liable for all of the injuries sustained by the

plaintiff even if another person in the plaintiff's position would not have been injured to the same extent. *See, e.g., Maurer v. United States*, 668 F.2d 98, 100 (2nd Cir. 1981); *Jordan vs. Atchison, Topeka and Santa Fe Ry. Co.*, 934 F.2d 225, 228-229 (9th Cir. 1991). This legal principle might be especially relevant in cases involving exposure to mold because some people are more susceptible to its effects than others. Additionally, a child may suffer greater injuries as a result of exposure to indoor contaminants than an adult, but the defendant nonetheless would be potentially liable for the child's injuries.

C. Other Related Claims

Lawsuits alleging that the defendant was negligent may include the following related claims, either in addition to, or in lieu of, a simple negligence claim.

Negligent infliction of emotional distress. A plaintiff who has proven that defendant's negligence caused his physical injuries may be able to seek additional damages for the mental anguish caused by those injuries and any physical manifestations of the mental anguish. 57 Am. Jur. Trials 395 § 12 (2004). A court might allow a claim for negligent infliction of emotional distress when the plaintiff has been exposed to a hazardous substance and fears it will cause future illness. *Id.*

Wrongful death. Historically, the common law did not provide a remedy for the family of a person who had died as a result of a negligent act. *See generally* 22A Am. Jur. 2d Death § 1 (2004). Over time the states corrected this gap in the law by passing statutes that allow the surviving family members to bring a wrongful death suit against a defendant. 22A Am. Jur. 2d Death § 4 (2004).

Nuisance. Nuisance is a broad concept that refers generally to actions or conditions on land that threaten life, health, or the reasonable use of property. *See generally* 58 Am. Jur. 2d Nuisances § 1 (2004). Nuisance can be based on negligent conduct or intentional conduct. Restatement (Second) of Torts § 822 (1965). Nevertheless, "[a] claim of nuisance is more than a claim of negligence . . . and negligent acts do not, in themselves, constitute a nuisance." 58 Am. Jur. 2d Nuisances § 8 (2004) (references omitted). Typical nuisance claims address conditions on property that are continuous and ongoing, and that by their nature may cause harm to others. *City of Bowman v. Gunnells*, 256 S.E.2d 782 (Ga. 1979); *Elliot v. City of Waterbury*, 715 A.2d 27 (Conn. 1998).

Nuisances may be public or private. The difference is not simply the number of people affected, but rather the nature of the harm. Public nuisances affect rights that are "common to the general public," whereas private nuisances typically involve the "invasion of another's interest in the private use and enjoyment of [his] land." Restatement (Second) of Torts §§ 821B, 821D (1965); 58 Am. Jur. 2d Nuisances §§ 31, 43 (2004). Government agencies may be empowered to require abatement of public nuisances. Individuals can bring tort actions to recover for private nuisances,

and they may also be able to recover for public nuisances if they suffer an injury different from that which the public at large suffers due to the same condition. Restatement (Second) of Torts § 821B, cmt. H (1965). *See, e.g., Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93 (Fla. Dist. Ct. App. 1990) (public nuisance not established where employees alleged exposure to toxic substances in workplace).

The concept of nuisance is not susceptible of easy definition. State courts vary in their interpretation of the doctrine, and individual state statutes may include definitions of nuisance. *See* 58 Am. Jur. 2d Nuisances § 59 (2004). Some states recognize an exception to the doctrine of sovereign immunity for the creation or maintenance of a nuisance. *See generally* 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability §§ 12, 497 (2004). While most cases involving IAQ-related injuries in schools would not fall squarely within common law nuisance doctrine, the doctrine may be relevant in some cases, and nuisance claims have indeed been included in cases filed against schools.

ANALYSIS OF LEGAL ISSUES

PART THREE: FEDERAL DISABILITY RIGHTS LAWS

When poor indoor air quality in a school facility has a negative impact on students or school staff who suffer from disabilities, certain federal laws may come into play. In particular, there are two types of federal laws that have given rise to litigation in these circumstances. The first area is special education law – specifically the federal Individuals with Disabilities Education Act, which establishes state and local responsibilities for ensuring that all children receive a “free appropriate public education.” The second area is non-discrimination law. Two federal laws – the Americans with Disabilities Act (ADA) and the Rehabilitation Act – prohibit discrimination against disabled individuals and establish affirmative requirements for ensuring that public facilities such as schools are accessible to those individuals.

All three of these federal laws are potentially applicable in cases involving environmental conditions that pose a barrier to a student’s education. School staff who are disabled within the terms of the federal non-discrimination laws may bring cases under those statutes. Because student and employee claims raise different legal issues and reflect different factual circumstances, this chapter is divided into two sections. The first discusses how the laws apply to cases involving students, and the second reviews employee claims under the laws.

There is a wide variety of legal issues that may arise in cases brought under each of these federal laws. This chapter does not purport to provide a guide to the many procedural and substantive issues that must be considered by those involved in litigation. Rather, the following sections focus on certain legal issues that are particularly relevant to cases involving the effects of indoor environmental conditions on disabled students or school employees. Moreover, this report only looks at the end of the process – that is, the point at which cases reach the courts. All three of the federal laws discussed here provide a framework that emphasizes collaborative efforts among students, parents, teachers, and school officials to ensure that disabled students and staff are not subject to discrimination and to develop appropriate remedies to meet the needs of individuals with disabilities. This chapter does not discuss the many situations that are resolved prior to formal administrative dispute resolution proceedings, nor does it review the large body of administrative case law.

I. Education of Children with Disabilities

A. *Individuals with Disabilities Education Act (IDEA)*

1. *Introduction*

The IDEA is a federal law that requires public schools to make available to all eligible children with disabilities a “free appropriate public education” (FAPE). 20 U.S.C. § 1400 *et seq.* (2004). The central mechanism for ensuring a FAPE is the development of an appropriate Individualized Education Plan (IEP) for each eligible child. The IEP details the special education and related services that must be provided to meet the needs of the student. 20 U.S.C. § 1414(d)(1) (2004). The IDEA provides for federal funding to state and local education agencies to assist them in making the required special education and related services available. Each state education agency is responsible for administering the IDEA within the state and distributing the funds for special education programs. 20 U.S.C. §§ 1412, 1413 (2004).

Under the IDEA, states are required to identify, locate, and evaluate all children with disabilities residing in the state. 20 U.S.C. § 1412(a)(3)(A) (2004). If a child is determined to be eligible, a team is assembled – including parents, teachers, school officials, and others – to develop the IEP. 20 U.S.C. § 1414(d)(1)(B) (2004); *see generally* U.S. Dep’t of Educ., My Child’s Special Needs: A Guide to the Individualized Education Program (2000), *available at* <http://www.ed.gov/parents/needs/speced/iepguide/index.html>.

Children who suffer from asthma or other illnesses that are affected by indoor environmental conditions may be entitled to services under the IDEA. Two key legal issues in such cases are whether the student is eligible for services under the IDEA, and what remedies exist if a parent disagrees with the program or placement offered to the eligible student. The answers to these related questions depend on how the legal doctrines are applied to the facts of the particular case. This report does not review state laws and regulations implementing the IDEA, however those state policies must also be considered in individual cases. The remainder of this section describes how the IDEA addresses eligibility and remedies in cases involving IAQ-related illnesses and facility problems.

2. *Eligibility*

The IDEA covers children who are evaluated and identified as having a disability and, due to that disability, require special education and related services. 20 U.S.C. § 1401 (3)(A) (2004). Included in the 13 categories of disability is “other health impairments.” *Id.* According to federal regulations, “other health impairments” means that a child has “limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that ... (i)s due to chronic or acute health problems . . . [and]

adversely affects a child's educational performance." 34 C.F.R. § 300.7(c)(9) (2004). Asthma is listed as one example of a chronic or acute health problem that may be covered. *Id.*

A child who suffers from asthma or another chronic or acute illness may thus be covered under the IDEA *if* the illness affects the child's educational performance and the child needs special education services as a result. Special education services are defined to include "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including . . . instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . ." 20 U.S.C. § 1401(25) (2004).

Children with asthma, multiple chemical sensitivity, or other impairments affected by indoor environmental conditions may require both special education and related services. In the case Rose v. Yeaw, 214 F.3d 206, 208 (1st Cir. 2000), the school district developed an IEP for an asthmatic student that included home tutoring for asthma-related absences, as well as the relocation of the student's classes to a part of the school building where she experienced fewer asthma-related problems. In another case, the parties did not contest the applicability of the IDEA to a student who was unable to attend school, allegedly due to respiratory and associated problems caused by poor environmental conditions in a school building. Punxsutawney Area Sch. Dist. v. Kanouff, 663 A.2d 831 (Pa. Commw. Ct. 1995).

If special education services are not required due to the disability, then the IDEA does not apply. For example, in one case the court noted that a child with severe asthma, gross motor difficulties, and extreme sensitivity to sensory stimulation was not in need of special education services, and therefore was not eligible for services under the IDEA. Molly L. ex rel. B.L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa., 2002) (court found child disabled and qualified for protection under Section 504 of the Rehabilitation Act of 1973). However, in another case, a federal court blurred the line between "special education" and "related" services. In Babicz v. Sch. Bd. of Broward County, 135 F.3d 1420 (11th Cir. 1998), the plaintiff children suffered from chronic asthma and sought services including notice of assignments and make-up work while sick at home, as well as access to medication to manage their asthma medically while in school. The court found that such relief is available under the IDEA, and therefore held that the plaintiffs were required to exhaust the IDEA's administrative remedies before pursuing a lawsuit under either the IDEA or other related federal disability laws. *Id.* at 1422.

Parents can disagree with the administrative evaluation of the student's eligibility, including the types of evaluations conducted. If the school district refuses to find the student eligible under the IDEA, parents have the right to challenge that determination. Parents may request an independent educational evaluation of their child at public expense. If the district refuses to pay for this additional evaluation, the district must initiate a due process hearing to defend its decision. 34 C.F.R. § 300.502(b) (2004).

Cases in which the IDEA does not apply or provide a cause of action may nonetheless involve the application of the Americans with Disabilities Act and the Rehabilitation Act, discussed in Section B, below. *See, e.g., Molly L.*, 194 F. Supp. 2d at 427; *Great Falls Pub. Sch. v. Johnson*, 26 P.3d 734 (Mont. 2001) (“disabled students. . . can receive a free appropriate public education. . . yet suffer discrimination when the physical premises of the school deprive them of basic human dignities. . .”).

3. Remedies

If parents disagree with the proposed IEP or with the implementation of the IEP, they may request voluntary mediation, or they may file a complaint with the state education agency. 20 U.S.C. § 1415(e) (2004); 34 C.F.R. § 300.660,661 (2004). Parents can also request a “due process hearing,” which involves the presentation of evidence before a hearing officer. 20 U.S.C. § 1415(f) (2004). If the local education agency conducts the hearing, the parents may appeal the hearing officer’s decision to the state agency. 20 U.S.C. § 1415(g) (2004). If these administrative remedies do not resolve the dispute, parents may appeal the hearing officer’s decision to either state or federal court. 20 U.S.C. § 1415(i)(2)(b)(iii) (2004).

In lawsuits under the IDEA, a court may “grant such relief as the court determines is appropriate.” *Id.*; *see also* 34 C.F.R. § 300.660(b) (2004). The most common relief sought in such cases is injunctive relief – typically an order that the school provide certain educational and related services to the child. The law’s very general remedial language gives a court broad discretion to craft an appropriate order. One type of injunctive remedy that has been ordered by courts is “compensatory education” – additional educational services to make up for what the child lost due to the district’s failure to provide a FAPE. *See M.C. ex rel. J.C. v. Central Reg’l Sch. Dist.*, 81 F.3d 389 (3rd Cir. 1996); *Maine Sch. Admin. Dist. No. 35 v. Mr. R. ex rel. S.R.*, 321 F.3d 9 (1st Cir. 2003); *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489 (9th Cir. 1994). In addition, monetary reimbursement may be available under the IDEA for services that the child’s family paid for, but that should have been provided to them by the state without cost – for example, reimbursement of private school tuition and related expenses if the district is unable to provide a FAPE within the school system. 20 U.S.C. § 1412(a)(10) (2004); *see Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359 (1985); *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993).¹

¹ A more complicated legal question is whether plaintiffs may recover monetary damages for other types of injuries (*e.g.*, pain and suffering) allegedly suffered as a result of the state or school district’s failure to provide a FAPE. A full analysis of this issue is beyond the scope of this report. It should be noted, though, that a number of federal circuit courts have held that the IDEA itself does not provide for monetary damages. *See Sellers v. Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998); *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2nd Cir. 2002); *Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996); *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999). The federal circuits are split, however, on whether a plaintiff may bring a damages claim for violations of the IDEA through the federal statute known as “Section 1983,” which provides a cause of action against “any person who, acting under color of law, deprives another of rights secured by federal law.” 42 U.S.C. 1983. *See W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995); *Polera*, 288 F.3d at 483 n. 5; *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912 (6th Cir. 2000); *Walker v. District of*

An important question in IAQ-related cases is whether the IDEA encompasses injunctive relief of a different sort – an order requiring changes involving the school facility that a disabled child is attending.

Facility-related changes. Where IAQ problems affect a child's health the question arises whether the school facility itself can meet the child's educational needs. Where the child cannot receive a FAPE in her regular school, one option available under the IDEA is to provide educational services outside of that school. For example, as noted earlier, the school may be required to provide a home tutor for some length of time. 34 C.F.R. § 300.26(b)(3) (2004); Weixel v. Bd. of Educ., 287 F.3d 138 (2d Cir. 2000) (special education in the form of home instruction provided for child with chronic fatigue syndrome who was unable to attend school); Hornstine v. Township of Moorestown, 263 F. Supp. 2d 887 (D.N.J., 2003) (home instruction by school staff provided for child with health problems that caused substantial fatigue and prevented her from attending school for a full day). Similarly, if a child cannot attend her regular school due to a disability, the school district may be required to enroll the child in another school within the school district, or to pay the tuition for a private school. 20 U.S.C. § 1412(a)(10) (2004); 20 U.S.C. § 1412(a)(5)(A) (2004); 34 C.F.R. §§ 300.552(a)(3), (c) (2004).

Changes involving the facility itself might also be a potential remedy under the IDEA. A central element of the Act is the requirement to provide a FAPE in the least restrictive environment available. 20 U.S.C. § 1412(a)(5) (2004). This requirement includes the directive to educate children, to the maximum extent possible, with other children who are not disabled. 34 C.F.R. § 300.550(a) (2004). In the IAQ context, this might mean educating a child in school rather than at home. In addition, the regulations require that, in determining the educational placement of a child with a disability, the educational agency ensure that the placement is "as close as possible to the child's home." 34 C.F.R. § 300.552(b)(3) (2004). The regulations further require that "[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled. . . ." 34 C.F.R. § 300.552 (c) (2004).

Thus, it is possible that facility-related changes that would allow a child to attend his regular school could be part of the child's IEP. On one level, an IEP might require that a student be allowed to attend class in a particular classroom, wing or building within the school complex. See Rose, supra. Or, an IEP could require the school to take certain actions, such as providing air filters, removing carpet or modifying the use of certain chemicals.

Some courts have required classroom modifications. In Wilson County Sch. Sys. v. Clifton, 41 S.W.3d 645 (Tenn. Ct. App. 2000), the court determined that the IEP for a hearing-impaired and dyspraxic

Columbia, 157 F.Supp.2d 11 (D.D.C. 2001) (Section 1983 suits allowed). *But see* Sellers, 141 F.3d 524; Heidemann, 84 F.3d 1021; Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (10th Cir. 2000) (Section 1983 suits not allowed).

student was inappropriate because it did not include modification of the facilities to create an acoustically treated environment. *See also Amy v. Brandywine Heights Area Sch. Dist.*, 1997 WL 672627 (E.D. Pa. 1997) (attorneys' fees awarded to parents after successfully challenging school district's failure to provide effective soundproofing and screening to eliminate distractions in their daughter's classroom). In another IDEA case, a court ordered the school district to air condition the classroom of a child whose impairment left him unable to regulate his body temperature. *Espino v. Besteiro*, 520 F. Supp. 905 (S.D. Tex. 1981). The court noted that the "cost of air-conditioning a classroom would be minimal in relation to the amount of federal funds received by [the school district and the district's] total budget." *Id.* at 912. *But see Tracy v. Beaufort County Bd. of Educ.*, 335 F. Supp. 2d 675 (D.S.C. 2004) (finding that the placement of an asthmatic student on homebound instruction during a two-month period when the school air conditioner was malfunctioning was reasonable). In a case involving a school district that failed to follow proper IDEA procedures and had placed a student on homebound instruction because of environmental conditions in the school, the court remarked that the district had failed to show "whether it was an appropriate change in educational placement in the least restrictive environment, as required by federal and state law." *Punxsutawney*, 663 A.2d at 835. In that case, the child initially had requested limiting classes to a different building in the school complex. *Id.*

Nevertheless, federal appeals court decisions suggest that changes to a child's *particular* school might not always be *required* if a FAPE can be provided at another facility. While federal regulations express a preference for neighborhood placement, courts have consistently interpreted those regulations as permitting a school system to designate a school other than a neighborhood school. *See, e.g., Schuldt v. Mankato Ind. Sch., Dist. No. 77*, 937 F.2d 1357 (8th Cir. 1991) (regulatory phrase "as close as possible" does not require placement at neighborhood school); *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921 (10th Cir. 1995), *cert denied* 516 U.S. 909 (1995) (no presumption of neighborhood schooling); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991), *cert denied* 502 U.S. 859 (1991) (regulations require only that "a school board take into account, as one factor, the geographical proximity of the placement"); *Hudson v. Bloomfield Hills Pub. Sch.*, 910 F. Supp 1291, 1304 (E.D. Mich. 1995), *aff'd* 108 F.3d 112 (6th Cir. 1997) (neighborhood school preferred unless child's needs require placement elsewhere). Indeed, no federal appellate courts have recognized the right to placement in a neighborhood school. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 381 (5th Cir. 2003) (discussing cases).

Thus, changes relating to the school facility itself might be within the scope of the IDEA, but the school district may have the option of moving the child to another school that can provide services consistent with the IEP. Some IAQ-related cases, however, may invoke countervailing considerations. For example, if the reason for the facility barrier is a lack of appropriate maintenance or operation of a school, resulting in sub-standard conditions, then a proposal to educate the affected child at home or another school facility may be viewed in a less favorable light.

Education cases involving the need for facility-related modifications are likely to involve consideration of federal legislation that prohibits discrimination against students with disabilities.

B. Section 504 of the Rehabilitation Act/Americans with Disabilities Act

The focus of the ADA and Section 504 of the Rehabilitation Act is non-discrimination. These laws prohibit public schools and other entities from discriminating against individuals with disabilities. For students with asthma or other impairments that are affected by the indoor environment, these laws may provide legal recourse where poor indoor environmental quality is a barrier to the student receiving an appropriate education.

1. Introduction

Section 504. Section 504 of the Rehabilitation Act, enacted in 1973, provides:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a) (2004). Thus, the law requires all federally-funded programs to provide people with disabilities the same access to their programs that they provide to non-disabled people. Because public school districts receive federal funding, they are subject to the Act. Each federal agency, including the Department of Education, has promulgated regulations to implement the law and is responsible for enforcing those regulations. 34 C.F.R. § 104 (2004). (Unless otherwise noted, references to Section 504 regulations in this chapter refer to the Department of Education regulations.)

Americans with Disabilities Act. The ADA was enacted in 1990 and extends the non-discrimination requirement to the private sector, as well as to public entities (regardless of whether they receive federal funding). 42 U.S.C. § 12101, *et seq.* (2004). Title I of the ADA prohibits discrimination in employment, including state and local employers. 42 U.S.C. §§ 12111(5), 12112 (2004). Title II prohibits discrimination in public programs, services and activities, including schools. 42 U.S.C. §§ 12131-12134 (2004). Title II of the ADA incorporates the same basic definitions of disability and remedies as Section 504, reiterating the responsibility of public schools to ensure that they do not discriminate in the provision of education to disabled students. 42 U.S.C. §§ 12111, 12132 (2004).

Courts have interpreted the two laws interchangeably. See *Bragdon v. Abbott*, 524 U.S. 624 (1998). The remainder of this section will refer mainly to Section 504, since this is the law most frequently cited in education cases, and since the ADA does not provide significantly different rights or

responsibilities in the education context. See *Washington v. Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 846 n. 6 (7th Cir. 1999) ("Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other").

Procedures. Under the Section 504 regulations, school districts are required annually to conduct evaluations of any students who may need special education or related services due to their disability. 34 C.F.R. § 104.35 (2004). Decisions about a child's appropriate placement and services are to be made by a committee that includes people knowledgeable about the child and about available services. 34 C.F.R. § 104.35(c)(3) (2004). These services are generally included in a written plan, which may be referred to as a "504 Plan" or "Accommodation Plan."

The remainder of this section discusses two key legal issues – eligibility and available remedies – that are relevant in school IAQ-related Section 504/ADA claims. It is important to note that most states have enacted their own non-discrimination laws. While these laws are often similar to the federal laws, they are not identical. Indeed, they may contain provisions relating to eligibility and remedies that provide separate avenues for seeking relief against school districts. While it is beyond the scope of this report to analyze state non-discrimination laws, those interested in understanding fully the legal context for resolving a particular school IAQ dispute should explore any such law in their state. See *generally* Colker and Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002).

2. Eligibility: Definition of Disability

If a school receives federal funding, the school may not discriminate or retaliate against students who are protected under Section 504. Students are eligible for protection if they are disabled ("handicapped") within the terms of the law, and if they are "otherwise qualified." Under the regulations, a child is qualified if he is also qualified under IDEA, or if he is of an age during which non-disabled students are (or are required to be) provided an education. 34 C.F.R. § 104.3(k) (2004). The more complicated question is whether the child is disabled within the terms of the law.

Section 504 applies to anyone who "has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 U.S.C. § 705(20)(B) (2004). The term "impairment" is defined to include a physiological disorder that affects one or more body systems, including the respiratory system. 34 C.F.R. § 104.3(j)(1) (2004). The term "major life activities" is a more complicated concept to apply in practice. The regulations define the term to include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii) (2004).

In light of the Section 504 definition, a student who has been determined to be eligible under IDEA – that is, significantly restricted in the major life activity of learning because her disability adversely

affects educational performance and she needs specially designed instruction as a result – would also be protected under Section 504. On the other hand, if the student’s impairment does not adversely affect educational performance and require special education, the student may still meet the definition of disability under Section 504. The student might be limited in a different major life activity. For example, children with asthma or other respiratory impairments may be substantially limited with respect to their breathing. The same impairment might also limit a child’s ability to walk. It is important to remember that for purposes of determining a student’s qualification under Section 504 within the school setting, learning does not need to be impacted by the disability.

In the case Hunt v. St. Peter Sch., 963 F. Supp. 843 (W.D. Mo. 1997), the court found a child disabled under Section 504 because her severe asthma substantially impaired her breathing. In another case challenging a school district’s failure to implement Section 504 plans for two students, the parties did not dispute the question whether an IAQ-related impairment satisfied the definition of disability. The school district acknowledged that the children’s chronic asthma, allergies, migraine syndrome, and sinusitis limited a major life activity, since the respiratory illness affected their breathing and the children were forced to miss a significant number of school days. Babicz v. Sch. Bd. of Broward County, 135 F.3d 1420 (11th Cir. 1998) (ruling that the plaintiffs were first required to exhaust administrative remedies under the IDEA before proceeding with lawsuit.) *See also* Weixel v. Bd. of Educ., 287 F.3d 138, 147-8 (2d Cir. 2000) (student with chronic fatigue syndrome substantially limited in attending classes and walking).

The question whether a student’s respiratory or other impairment constitutes a disability under Section 504 requires a fact-specific determination. This is because the determination of disability depends not on the existence of a medical diagnosis of an impairment, but rather on how that impairment affects the particular individual. *See* Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 198-9 (2002) (individualized determination particularly important “when the impairment is one whose symptoms vary widely from person to person”); Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999). Most of the court decisions analyzing this legal standard occur in the employment discrimination context and are discussed in the last section of this chapter.

Two specific issues relating to the determination of disability are particularly relevant to the IAQ context: Whether the impairment is controlled by medication, and whether the impairment limits the student only in one particular school facility.

Impairments controlled by medication. In a 1999 ADA employment discrimination case interpreting the definition of disability, the Supreme Court rejected an ADA regulation of the Equal Employment Opportunities Commission (29 C.F.R. § 1630.2(j)) stating that the determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures such as medicines. Rather, the Court held that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures – both positive and negative – must be taken into account when judging whether that person is

"substantially limited" in a major life activity and thus disabled under the Act. Sutton, 527 U.S. at 482.

The Court noted specifically that "individuals who take medicine to lessen the symptoms of an impairment so that they can function [may] nevertheless remain substantially limited." *Id.* at 488. According to the Court, the "use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment *actually* faces are in fact substantially limiting." *Id.*

Few, if any, reported cases have discussed this issue in the context of a Section 504 education case. Applying the Sutton holding in employment discrimination cases, federal courts have found that individuals may be disabled despite the use of medical measures that improve their condition. *See, e.g., E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001) (epilepsy); Daoud v. Avamere Staffing, LLC, 336 F. Supp. 2d 1129, 1135 (D. Or. 2004) (arthritis). Some courts have further clarified that an individual is not required to avail himself of all possible corrective treatments in order to be determined disabled. *See, e.g., Nawrot v. CPC Intern*, 277 F.3d 896 (7th Cir. 2002); Capizzi v. County of Placer, 135 F. Supp. 2d 1105 (E.D. Cal. 2001); Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y. 2000).

This issue might arise, for example, in Section 504 cases involving asthmatic children who use inhalers or other medications to control their symptoms. In such cases, the fact that symptoms may be controlled with medication is not dispositive on the question of whether the child is substantially limited in a major life activity. However, courts may consider the overall effect of medication on the child's condition in making this determination.

As with other legal issues regarding the Section 504 definition of disability, state non-discrimination laws may dictate a different analysis, depending on the specific provisions in the state statute and regulations. Thus, it is possible that some state laws will direct that mitigating measures need not be considered by a court in determining the existence of a disability. *See, e.g., Bryan v. United Parcel Serv.*, 307 F. Supp. 2d 1108, 1113 (N.D. Cal. 2004) (state law expressly precludes consideration of mitigating measures); Dahill v. Police Dep't, 748 N.E. 2d 956 (Mass. 2001) (statutory purpose and legislative history call for determining disability without regard to mitigating measures).

Substantial limitations confined to a particular school facility. If a child's impairment poses a substantial limitation on her activities both in and outside of school, the case would clearly fall within the definition of disability under Section 504. One question that may arise in IAQ-related cases, though, is whether the child is considered disabled under Section 504 if she is only experiencing limitations on major life activities in a *particular* school building. For example, a child may attend a school with mold or other IAQ problems that affect her asthma, but she could attend another school without any limitations. This is a threshold question that may arise prior to

considering what remedies are appropriate for eliminating the barriers posed by poor indoor air quality in the facility.

Neither Section 504 nor its regulations directly address this issue. Regulations under the ADA describe the concept of “substantial limitation” on a major life activity in general terms. The regulations define “substantially limits” to mean “significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population . . .” 29 C.F.R. § 1630.2(j)(1)(ii) (2004). According to the regulations, the following factors should be considered in making this determination: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or expected impact, resulting from the impairment. 29 C.F.R. § 1630.2(j)(2) (2004).

There are few reported decisions involving facility-specific limitations in the education context. Federal cases addressing this issue in the employment context are discussed in the following section. Those cases may be of limited application, however, given the difference between the school-student and school-employee relationships. In light of the general nature of the legal standard, courts are likely to reach different conclusions. Nevertheless, in Section 504 cases involving the effect of indoor air quality on a student’s health and education, the focus will likely be on the appropriate remedy or services, rather than on the question of disability.

3. Remedies

School districts are required to establish and implement procedures for identifying and evaluating students who may be eligible under Section 504. These may be the same procedures as the district uses under the IDEA. Students and parents may request a due process hearing to challenge the decision made by the school district. 34 C.F.R. §§ 104.35, 104.36 (2004). In some states, the special education (IDEA) hearing officers have the authority to hear Section 504 cases; in other states, the school district is responsible for the Section 504 hearing process, including the hiring of an impartial hearing officer.

Both Section 504 and the ADA may be enforced through private lawsuits. 29 U.S.C. § 794a(a)(2), (b) (2004); 29 U.S.C. § 12133 (2004). (The IDEA requires that plaintiffs who wish to file an ADA or Section 504 lawsuit seeking remedies that are also available under the IDEA must first exhaust the administrative procedures provided in the IDEA. 20 U.S.C. § 1415(l) (2004).) The remedies for violations of the ADA and the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964. 42 U.S.C. § 2000d, *et seq.* (2004); 29 U.S.C. § 794a(a)(2) (2004); 42 U.S.C. § 12133 (2004). Most Section 504 lawsuits seek equitable relief in the form of injunctions to require school districts to take particular actions to comply with the law. Plaintiffs also have sought monetary damages for violations of Title II of the ADA and Section 504, though courts disagree on whether such remedies are available under each

² Punitive damages are generally not available under the laws. See Barnes v. Gorman, 536 U.S. 181, 190 (2002).

Equitable relief. Section 504 establishes duties on the part of recipients of federal funding (including school districts) that are general, as well as specific to an individual. The regulations require recipients to evaluate their programs, modify any policies and practices that do not meet the law's requirements, and take appropriate remedial steps to eliminate the effects of any discrimination that has resulted from the policies. 34 C.F.R. § 104.6 (2004). A recipient is also required generally "to operate its program. . . so that the program . . . when viewed in its entirety. . . is readily accessible to handicapped persons." 34 C.F.R. § 104.22(a) (2004).

With respect to disabled individuals, the Section 504 regulations state: "No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity . . ." 34 C.F.R. § 104.21 (2004). At the core of the obligations imposed by Section 504 in the education context is the requirement that schools make available a free, appropriate public education to disabled students. 34 C.F.R. § 104.33(a) (2004). The regulations define the FAPE to include the "provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons. . . ." 34 C.F.R. § 104.33(b)(1) (2004). The Department of Education (Office of Civil Rights) has stated that this FAPE requirement does not incorporate the "reasonable accommodation" standard that applies under Section 504 in the employment context, as discussed in the following section. See Office of Civil Rights, U.S. Department of Education, Policy Letter to Zirke, OCR 20 IDELR 134. (1993).

The Section 504 regulations list a number of means for achieving the accessibility required by the Act. In addition to alteration of facilities, the regulations list the following possible remedies:

² Although a full analysis of this issue is beyond the scope of the report, it is important to note one issue that has received considerable attention recently – whether state agencies can claim sovereign immunity from such lawsuits under the Eleventh Amendment to the U.S. Constitution. Although federal courts have reached different conclusions, most have held that the Eleventh Amendment does not provide sovereign immunity protection under Section 504 because the state has validly waived immunity by accepting federal funds under the Act. See generally Eleventh Amendment Immunity and Student Suits Under the IDEA, Section 504 and the ADA, 183 Educ. Law Rep. 657 (2004). This is a more unsettled question for education cases brought under Title II of the ADA. See *id.*; see, e.g., Ass'n for Disabled Americans, Inc. v. Florida Intern. Univ., 405 F.3d 954 (11th Cir. 2005); Miranda B. v. Kitzhaber, 328 F.3d 1181 (9th Cir. 2003) [valid abrogation; states do not retain sovereign immunity]; but see Garcia v. SUNY Health Sciences Ctr., 280 F.3d 98 (1st Cir. 2001) [no valid abrogation; states retain immunity]. Regardless of whether states retain immunity for such lawsuits, local agencies such as school districts may be unable to claim this protection unless they are considered "arms of the state." See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (school board more like a county or city than arm of the state and not entitled to immunity). Although there is no clear-cut test for deciding whether a school district is an arm of the state, courts evaluating state laws on this question generally have determined that local school districts are not covered by the Eleventh Amendment's grant of immunity. See Kirchmann v. Lake Elsinore Unified Sch. Dist., 100 Cal. Rptr. 2d 289, 295 (Cal. Ct. App. 2000) (citations omitted). In a recent ADA case, the Supreme Court also noted that the doctrine of sovereign immunity does not preclude lawsuits against governmental entities for injunctions, as opposed to monetary damages. See Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 374 n 9 (2001).

reassignment of classes or other services to accessible buildings; assignment of aides to beneficiaries; and home visits. 34 CFR § 104.22(b) (2004). *See, e.g., Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420 (11th Cir. 1998) (parties agreed to 504 plan that included notice of assignments and make-up work during asthma-related absences, as well as access to medication to manage asthma while in school); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991) (504 accommodations included cued speech services offered at centralized location in the school district).

Facility-related changes. As in cases brought under the IDEA, one important question in situations involving IAQ problems that pose a barrier to disabled students is whether the school is required to make facility-related modifications to address these problems. Section 504 requires that programs be physically accessible to disabled students, and thus encompasses facility modifications as a potential remedy.

Like the IDEA, Section 504 incorporates the presumption that students will be placed in the least restrictive environment that can provide a FAPE. Thus, while homebound instruction is a possible accommodation under the Act, the regulations require schools to “provide for the education of . . . each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.” 34 C.F.R. § 104.34(a) (2004). A disabled student is to be placed in the regular educational environment unless the school demonstrates that it cannot achieve this goal satisfactorily even with the use of supplementary aids and services. *Id.* In light of these general requirements, there are a number of accommodations relating to the school facility that may be appropriate in an IAQ-related case. These might include modifications to a classroom, facility repairs or maintenance, provision of ventilation or other related equipment, etc. As under the IDEA, there is no “bright line” indicating when a school district has provided a FAPE; the legal question of how far a school district must go in order to modify a school facility merges with the practical question of what is appropriate in light of the facts of the particular case.

It is also important to note that the general context for these regulatory requirements is the mandate that school districts operate their “program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons.” 34 C.F.R. § 104.22(a) (2004). As long as the program as a whole is accessible, it is not required that “each of [a school district’s] existing facilities or every part of a facility [is] accessible to and usable by handicapped persons.” *Id.* Nor do the regulations require “structural changes in existing facilities where other methods are effective in achieving compliance” with the requirements of the law and regulations. *Id.* Thus, as under the IDEA, a school district might not be required in every case to place a child at her regular school in order to meet the requirements of the law. At least one federal appeals court has ruled that, given the similarity between the laws and their regulations, if a child is not entitled to a neighborhood placement under the IDEA, he is not entitled such a placement under Section 504 or the ADA. *See*

Urban v. Jefferson County Sch. Dist., 89 F.3d 720, 728 (10th Cir. 1996) (child placed in non-neighborhood school with special education programs).

Nevertheless, as noted earlier, if the reason for the facility barrier is a lack of appropriate maintenance at the school and sub-standard indoor environmental conditions, a court may be less willing to allow a school district to implement the alternative remedy of moving the child to another school facility.

II. Non-discrimination in Employment

A. ADA and Section 504

1. Overview

The non-discrimination requirements of Section 504 and the ADA may also apply to situations involving school employees who are disabled and whose impairments are affected by indoor environmental conditions within the school facility. Section 504 specifically states that the determination of whether there has been a violation of that statute in an employment case shall be made using the standards applied under Title I of the ADA. 29 U.S.C. § 794(d) (2004). Title I of the ADA applies to employers, including public employers. 42 U.S.C. § 12111(5) (2004). Although federal regulations address employment under Title II of the ADA (which relates to public programs, services and activities), it is not entirely settled in the federal courts whether Title II applies to employment discrimination. See Univ. of Ala. v. Garrett, 531 U.S. 356, 360 n. 1 (2001) (noting question); Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999) (Title II not applicable); Bledsoe v. Palm Beach Cty. Soil & Water Cons. Dist., 133 F.3d 816 (11th Cir. 1998) (Title II applicable). In discussing school employee claims, this section will refer primarily to the framework of ADA Title I, as well as the regulations implementing the law issued by the Equal Employment Opportunity Commission (EEOC). See 20 C.F.R. § 1630 (2004).

The employment relationship is different from the relationship between a school district and its students. While the basic non-discrimination requirements of ADA Title I are the same as those under Title II and the Rehabilitation Act, some of the regulations implementing and court cases interpreting the laws reflect this difference. Thus, an analysis of the two primary legal issues considered in this section – the definition of disability and the availability of remedies – raises a different set of considerations in the employment context than in the education context discussed in the preceding section. State non-discrimination laws may provide additional requirements and remedies for public employment cases.

2. Eligibility: Definition of Disability

The basic definition of disability is the same for cases under the ADA and Section 504. That is, the employee must show that he has an impairment that substantially limits a major life activity (or has a record of such impairment, or is regarded as having such an impairment). 29 C.F.R. § 1630.2(g) (2004). The determination of disability may take into account whether the impairment is controlled by medication, as discussed in the previous section.

There are certain differences for employment cases, however. For example, whereas many education cases involve an impairment that substantially limits learning, the corresponding area of limitation for employees is the major life activity of working. See 29 C.F.R. § 1630.2(i) (2004). The legal standard for such claims is somewhat difficult to satisfy, as discussed below. See generally *Sutton v United Airlines, Inc.*, 527 U.S. 471, 492 (1999) (noting the “conceptual difficulty” involved in such claims). Additionally, an employee must demonstrate that he is “otherwise qualified” for the position with or without accommodation, a requirement that takes on a different meaning in employment cases than in education cases.

Substantial limitation on major life activity. IAQ-related impairments such as asthma have been the subject of many employment cases under the ADA. The central legal question in these cases is whether the impairment substantially limits a major life activity. The major life activities typically at issue in IAQ-related cases are breathing and working.

With respect to the major life activity of breathing, the inquiry is similar to that in education and other cases, and requires the employee to present medical evidence concerning “the extent of the limitation . . . in terms of their own experience . . .” *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 198 (2002). Because this is an individualized, fact-specific inquiry, courts have ruled both ways in determining whether a particular employee’s asthma or other respiratory condition substantially impaired his breathing. See, e.g., *Albert v. Smith’s Food and Drug Ctrs., Inc.*, 356 F.3d 1242 (10th Cir. 2004) (summary judgment not appropriate where employee presented evidence that severe asthma was not completely controlled by medication and was activated by common substances); *Service v. Union Pac. R.R. Co.*, 153 F. Supp. 2d 1187, 1192 (E.D. Cal. 2001) (court found that “plaintiff cannot ‘cure’ his asthma or prevent an . . . attack by using an inhaler or by taking hot showers. . . .”); *MacLean v. State*, 986 P.2d 903 (Ariz. Ct. App. 1999) (summary judgment not appropriate where asthmatic employee presented sufficient evidence that breathing was substantially impaired.); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995) (breathing was substantially limited by hypersensitivity to various chemicals; ADA inapplicable on other grounds). But see, e.g., *Heilwell v. Mount Sinai Hosp.*, 32 F.3d 718 (2nd Cir. 1994) (employee’s respiratory condition did not limit ability to breathe, since she could exercise and swim); *Ventura v. City of Independence*, 108 F.3d 1378 (6th Cir. 1997) (breathing not substantially limited where asthmatic employee was able to play sports, perform calisthenics, walk, play the saxophone, run, sing, etc.); *White v. Honda of America Mfg., Inc.*, 241 F. Supp. 2d 852 (S.D. Ohio 2003) (breathing

not substantially limited since asthmatic employee only affected when she breathes certain irritants and she is able to walk, exercise, smoke cigarettes, drive, pump gas).

Alternatively, courts have considered whether the employee is substantially limited in the life activity of working. The Supreme Court weighed in on this issue in Sutton v United Airlines, Inc., 527 U.S. 471 (1999), a case involving airline pilots who were denied certain pilot jobs because of minor vision impairments. The Court ruled that “when the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.” The Court cited the EEOC regulations, which state: “The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” 29 C.F.R. § 1630.2(j)(3)(i) (2004). Thus, in a case involving a pharmacologist who could not work in a laboratory due to allergies to chemicals, the court found that the inability to perform lab work was not itself a substantial limitation on working. Maulding v. Sullivan, 961 F.2d 694 (8th Cir. 1992). *See also* Nugent v. Rogosin Inst., 105 F. Supp. 2d 106 (E.D.N.Y. 2000) (nurse who could not work at a medical center because she was allergic to the particular chemical used there was not substantially limited in working).

In the indoor air quality context, cases typically involve claims that specific environmental conditions in a particular building – *e.g.*, inadequate ventilation, chemical emissions, mold contamination – produce respiratory and other symptoms that leave an employee unable to work without accommodations. (While a number of cases involve exposure to second-hand cigarette smoke, that problem is not likely to arise in the public school setting, and the cases are not discussed here.) Courts frequently have interpreted such situations as involving only an inability to work in a particular building, and not the inability to work in a broad class of jobs.

For example, in Byrne v. Bd. of Educ., Sch. of West Allis-West Milwaukee, 979 F.2d 560 (7th Cir. 1992), a teacher who was allergic to fungi left her job because she experienced respiratory difficulties and other symptoms when working in her school building. She filed a Section 504 claim alleging that the district had failed to accommodate her disability. The court affirmed the jury verdict in favor of the school board. Specifically, the court found that the teacher was not disabled because she had not demonstrated that she was substantially limited in working, since she was “unable to work only at two schools, and . . . was able to procure other employment and to engage in activities outside of work.” *Id.* at 566.

Similarly, Mobley v. Bd. of Regents of Univ. Sys. of Georgia, 924 F. Supp. 1179 (S.D. Ga. 1996), involved a college professor who developed recurrent asthmatic bronchitis, allegedly as a result of poor indoor air quality in her university building. The employee was able to work in an office located in a different building, but the university did not fully accommodate that request. Nevertheless, the court found that the employee was not limited in the major life activity of working, and thus the ADA was not applicable, because she was limited only to working in the particular office building. *See also* Murphy v. Bd. of Educ. of Rochester City Sch. Dist., 273 F. Supp

2d. 292 (W.D.N.Y. 2003) (teacher not disabled under Section 504 or ADA because asthma was controllable and did not limit ability to work); Russell v. Clark County Sch. Dist., 232 F.3d 896 (table), No. 98-17194

2000 WL 982137 (9th Cir. 2000) (asthmatic teacher did not demonstrate that she was substantially limited in working, as she was transferred to another school and was working there); Benson v. Lawrence Livermore Nat'l Lab., No. C95-2746 FMS, 1997 WL 651349 (N.D. Cal. 1997) (employee's respiratory problems aggravated by new carpet and paint in office building); Darnell v. Principi, No. 03-987-KI, 2000 WL 1824120 (D. Or. 2004) (plaintiff's asthma triggered by dust mites in the office building where she worked); Mayers v. Washington Adventist Hosp., 131 F. Supp. 2d 743 (D. Md. 2001) (plaintiff's asthma triggered by dust in workplace).

Thus, although substantial limitation in the life activity of working remains an independent basis for establishing disability, that avenue is fairly limited, particularly in the IAQ context. In ADA and Section 504 cases, a court is more likely to find that the definition of disability is met in cases involving a significant medical problem that exists independent of the particular work environment. If the employee is limited only because of conditions in a particular building, then a court may determine that the ADA does not apply, even if the building is in sub-standard condition.

Otherwise qualified. An employee who is determined to be disabled under the law must still be otherwise "qualified" to perform the job. 42 U.S.C. § 12112 (2004); 29 U.S.C. § 794(a) (2004). The Department of Education regulations implementing Section 504 for employment cases defines "qualified handicapped person" as someone who, "with reasonable accommodation, can perform the essential functions of the job in question." 34 C.F.R. § 104.3(l) (2004). The EEOC's regulations implementing ADA Title I define the term "qualified individual with a disability" as an "individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m) (2004). The Appendix to these regulations describes the determination as a two-step process: first, determine if the individual satisfies the prerequisites for the position; and second, determine whether the individual can perform the essential functions of the position with or without reasonable accommodation. 29 C.F.R. § 1630, App. (2004).

Thus, the threshold determination whether an employee is qualified under the law is closely connected to the determination of what types of accommodations are reasonable under the law, as discussed below.

3. Remedies: Reasonable Accommodation

The ADA prohibits discrimination in employment and requires that employers make "reasonable accommodations" for qualified disabled individuals. In general, when an employee (or job

applicant) believes that he needs an accommodation based on his disability, the employee notifies the employer. The EEOC's regulations state that, in order to identify the appropriate accommodations, "it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3) (2004). The EEOC regulations envision a "flexible, interactive" process involving both employer and employee, in which the employer must make a "reasonable effort to determine the appropriate accommodation." 29 C.F.R. § 1630, App. (2004).

As noted earlier, the remedies and enforcement procedures of the ADA (and Section 504) are tied to those of the Civil Rights Act of 1964. 42 U.S.C. § 12133 (2004); 29 U.S.C. § 794a(a)(2) (2004). An employee who wishes to challenge a school district's actions must file a complaint with the EEOC. (The EEOC regulations describe the procedures to be followed if an employee files a complaint under Section 504 that is also within the jurisdiction of another agency under the ADA; such cases will typically be handled by the EEOC. 29 C.F.R. § 1640.6 (2004).) The EEOC then investigates the charges and seeks to resolve the dispute between the parties. If a resolution is not reached, the agency refers the case to the Department of Justice to either file a lawsuit against the employer or issue a "right to sue" letter. The employee may then file a private lawsuit to enforce the Act. See generally, EEOC, Federal Laws Prohibiting Job Discrimination: Questions and Answers, at <http://www.eeoc.gov/facts/qanda.html> (last modified May 24, 2002).

The principal remedy in a private lawsuit under the ADA or Section 504 is injunctive or equitable relief – *e.g.*, an order requiring reasonable accommodation or job reinstatement.³ The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (2004). Thus, if an employee is disabled under the terms of the law, the key question becomes whether the employer has provided "reasonable accommodation" so that the employee can continue working. The commentary to the ADA regulations notes that an accommodation is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. § 1630.2 App. (2004).

³ As in the education context, the question whether monetary damages are available in employment discrimination cases involves a complex legal analysis. With respect to Title I of the ADA, however, the issue of state sovereign immunity is clear. The Supreme Court recently decided that states *are* protected by sovereign immunity from lawsuits seeking money damages under the employment provisions of Title I of the ADA. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2000). Whether local school districts are similarly protected is a distinct inquiry; as noted earlier, school districts might not be considered "arms of the state" entitled to sovereign immunity protection. See Kirchmann v. Lake Elsinore Unified Sch. Dist., 100 Cal. Rptr. 2d 289, 295 (Cal. Ct. App. 2000) (citations omitted).

According to the law, reasonable accommodations may include, but are not limited to: “making existing facilities . . . readily accessible to and usable by individuals with disabilities and . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices . . .” 42 U.S.C. § 12111(9) (2004). The regulations implementing Section 504 contain parallel provisions. 34 C.F.R. § 104.12 (2004).

The ADA limits the reasonable accommodation requirement by providing an exception for cases where the employer can “demonstrate that the accommodation would impose an undue hardship on the operation of the business” of the employer. 42 U.S.C. § 12112(b)(5)(A) (2004). *See also* 29 C.F.R. § 1630.2(p) (2004), 34 C.F.R. § 104.12(a) (2004). The law defines “undue hardship” as an action requiring “significant difficulty or expense,” and lists the factors to be considered in making this determination. 42 U.S.C. § 12111(10) (2004). These factors include: the nature and cost of the accommodation; the overall financial resources; and the type of operation, including the composition, structure, and functions of its workforce. *Id.*

As these statutory and regulatory provisions suggest, the law does not require an employer to provide the maximum accommodation, or even the particular accommodation sought by the employee. In a lawsuit to enforce the requirements of the ADA and Section 504, a court will evaluate whether the accommodations that are requested by the employee and offered by the employer are reasonable, given the disability, the particular job, and the nature of the workplace. In cases involving indoor air quality problems, the requested accommodations would involve mitigating the effect of the environmental conditions on the employee. These accommodations would likely fall into three main categories: changes to the facility, moving the employee to a new location, or changing the nature of the employee’s job. Although a court’s analysis will depend heavily on the particular factual circumstances, there have been a number of federal cases discussing these types of accommodations.

Facility changes. The ADA states that possible accommodations include actions to make the workplace “readily accessible to and usable by” disabled employees. 42 U.S.C. § 12111(9) (2004). Requests for physical modifications, repairs or other alterations to a building are likely to arise in cases where indoor air quality problems are posing a barrier to school employees.

In a number of IAQ-related cases, federal courts have decided that the employer’s actions to address the indoor air quality problems met the law’s requirements for reasonable accommodations. *See, e.g., E.E.O.C. v. Newport News Shipbuilding and Drydock Co.*, 949 F. Supp. 403 (E.D. Va. 1996) (employer took “extraordinary measures to accommodate” employee with HIV and allergies to mold, including removing standing water, fixing drainage problem, repairing leak, cleaning air conditioning units, and installing new air filters); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249 (10th Cir. 2001) (employer made reasonable accommodations for employee with sinusitis, including hiring an industrial hygienist and installing air vents); *Wiemann v. Indianola Cmty. Sch.*

Dist., 278 F. Supp. 2d 968 (S.D. Iowa 2003) (employer provided air conditioned classroom to accommodate employee with skin condition;). *See also* Montenez-Denman v. Slater, 208 F.3d 214 (table), No. 98-4426, 2000 WL 263279, *2 (6th Cir. 2000) (“impractical and virtually impossible” for employer to enforce “fragrance-free” environment to accommodate air traffic controller with multiple chemical sensitivity); Cassidy v. Detroit Edison Co., 138 F. 3d 629, 635 (6th Cir. 1998) (employee’s general request for an allergen-free workplace too vague and not viable). Whether a court will require a school district to take specific actions to improve IAQ conditions will depend largely on the nature of the environmental conditions and the actions already taken by the district.

Job location changes. Another possible accommodation in an ADA/Section 504 case is transfer of a disabled employee to another building that does not present barriers to the employee. The EEOC’s guidance under the ADA provides an expansive interpretation in this regard, stating that unless it shows undue hardship, the employer may be required to transfer an employee to a different “office, branch, agency, department, facility, personnel system, or geographical area,” even if the employer has a policy against such transfers. EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act Q. 27 (2002), <http://www.eeoc.gov/policy/docs/accommodation.html> (hereinafter EEOC Enforcement Guidance). In determining whether such a transfer would be an undue hardship on the employer, courts have taken into consideration whether the employer has a regular practice or policy against allowing such transfers. *See* Guess v. Pfizer, Inc., 971 F. Supp. 164 (E.D. Pa. 1996); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp 393, 398 (E.D. Tex. 1995); Wood v. Crown Redi-Mix, Inc., 218 F. Supp. 2d 1094, 1106 (S.D. Iowa 2002); Picinich v. United Parcel Service of America Inc., 321 F. Supp. 2d 485, 506 (N.D.N.Y. 2004).

A number of federal ADA/Section 504 cases – including some cases involving multiple chemical sensitivities or allergies – have considered employee requests to work at home. According to EEOC guidance, an employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship. EEOC Enforcement Guidance at Q. 32. The guidance describes the factors to consider in making this determination – *e.g.*, the ability to supervise the employee and the need for specialized equipment that cannot be provided at home. *Id.* Courts considering this issue have ruled both ways. Some have been receptive to such claims. *See, e.g.*, Humphrey v. Memorial Hosps. Ass’n, 293 F.3d. 1128, 1139 (9th Cir. 2001) (medical transcriptionist with obsessive compulsive disorder); Langon v. Dep’t of Health and Human Serv., 959 F.2d 1053 (D.C. Cir. 1992) (computer programmer with multiple sclerosis); Hernandez v. City of Hartford, 959 F. Supp. 125, 132 (D. Conn., 1997) (city administrative assistant suffering from pre-term labor). Others have not. *See, e.g.*, Vande Zande v. State of Wisconsin Dep’t of Admin., 44 F.3d 538 (7th Cir. 1995) (paraplegic housing agency clerical/administrative assistant); Whillock v. Delta Airlines, Inc., 926 F. Supp. 1555 (N.D. Ga. 1995) (airlines reservations agent with multiple chemical sensitivity).

Changes in job duties. Another type of accommodation that may be sought in IAQ-related cases is re-assignment to a job with different duties. The ADA itself defines reasonable accommodation to include job restructuring, part-time or modified work schedules, or reassignment to a vacant position. 42 U.S.C. § 12111(9) (2004). Thus, consideration of reassignment is one component part of the overall reasonable accommodation duty. In one recent ADA case, a grocery store cashier who suffered from asthma requested a transfer to a different position in the store, where she would not be in close contact with perfumes and other substances that could trigger an asthma attack. The court found that the employee had presented sufficient evidence of a vacant position to avoid summary judgment and that the employer was required to work with her to identify the type of position that would reasonably accommodate her limitations. Albert v. Smith's Food & Drug Ctrs., Inc., 356 F.3d 1242, 1252 (10th Cir. 2004). See also Guess v. Pfizer, 971 F. Supp. at 174-175 (chemical engineer with multiple chemical sensitivity presented sufficient evidence to avoid summary judgment on whether requested transfer to a position involving less laboratory work was a reasonable accommodation); Norville v. Staten Island Univ. Hosp., 196 F.3d 89 (2nd Cir. 1999).

Nevertheless, there are limitations on this requirement – for example, in cases where an alternate position is not available or where transferring an employee to a different position raises internal personnel and other policy conflicts for the employer. EEOC guidance states that “an employer who does not normally transfer employees would still have to reassign an employee with a disability, unless it could show that the reassignment caused an undue hardship.” EEOC Enforcement Guidance at Q. 26. However, courts have noted that the ADA does not require employers to reassign a disabled employee to a position “when such a transfer would violate a legitimate, nondiscriminatory policy of the employer.” Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 679 (7th Cir. 1998) (conflict with policies regarding job qualifications). See also Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1225 (11th Cir. 1997) (collective bargaining and other general job transfer policies); Burns v. Coca-Cola Enters., 222 F.3d 247, 257 (6th Cir. 2000) (conflict with collective bargaining agreement or other policy). On the specific issue of company seniority systems, the Supreme Court recently ruled that a transfer or re-assignment that violates a seniority system is not reasonable in ordinary cases, though the employee is free to present evidence of special circumstances surrounding the particular case that demonstrate that the assignment is a reasonable accommodation. US Airways, Inc. v. Barnett, 535 U.S. 391, 405 (2002).

For more than three decades, the Environmental Law Institute has played a pivotal role in shaping the fields of environmental law, management, and policy domestically and abroad. Today, ELI is an internationally recognized, independent research and education center.

Through its information services, training courses and seminars, research

programs and policy recommendations, the Institute activates a broad constituency of environmental professionals in government, industry, the private bar, public interest groups, and academia. Central to ELI's mission is convening this diverse constituency to work cooperatively in developing effective solutions to pressing environmental problems.

The Institute is governed by a board of directors who represent a balanced mix of leaders within the environmental profession. Support for the Institute comes from individuals, foundations, government, corporations, law firms, and other sources.

Environmental Law Institute

2000 L Street, N.W.

Suite 620

Washington, D.C. 20036

Telephone: (202) 939-3800

Fax: (202) 939-3868

www.eli.org

