

SCHOOL CONSTRUCTION

House Bill 5654 (Substitute H-3) First Analysis (6-4-98)

Sponsor: Rep. George Mans
**Committee: Labor and Occupational
Safety**

THE APPARENT PROBLEM:

The construction of school buildings is subject to Public Act 306 of 1937 (the school construction act) and not to the State Construction Code Act. This means school buildings are not subject to the same set of structural, mechanical, and electrical standards as other buildings, nor are they subject to the same level of scrutiny. Public Act 306 is concerned mainly with fire safety and health inspections. It is generally understood that inspectors at the state and local level who typically oversee building projects do not have jurisdiction over the building of schools. The jurisdiction lies instead with the state school superintendent, who has apparently delegated the task to the state fire marshal, who provides fire safety inspections, while the Department of Consumer and Industry Services (formerly the Department of Labor) carries out electrical inspections for the state fire marshal. In some cities, reportedly including Lansing and Detroit, school officials and municipal building departments collaborate but that is done voluntarily. Schools are required to hire architects and, it is said, it is up to school districts to negotiate with architects for the desired level of building oversight services.

In recent years, public attention has been focused on the problem of shoddy construction of schools. One middle school, in the Woodhaven School District, has had to be almost wholly reconstructed even though it was originally built only in 1976. Reportedly, the exterior walls of the school were not properly connected to the building's steel frame and were in danger of collapsing. More recently, a Petosky middle school that was built in 1990 at a cost of \$9 million to the school district taxpayers had a defective roof that leaked from the time it was installed, despite the fact that a construction manager was on-site daily and the architect made periodic visits during construction. Indeed, when the school district finally sued the architect, evidence was presented that both the architect and the construction manager both knew that the roof had substantial and numerous problems during construction. According to testimony during the trial,

the architect told the construction manager to have the contractor fix the problems (reportedly, the Gladwin-based roofing contractor made 23 trips back to the middle school before going bankrupt, and the school district had to hire another roofing contractor to look at the problem), but apparently nobody checked to see if the problems had been corrected before the school was given the go-ahead to pay the roofer. The district estimates that the defective roof will have cost it \$425,000 before the problem will be adequately addressed. (The estimate reportedly includes the \$150,000 worth of court-related costs, eight years of constant repairs to the roof, and the projected cost of replacing the roof.) While the attorney for the architect reportedly blamed the construction manager as the negligent party, a jury found the architect liable based on professional negligence and breach of his contract under the law to protect the owner-school district. During the trial, the architect's attorney reportedly suggested that the school could have paid the architect an additional fee to have the architect's representative on site more frequently, at a cost of \$75 per hour. However, the attorney for the school pointed out that the architect was already being paid over \$750,000 (\$460,000 in architect's fees, an additional \$198,500 for the construction manager's fee, \$10,000 for a model of the school, \$30,000 for printing plans and specs, and \$53,000 in "miscellaneous" costs) to protect the owner's interests under basic services. Though the construction manager settled before the trial and the jury awarded the district \$147,500 in damages on January 20, 1998, the district has yet to collect either the settlement or the jury award. Other recent cases include that of an elementary school in the Petosky school district whose roof reportedly started "coming apart" while children and teachers were in the five-year-old building, problems with a \$16.8 million Gaylord high school built in 1994 (which had met fire code requirements, but which has had problems with heaving in the cement in front of the school's main entrance, ventilation problems due to windows that couldn't be opened, cracking in the

brick facade, and roof leaking problems), and serious injury to an ironworker working on a new DeWitt school due to shoddy work done by the contractor earlier in the construction project.

Because of these and other cases in which school buildings were discovered to have structural flaws, some people believe that it makes sense to subject the construction of school buildings to the same codes, permit process, plan reviews, and inspections to which other major buildings, including residential buildings, are subject.

THE CONTENT OF THE BILL:

The bill would, generally speaking, bring school buildings under the State Construction Code Act, and would repeal the school construction code act (Public Act 306 of 1937).

Administration and enforcement. The bill would require all plans and specifications for school buildings to be submitted to the department, and, with two exceptions, would make the director of the Department of Consumer and Industry Services (DCIS) responsible for administering and enforcing the act and the code in each school building in the state, unless he or she had delegated this responsibility to the applicable local enforcing agency.

Delegation of responsibility for administering and enforcing the act and the code could occur under the act's current provisions, which allow local subdivisions of government to exempt themselves from the state code by adopting and enforcing a nationally recognized model building code. Alternatively, a new provision in the bill would require the director to delegate authority for the administration and enforcement of the act to the applicable agency if he or she had determined that the code officials, inspectors, and plan reviewers who would conduct plan reviews and inspections of school buildings had the necessary experience to perform these duties. (These code officials, inspectors, and plan reviewers also would have to be registered under the Building Officials and Inspectors Registration Act.) The bill would delete a current provision requiring the concurrence by the relevant school authorities before locally adopted codes can apply to schools.

If there was no delegation of responsibility for administering and enforcing the act and the code, then the Bureau of Construction Codes (in the Department of Consumer and Industry Services) would perform all

school building plan reviews and inspections required by the State Construction Code Act. A school building could not be constructed, remodeled, or reconstructed after the effective date of the bill until written approval of the plans and specifications had been obtained from the bureau indicating that the school building would be designed and constructed in conformance with the State Construction Code Act. However, this requirement would not apply to a school building for which construction had begun before the effective date of the bill, nor where the director of the department had determined that the code officials, inspectors, and plan reviewers who would conduct plan reviews and inspections of school buildings had the necessary experience to do so.

Fire prevention code. The bill would not affect the department's responsibilities under the Fire Prevention Code, and would require the Bureau of Construction Codes and the Office of Fire Marshall (both of which are in the department) to jointly develop procedures to use the plans and specifications submitted to the department in carrying out the requirements of the State Construction Code Act and the Fire Prevention Code. A certificate of occupancy could not be issued by the appropriate code enforcement agency until a certificate of approval had been issued under the Fire Prevention Code.

Role of architects and engineers. All plans and specifications for school buildings (whether for instructional or noninstructional school buildings) would have to be prepared by a licensed architect or professional engineer, who also would be responsible for designing the building of adequate strength so as to resist fire and for providing plans and specifications which conformed to applicable building and safety code requirements.

The bill also says that construction of an instructional or noninstructional school building would have to be supervised by an architect or professional engineer licensed to practice architecture or professional engineering in this state "deemed qualified by the school district if the manager has specifically been contracted by the school district to supervise, coordinate, and manage all construction activities." [Note: This language is the result of an amendment to an H-2 version of the bill, which deleted "or a construction manager" which immediately preceded "deemed qualified by the school district." According to the Legislative Service Bureau, this language will be amended.] A person who contracted with the school district to manage and supervise construction of a

school building would be responsible for constructing those buildings (a) of adequate strength to resist fire and (b) in a "workmanlike manner, according to the approved plans and specifications."

"School construction." The bill would define "school construction" to mean a structure in which six or more pupils received instruction. The term also would apply to a structure owned, leased, or under the control of a public or private K to 12 school system or a community college or junior college. The definition would not include a "dwelling unit" or a structure owned, leased, or under the control of a college or university.

Repeal. Besides repealing the school construction code act (Public Act 306 of 1937), the bill also would repeal a section of the Revised School Code (MCL 380.1263). This section of the school code, added in 1990, prohibits a school board from designing or building a school building to be used for instructional or noninstructional school purposes or from designing and implementing the design for a school site unless the design and construction complies with Public Act 306 of 1937 (the school building construction law). The section also says that the state superintendent "has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes and of site plans for those school buildings."

MCL 125.1502 et al.

FISCAL IMPLICATIONS:

According to an analysis by the Department of Consumer and Industry Services (dated 3-23-98) on the bill as introduced, the Bureau of Construction Codes (which, along with the Office of Fire Safety, is one of two offices in the department that would be affected by the bill) believes that fees charged under the State Construction Code Act for permits, plan reviews, and inspections will cover the cost of any increased responsibilities under the bill. The responsibilities of the Office of Fire Safety also should not be diminished either, because the Fire Prevention Code of 1941 provides alternative authority to assure fire safety in schools. Finally, the bill also would relieve the Department of Education of its responsibilities under Public Act 306 of 1937, though since many of these responsibilities currently are being carried out by the Office of Fire Safety under an

agreement with the Superintendent of Public Instruction it is uncertain how great this impact would be.

ARGUMENTS:

For:

The current lack of mandatory structural inspection of school building construction poses potentially serious safety issues as well as potentially costly repairs and possible litigation costs when school construction projects are not adequately inspected during their construction. In New York state, as the result of an incident in which six elementary school children were killed when an unbraced and improperly supported wall fell on them, legislation was enacted implementing a mandatory structural safety inspection program. While no deaths from shoddy school construction have been reported in Michigan, there has been at least one instance in which a construction worker was seriously injured in the course of his work due to earlier shoddy construction work allowed at a school construction site. Before any further such accidents or even deaths of schoolchildren occur in Michigan, stronger construction inspections should be enacted into law.

In addition to the potential safety issues, inadequately inspected construction can be financially costly to school districts as well. As a number of shoddy school construction problems have vividly illustrated, substandard materials and workmanship are allowed by the exemption of school buildings from the State Construction Code Act that covers the construction of other major buildings in Michigan. That exemption means that when schools are under construction, no state or local authority is required to be on site to inspect the walls, the foundation, or the roof to certify that state construction codes are being met. Instead, school construction falls under Public Act 306 of 1937, which makes the architect responsible for "supervising" the construction of his or her own project, and the act doesn't mention construction managers, a profession that didn't exist 60 years ago.

When the school construction code act was enacted in 1937, schools were not as extensively used by communities for a variety of activities before and after the school day commenced. Today, however, school buildings are used not only to instruct schoolchildren but to house a variety of programs such as latch-key programs, day care programs, and meeting areas for community groups, such as senior citizen groups, evening PTO and PTA meetings, scouting meetings,

and for fund raisers. In addition, sixty years ago, athletic activities and events generally were held during the school day, whereas today many such events are held on evenings and even weekends. Given such intensive use of these important community buildings, it is more important than ever that the buildings be constructed in a safe manner comparable to what is required of other major buildings in the state.

The aim of the bill is to make school buildings subject to the same construction codes and inspections as other major buildings and thereby avoid any repetition of the construction of structurally flawed, unsafe school buildings. The bill requires the Department of Consumer and Industry Services to approve plans and oversee construction of schools or else delegate the responsibility to competent local officials. Currently, schools can be built without any oversight by state or local inspectors, except for checks for compliance with fire safety and health regulations. Under this proposal, schools will be subject to the permit, plan review, and inspection requirements of the state construction code.

The bill will protect students, school personnel, and the public, and save school districts the expense of repairing or even reconstructing flawed buildings. There appears to be no good reason why school buildings should not be subject to stringent codes and inspections. Also, some people argue that currently it is not clear where the responsibility lies for the costs associated with unsuccessful school building projects; this bill will clarify that issue.

For:

In a separate but related issue, a dispute between school and municipal officials in Birmingham raised the question of who at the local level has authority over site selection and planning decisions when the construction of a school or school-related facility is proposed. Municipal officials have argued that zoning and site plan review should be their responsibilities, while school officials have argued for at least a neutral zoning dispute resolution mechanism. As a result of the Birmingham dispute (which reportedly was over tennis courts or the placement of fences around tennis courts), a provision was added to the School Code in 1990 that says that a school board can't design or build a school building or design and implement the design for a school site unless the design and construction complies with Public Act 306 of 1937 (the school building construction law). The section also says that the state superintendent "has sole and exclusive

jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes and of site plans for those school buildings." Though the State Construction Code Act does not deal with planning and zoning issues, the bill would repeal Public Act 306, and thus would have some impact on School Code provisions that cite that act. By repealing the section of the school code added in 1990, the bill would remove this concern. At the same time, the bill would add language to the State Construction Code Act that would serve to provide a cause of action for school districts against architects for failure to prepare and design school buildings "of adequate strength to resist fire and for providing plans and specifications which conform to applicable building and safety code requirements. The bill also would preserve language (from the school construction code act) that would make persons who contracted with school districts to manage and supervise construction of school buildings responsible for constructing those buildings "of adequate strength so as to resist fire" and "in a workmanlike manner, according to the approved plans and specifications." Finally, the bill would apply to noninstructional as well as instructional buildings, thereby assuring that minimal structural safety inspections would be required for all structures "affording a facility or shelter for use or occupancy by persons" (in the construction code act's definition of "building"), including such structures as bleachers, and so forth.

Response:

According to school officials, shifting authority over site plans is an issue separate and distinct from the purported safety and litigation issues addressed by the bill, and should be dealt with in a completely different bill of its own.

Against:

While the concept of improving the supervision of the construction of school buildings is a good one, school officials have a number of financial concerns about this bill. For example, they are concerned about the additional costs that may be involved under the process mandated by the bill, both because of what the Department of Consumer and Industry Services has said it typically charges in fees (reportedly one-half of one percent of the total project cost) for permits, plan reviews, and inspections and because of the costs of enforcement of duplicate codes with duplicate fees (e.g., the state construction code and the fire safety code). School districts now must pay fees to architects for the planning and oversight of school construction,

and will continue to have some architect costs under this proposal, in addition to new fees from the state or from local building inspectors. Won't there be Headlee implications if school districts are required to pay new costs, in the form of substantial fees to the state for its permits, plan reviews, and inspections? School representatives also are concerned about the potential for delay -- and the concomitant increases in construction costs -- if state inspections are required, as they would be under the bill, as they believe that there currently is a shortage of certified state inspectors and that the Department of Consumer and Industry Services already is struggling to complete those public school inspections for which they currently are (voluntarily) responsible. Finally, school officials claim that the problems that give rise to this bill are unusual and do not typically occur. For example, no one has presented any concrete examples of injuries to or deaths of school children or staff due to faulty construction. If the issue is student safety, then where are the examples of threats to students' safety under current law? If the issue is recovery of damages for faulty or shoddy construction, then why not simply amend existing law to address this issue? Finally, it should be pointed out that the proposed changes to existing statutory language will in all likelihood result in litigation in order to clarify the new language. For example, the proposed language in subsection (3) of the proposed new section 8a would require the director of the Department of Consumer and Industry Services to delegate responsibility for the administration and enforcement of the State Construction Code Act to "the applicable agency." Presumably, this refers to local agencies, but the reference -- and other language in the bill -- is far from clear.

Response:

There are a number of responses to these concerns raised by school officials. First, lack of adequate inspections already has cost a number of school districts hundreds of thousands of dollars, both to repair damage resulting from faulty or shoddy construction and to pay for costly lawsuits in the aftermath of such construction problems. Surely responsible school officials would want to ensure that adequate inspection of construction of school buildings protects both the safety of their students and the effective use of their taxpayers' construction dollars, rather than waiting to take action "after the fact." Secondly, if there are not enough state inspectors to meet statutorily-mandated duties, it is the state's duty to appropriate more money to hire an adequate number of inspectors. In addition, the bill allows alternatives to requiring state inspectors, while continuing to

require that state construction standards be met. And although some school districts reportedly are paying more attention to getting better construction inspections as a result of the publicity from the Petosky trial, this always has been an option and, obviously, has not always been exercised. As the transcripts of the Petosky trial indicate, architects and their construction managers or general contractors do not always do the inspections delegated to them under current law. The bill would not allow adequate construction inspections to be merely an option; it would require them, thereby protecting both students' safety and taxpayers' money. Lastly, even though there apparently have been no student or staff injuries or deaths so far under current law, the disaster in New York state (where six elementary school children were killed when a badly-constructed wall fell on them) should not have to occur before action is taken to prevent such tragedies from occurring in Michigan. And though apparently no one was injured, reportedly in March of 1997, the roof of Blackbird Elementary School in Harbor Springs started coming apart while children and teachers were in the building. And there has been at least one documented case of a serious injury to a construction worker, reportedly due to shoddy construction work done earlier in the course of the school construction. Rather than wait until someone dies or until more people are injured, the state should act to prevent, to the extent possible, such results of inadequately inspected school construction.

SUGGESTED AMENDMENTS:

The Department of Consumer and Industry Services recommends deleting the definition of "executive director," as that position was abolished by ERO 1996-2, which restructured the Departments of Labor and Commerce into the Department of Consumer and Industry Services. In addition, the department will recommend specifying that the language in subsection (3) of the proposed new section 8a referring to the director delegating the responsibility for the administration and enforcement "of this act" specify instead the proposed amendatory act, which specifically concerns school construction and not construction of all buildings in general.

POSITIONS:

The Department of Consumer and Industry Services supports the bill. (6-3-98)

The Michigan State AFL-CIO supports the bill. (6-3-98)

The Michigan Chapter of the Air Conditioning Contractors of America supports the bill. (6-3-98)

The Michigan Municipal League supports the bill. (6-3-98)

The Michigan Township Association supports the bill. (6-3-98)

A representative of the Michigan State Building and Construction Trades Council indicated support for the bill. (6-2-98)

The Michigan Association of School Administrators opposes the bill. (6-3-98)

The Michigan Association of School Boards opposes the bill. (6-3-98)

A representative of the Michigan School Business Officials organization indicated opposition to the bill. (6-2-98)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.