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New York City's School Asbestos Debacle: An Administrative Approach to the Problem of Faulty School Inspections and a Possible New Round of Asbestos Litigation

Louis DiGiovanni*

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NOTES

NEW YORK CITY'S SCHOOL ASBESTOS DEBACLE: AN ADMINISTRATIVE APPROACH TO THE PROBLEM OF FAULTY SCHOOL INSPECTIONS AND A POSSIBLE NEW ROUND OF ASBESTOS LITIGATION

Louis DiGiovanni *

INTRODUCTION

Asbestos problems arising from faulty inspections caused New York City's public schools to open later than planned in the fall of 1993. In June of 1993, workers repairing the leaky roof of a school building discovered asbestos, despite written reports that the building was asbestos-free.¹ A further, more thorough examination of school asbestos reports exposed city-wide inadequacies involving gross inaccuracies, revelations of past warnings, and citations from the Environmental Protection Agency ("EPA").² In August, the School Construction Authority ("SCA") and the Special Commissioner for Investigations ("SCI") sealed the offices of the New York City Board of Education's Environmental Health and Safety Group (formerly called the Asbestos Task Force),³ alleging that hundreds of reports were falsified, and thousands of other documents were missing.⁴ The internal probe eventually widened to include probes by the EPA, federal prosecutors, the Federal Bureau of Investigation, and the Queens County District Attorney's Office.⁵ That same month, the Board of

* J.D. Candidate, 1995, Fordham University.

1. Steven Lee Myers, "Misplaced Reliance" Cited On Asbestos, N.Y. TIMES, Aug. 16, 1993, at B3.

2. *Id.* Myers reported a number of pre-1993 incidents. In 1990, the Environmental Protection Agency ("EPA") notified the New York City Board of Education that it was not in compliance with asbestos inspection and management provisions. See the discussion in part III, *infra*. In 1991, an audit by the Comptroller's Office warned of inadequacies in the inspections that were performed to comply with federal regulations, and that reinspections would probably be necessary; the Board responded that it would resurvey buildings when required to do so by the federal government. In 1992, random inspections by the EPA led to citations of the Board of Education for inadequate compliance. Myers, *supra* note 1.

3. Sam Dillon, *School Asbestos Task Force Cited For History Of Mistakes*, N.Y. TIMES, Aug. 12, 1993, at A1 [hereinafter Dillon I].

4. *Id.*

5. Myers, *supra* note 1; Sam Dillon, *Ex-Official Admits Ordering Bogus Asbestos Reports*, N.Y. TIMES, Mar. 25, 1994, at B1; Kevin Flynn & William Bunch, *Lying Squads? Repair Teams Under Suspicion*, NEWSDAY, Aug. 25, 1993, at 3 (The "flying squads" were employees of the Board of Education's Asbestos Task Force who were to respond to asbestos projects that were too small to warrant outside contractors. The Asbestos Task Force offices were located in Long Island City, in Queens County. The central offices of the Board of Education are located in Kings County (Brook-

Education ordered that all 1069 schools be retested by a contractor not involved in the original inspections.⁶ What started out as a set of inaccurate reports led to discussions of possible fraud by the original inspection contractor and officials of the Asbestos Task Force.⁷ Parent groups were outraged.⁸

On September 17, 1993, Advocates for Children, a not-for-profit agency dealing in children's issues, filed suit against the Board of Education and the SCA in the United States District Court for the Eastern

lyn).). On March 24, 1994, Robert Pardi, the person in charge of the Asbestos Task Force, pleaded guilty to federal conspiracy charges. Mr. Pardi admitted to signing more than 100 blank inspection forms. No findings of bribery were made. Dillon, *supra*, at B1.

6. Edna Negron, *Removal May Not Make It*, NEWSDAY, Aug. 11, 1993, at 7 [hereinafter Negron I]. The new contractor was ConTest, and was selected by the Board of Education. *Id.* However, it was reported that the SCA's main asbestos contractor was Kaselaan and D'Angelo, also not connected with the original inspection. William Bunch, *Asbestos Trainers Were Suspended*, NEWSDAY, Aug. 27, 1993, at 8 (prior to school asbestos controversy, state health officials threatened to withhold course completion certificates until the Asbestos Training Institute, the company training the new inspectors, corrected procedures for students not fully understanding English; company complied within a week).

7. See Dillon I, *supra* note 3; Negron I, *supra* note 6; Edna Negron et al., *EPA Probe Too; Feds Study Asbestos Tests*, NEWSDAY, Aug. 12, 1993, at 7 [hereinafter Negron II]. In August, it was reported:

EPA officials want to know if the Board of Education has complied with a consent order signed by former Schools Chancellor Joseph Fernandez in February, in which the board agreed to adhere to a host of federal standards and correct violations in 22 schools. Most of the problems involved record-keeping. "Depending on what we find, we could fine the Board of Education or whoever we find to be out of compliance," said Mary Breitenbach, an EPA spokeswoman. The EPA will examine many of the same records being studied by special commissioner of investigation Ed Stancik and Thomas Thacher, inspector general for the School Construction Authority, she said. Stancik and Thacher are studying possible criminal conflict of interest surrounding the relatively inexperienced consulting firm Envirosafe Corp., which won a \$1.4-million contract to oversee the Board of Education's asbestos testing program in compliance with state and federal law. They also are scrutinizing the chain of responsibility at the board. Philip Klein, the attorney for Envirosafe, maintains that it was Board of Education officials, not company employees, who performed the highly criticized inspections. A copy of the contract, obtained by New York Newsday yesterday, said that Envirosafe trained the board inspectors. [The office of the city comptroller provided a copy of the contract to Newsday. A portion reads:]

Services shall consist of the following:

1. Training 26 Division of School Buildings personnel for certification through an approved AHERA Asbestos Inspectors course and supervise (with three Industrial Hygienists) a thorough and complete asbestos survey of all spaces within each school building in the New York City Board of Education school system, excluding buildings used for offices. . . .

5. Assemble a management plan by a certified management planner for each facility surveyed in accordance with 40 CFR Part 763, including written identification, sampling analysis results, priority conditions and quantities of asbestos containing materials within one (1) week of the survey of each facility as outlined above. *Id.*

8. Negron I, *supra* note 6; Negron II, *supra* note 7.

District of New York.⁹ The class-action suit alleged that: first, the Board of Education failed to adhere to regulations promulgated under the Asbestos Hazard Emergency Response Act ("AHERA")¹⁰ by failing to conduct inspections and reinspections properly and by failing to make its asbestos management plan available to the public;¹¹ second, the defendants violated 42 U.S.C. § 1983 by denying plaintiffs information regarding the presence of asbestos-containing material in the school buildings and the extent and result of the defendants' cleanup efforts, and by adopting a policy of inspection and reporting that is contrary to AHERA;¹² and third, the defendants' negligent and unlawful conduct resulted in exposing the plaintiffs to a variety of asbestos-related hazards.¹³ Plaintiffs sought an injunction requiring defendants to provide and/or finance the continuous medical monitoring of their children to ensure early detection and treatment of asbestos-related disease.¹⁴ The complaint also alleged that in response to Advocates for Children's August 24, 1993 request to see the asbestos management plan for the city's schools under New York's Freedom of Information Law,¹⁵ the Board of Education, without providing any explanation, replied that no plan was available.¹⁶ The suit is significant since it highlights two new aspects of asbestos litigation, faulty inspections and medical monitoring, which may characterize future asbestos litigation.

The concept of awarding damages for medical monitoring costs in the absence of physical injury was undeveloped at the time of the AHERA regulations. For example, *Askey v. Occidental Chemical*

9. *Advocates For Children of N.Y., Inc. v. Board of Educ.*, No. CV-93 4269 (E.D.N.Y. filed Sept. 17, 1993). The suit also names various private persons as plaintiffs.

10. Asbestos Hazard Emergency Response Act, 15 U.S.C. §§ 2641-2654 (1988). The EPA promulgated regulations under AHERA, codified in 40 C.F.R. § 763.

11. *Advocates for Children*, No. CV-93 4269, at 10-11. See 15 U.S.C. § 2644(d)(5): "A copy of the management plan shall be available in the administrative offices of the local educational agency for inspection by the public, including teachers, other school personnel, and parents. The local educational agency shall notify parent, teacher, and employee organizations of the availability of such plan." See also 40 C.F.R. § 763.93(g)(1), which states, "The management plans shall be available, without cost or restriction, for inspection by representatives of EPA and the State, the public, including teachers, other school personnel and their representatives, and parents." In addition, 40 C.F.R. § 763.93(g)(3) has a similar requirement for each school.

12. *Advocates for Children*, No. CV-93 4269, at 11-12.

13. *Id.* at 12.

14. This is filed as a pendent state law claim for future medical monitoring. *Id.* See 15 U.S.C. § 2649(a): "Nothing in this subchapter shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common." Subsections (b), (c), (d), and (e) also make clear, in greater detail, that AHERA is not intended to increase or decrease the liability of persons under state or federal law. 15 U.S.C. § 2649(b)-(e).

15. N.Y. PUB. OFF. LAW § 84 (McKinney 1986).

16. *Advocates for Children*, No. CV-93 4269, at 10.

*Corp.*¹⁷ was only a few years old, and it dealt with an extreme situation. New York's Toxic Tort Revival Statute,¹⁸ which was designed to help victims of pollution agents whose damage was not apparent immediately, was enacted only in 1986, the same year as AHERA. Since AHERA required every public school system in the country to undergo inspections, New York City's experience of asbestos-related lawsuits may be repeated in other school districts where inspections were conducted hastily to comply with federal deadlines.

This Note examines this possible new wrinkle in asbestos litigation from an administrative law standpoint; it argues that the scope of possible claims for damages is so vast and the expertise needed to review claims so specialized that AHERA violations need to be resolved by an administrative agency capable of providing medical monitoring services either through its own health network or by funding non-agency providers. An administrative framework for remedies, funded from an insurance program paid for by school districts and/or the asbestos abatement industry itself, is a superior mechanism since asbestos claims already surpass existing resources and cannot be called upon for this new round of relief.¹⁹ School districts are already hard pressed for resources. Moreover, studies have shown that the costs of litigation itself are major components that eat away at the resources available for relief.²⁰

A key factor of this proposed administrative framework is a preemption requirement in AHERA that would bar school asbestos medical monitoring claims until the plaintiff had exhausted administrative remedies available from the agency providing medical monitoring services. Currently, AHERA does not preempt state laws that relate to harm caused by asbestos in schools.²¹ Since caselaw involving medical monitoring in the absence of injury is new and varies considerably from state to state, school districts may be subjected to varying damages arising from their compliance with a national program designed to protect schoolchildren and school employees. The proposed administrative framework for relief would also impose more rigorous inspection requirements since current regulations are insufficient in preventing faulty inspections.

Part I of this Note examines the history of asbestos litigation and school asbestos legislation in particular. Part II discusses consultant regulations in existing school asbestos regulations and their legal ramifications. Part III proposes that, through medical monitoring, the

17. 477 N.Y.S.2d 242 (App. Div. 1984) (holding that an action for medical monitoring costs is sustainable absent present harm provided plaintiffs, residents of the Love Canal area, could show that such expenditures were reasonably expected).

18. N.Y. CIV. PRAC. L. & R. § 214-c (McKinney 1990 & Supp. 1995).

19. See *infra* notes 56-61 and accompanying text.

20. See *infra* note 53 and accompanying text.

21. See *supra* note 14 (no preemption in AHERA).

government can give appropriate compensation for school asbestos exposure resulting from faulty inspections, and further, that alternatives to lump sum payments, such as periodic payments and service provision remedies, are appropriate methods of compensation. This Note concludes by recommending that the EPA use its rulemaking powers under AHERA to enact stricter inspection regulations and require school districts to develop medical monitoring mechanisms for children and school employees in improperly inspected school buildings.

I. ASBESTOS AND THE LAW

Judging from past and current personal injury litigation arising from suits filed by asbestos workers, it is likely that a whole body of school asbestos litigation will arise in the future. The history of litigation by asbestos workers is an evolving one. Early suits were characterized by manifested disease, while more recent suits involve medical monitoring for less seriously ill plaintiffs.²² The evolution is significant to school asbestos since this special field of asbestos litigation will involve plaintiffs with less serious conditions, or even no illnesses, but who may seek damage awards related to medical monitoring. A history of asbestos litigation follows.

A. *Background on Asbestos Building Material*

Asbestos is actually a collective term for a number of naturally occurring fibrous silicate minerals: actinolite, amosite, anthophyllite, chrysotile, crocidolite, and tremolite.²³ The term "asbestos" has also been applied to mixtures.²⁴ Asbestos can be easily crumbled or pulverized, and, in this form, is called "friable."²⁵ In the 1950s, asbestos'

22. See *Gerardi v. Nuclear Util. Servs., Inc.*, 566 N.Y.S.2d 1002 (Sup. Ct. 1991); *Acevedo v. Consolidated Edison Co.*, 596 N.Y.S.2d 68 (App. Div. 1993). See also Roger Parloff, *The Tort That Ate The Constitution*, AM. LAW., July-Aug. 1994, at 75 (discussion of recent asbestos litigants suing for medical monitoring due to "pleural plaques," an irregularity that has not been linked to any of the asbestos-related diseases, but which requires regular checkups; the condition was found in health screenings sponsored by labor unions after some workers contracted asbestos-related conditions).

23. INTERNATIONAL LABOUR CONFERENCE, SAFETY IN THE USE OF ASBESTOS, 71st Sess., Report VI(1) at 3 (1985) [hereinafter INTERNATIONAL LABOUR CONFERENCE]. See also 15 U.S.C. § 2642(3) (1992).

24. INTERNATIONAL LABOUR CONFERENCE, *supra* note 23, at 42. See also 15 U.S.C. § 2642(4): "The term 'asbestos-containing material,' means any material which contains more than 1 percent asbestos by weight."

25. OFFICE OF TESTING AND EVALUATION & OFFICE OF PESTICIDES AND TOXIC SUBSTANCES, EPA SUPPORT DOCUMENT FOR PROPOSED RULE ON FRIABLE ASBESTOS CONTAINING MATERIALS IN SCHOOL BUILDINGS 2 (1980) [hereinafter SUPPORT DOCUMENT]. See also 15 U.S.C. § 2642(6):

The term "friable asbestos-containing material" means any asbestos-containing material applied on ceiling, walls, structural members, piping, duct work, or any other part of a building which when dry may be crumbled, pulverized,

fireproof qualities and light weight led to its replacement of concrete as a protective material for steel in large buildings.²⁶ A 1980 study by the Battelle Memorial Institute showed that amosite and chrysotile were the most common asbestos minerals in school buildings.²⁷

B. *Asbestos and Health*

The history of the medical problems²⁸ associated with asbestos in general, and with asbestos in schools in particular, is worth a brief review. Asbestos-related diseases were noted at least as far back as the first century,²⁹ when Pliny the Elder (23-79 A.D.) referred to the "diseases of slaves" who wove asbestos fibers.³⁰ By the 1930s, the dangers of asbestos were discovered and documented.³¹ However, the then-known dangers of asbestos-related diseases were limited to asbestosis, a lung disorder specifically linked to asbestos exposure. No other diseases were linked to asbestos-containing materials. It was not until the 1950s that an association was discovered between asbestos and two additional conditions: lung cancer and mesothelioma, a rare form of cancer.³² Yet even at that time, only persons who worked long and closely with asbestos were considered to be at risk for asbestos-related diseases.

Finally, in the 1970s, short-term asbestos exposure was cited as hazardous.³³ Danger to building occupants was not recognized until the

or reduced to powder by hand pressure. The term includes non-friable asbestos-containing material after such non-friable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

26. SUPPORT DOCUMENT, *supra* note 25, at 3. During a fire, the steel in a large building can become soft and endanger the structure unless it is protected by fireproof material.

27. *Id.* (citing BATTELLE MEMORIAL INSTITUTE, COLUMBUS LABORATORIES, ASBESTOS IN SCHOOLS 1 (1980), Washington, D.C.: Survey and Analysis Division, Office of Pesticides and Toxic Substances, U.S. Environmental Protection Agency. Contract No. 68-01-3858).

28. See James C. Stanley, Note, *Asbestos In Schools: The Asbestos Hazard Emergency Response Act and School Asbestos Litigation*, 42 VAND. L. REV. 1685, 1690 (1987) (describing three conditions: *asbestosis*, which can result from long-term exposure to high concentrations of asbestos and is characterized by scarring of the lung tissue; *lung cancer*, which can occur with lower concentrations and has a typical latency period of 15 to 35 years; *mesothelioma*, a rare but deadly form of cancer which is thought to have an even longer latency period but which can result from low-level exposure to asbestos).

29. THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 8 (1987) (citing B. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 1 (1986)).

30. *Id.* at 8 n.24.

31. *Id.* at 8 (citing P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 97-131 (1985)). The author of this Note remembers his ninth grade earth science class in 1969 where he was told not to handle the asbestos mineral sample due to its toxicity.

32. INTERNATIONAL LABOUR CONFERENCE, *supra* note 23, at 3.

33. It was later learned that workers with less than three months employment in the asbestos industry still had twice the normal mortality rate from lung cancer. SUP-

late 1960s in Paris office buildings,³⁴ where researchers reported a 0.4% "crepitation" rate in the lungs of occupants.³⁵ The Paris findings were considered applicable to the United States due to similarities in building construction.³⁶ Although many occupants of the Paris buildings were smokers, smoking was not considered an intervening variable since the effects of asbestos were not limited to smokers, but also affected non-smokers.³⁷

From an administrative law standpoint, the late 1970s was a period when research circles began to notice a potential public health problem. Up to that point, the problem of asbestos was viewed as a concern only to those individuals who worked with the material.

C. Surveys of Asbestos Claims

The 1970s was also a period when asbestos workers began filing suit against asbestos manufacturers seeking compensation for injuries related to asbestos exposure. The Institute for Civil Justice conducted a survey of 513 randomly selected claims closed between January 1980 and August 1982.³⁸ The survey indicated a number of demographic, occupational, and health characteristics shared by large numbers of claimants. For example, the average claimant was fifty-seven years old. Ninety-five percent were male and ninety-five percent were married.³⁹ Nearly all claimants were smokers at some time in their lives.⁴⁰ Occupationally, thirty-seven percent of claimants were shipyard workers, thirty-five percent were factory workers, and twenty-one percent were insulation workers.⁴¹ Geographically, seventy-one percent were in five states: California, Massachusetts, New Jersey, Pennsylvania,

PORT DOCUMENT, *supra* note 25, at 22 (citing H. Seidman et al., *Short Term Asbestos Work Exposure and Long-Term Observation*, ANN. N.Y. ACAD. SCI. 330: 61-89 (1979)).

34. In 1969, it was noted that spraying asbestos onto steel girders, a common method of applying asbestos, created a friable asbestos coating and released asbestos fibers. *Id.* at 15 (citing J.C. Byrom et al., *A Dust Survey Carried Out in Buildings Incorporating Asbestos-Based Materials In Their Construction*, ANN. OCC. HYGIENE 12: 141-45 (1969)). However, it was not until later that such fibers were identified as hazardous. *Id.* at 41 (citing L. Awad et al., *An Attempt to determine a medium-term low-dose exposure indicator based on clinical and radiological lung modifications*. Paper presented at the symposium on the Biological Effects of Mineral Fibres held on 25-27 September 1979).

35. *Id.* at 41. The rate should be looked upon as a prevalence rate; 0.4% of occupants showed evidence of damage to the lungs.

36. *Id.* at 68.

37. *Id.* at 45-48. Some believed asbestos only affected smokers and did not cause lung cancer in non-smokers. However, about 10% of lung cancer cases were determined to be caused by asbestos alone. *Id.*

38. JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES at v (1984).

39. *Id.* at vi.

40. *Id.* at vi-vii.

41. *Id.* at vii.

and Texas.⁴² By claim, seventy-six percent of plaintiffs alleged damages arising from asbestosis, twelve percent from lung cancer, and five percent from mesothelioma. Ninety-six percent of claimants manifested injury.⁴³ Fifteen percent of claimants were deceased at the time of case closure.⁴⁴

A survey by the Federal Judicial Center also showed a concentration of claims.⁴⁵ One concentration occurred around shipyard cities: Boston, Philadelphia and the San Francisco-Oakland area.⁴⁶ A second cluster occurred around asbestos plant cities such as Tyler, Texas, and Manville, New Jersey.⁴⁷ A total of 20,837 claims were filed in federal courts between July 1, 1977 and June 30, 1986.⁴⁸ Significantly, only 1133 claims were filed in federal courts of the Second Circuit, 1023 of which were in Connecticut.⁴⁹ New York, despite its significant industrial base and shipyard activity during World War II, had relatively few asbestos-related claims.

In the mid-1980s, follow-up surveys of early asbestos litigation outcomes were conducted.⁵⁰ One questionnaire survey on settlements conducted by the Institute for Civil Justice revealed that the average settlement was \$64,000, and varied by disease: \$54,000 for asbestosis, \$83,000 for lung cancer, and \$265,000 for mesothelioma. The survey also revealed that the average defense expense was \$37,000, seventy-eight percent of which was composed of fees and related professional items, which might have been split among defendants.⁵¹ According to the survey, nine percent of claimants received no compensation.⁵² Survey estimates revealed that plaintiffs received less than forty percent of all expenditures related to the claim, which included plaintiff's compensation, plaintiff's legal fees, and defendant's legal fees and expenses.⁵³

Importantly, the survey by the Federal Judicial Center indicated that only three percent of claims went to trial.⁵⁴ The Center found that so-called "Wellington" settlements averaged higher: \$72,000.⁵⁵ Wellington settlements are those settlements connected with the Wel-

42. *Id.*

43. *Id.*

44. *Id.*

45. WILLGING, *supra* note 29.

46. *Id.* at 13.

47. *Id.*

48. *Id.* at 14-15.

49. *Id.* at 14.

50. KAKALIK, *supra* note 38; WILLGING, *supra* note 29.

51. KAKALIK, *supra* note 38, at xii.

52. *Id.* at xi.

53. *Id.* at 91. Plaintiff received \$1 out of every \$2.59 spent in the case; the other \$1.59 went to plaintiff's legal fees (\$0.64) and defendant's legal fees and expenses (\$0.95).

54. WILLGING, *supra* note 29, at 25.

55. *Id.* at 22 n.58.

lington facility, a private arrangement developed by Dean Wellington, then of Yale Law School. Under the arrangement, large numbers of asbestos claims were consolidated, and asbestos manufacturers dropped cross-claims against each other and consolidated defense counsel. The practical effects of the Wellington arrangement were that defense costs were reduced and settlement negotiating power shifted from the plaintiff to the defendant. The Center's finding of higher Wellington settlements could be explained by the later date of its survey, 1986, four years after the questionnaire study conducted by the Institute for Civil Justice. Indeed, inflation over four years could easily account for the 12.5% increase from \$64,000 to \$72,000, rather than any strategic or legal advantage to the plaintiff by using the Wellington arrangement.

The volume of asbestos litigation has grown steadily since the early 1980s. By 1990, 30,401 cases were pending in federal courts and twice that number were pending in state courts—a total of over 90,000 cases.⁵⁶ A different survey of state courts estimated that as many as 129,000 state court cases were pending, for a grand total of 160,000 cases.⁵⁷ Projections based on exposure estimated another 668,363 personal injury cases will be filed from 1990 to 2049.⁵⁸ With one-third of school buildings reporting asbestos, the number of property damage cases from school buildings and public buildings can number in the thousands.

Significantly, the economic costs to defendants have been so staggering that they have raised concerns over the availability of relief. Out of twenty-five asbestos manufacturers, up to sixteen have filed bankruptcy petitions.⁵⁹ Potential liabilities of \$7 billion exist, to be paid from an interpleader trust fund arrangement valued at only \$2.6 billion. To date, there are already 192,347 claims, valued at \$13,517 per claim.⁶⁰ One result is that early claimants have received compensation while later claimants, a group which may include schoolchildren

56. *Dunn v. Hovic*, 1 F.3d 1371, 1394 (3d Cir. 1993) (Weis, J., dissenting) (citing Judicial Conference Ad Hoc Comm. on Asbestos Litig., *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* (Mar. 1991), reprinted in ASBESTOS LITIG. REP., Mar. 14, 1991, at 22,698, 22,702-03 [hereinafter Ad Hoc Comm. Report]).

57. *Dunn*, 1 F.3d at 1394 (citing State Judges Asbestos Litig. Comm., *Megatorts: The Lessons of Asbestos Litigation* (July 21, 1992), reprinted in MEALEY'S LITIG. REP.—ASBESTOS, Nov. 20, 1992, at B-1 [hereinafter State Judges Asbestos Litig. Comm.]).

58. *Dunn*, 1 F.3d at 1394 (citing Eric Stallard & Kenneth Manton, *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants, 1990-2049*, at 42 (Draft Nov. 9, 1992)).

59. Originally, 11 companies were estimated to be in bankruptcy, but subsequent reports increased the number to 16. *Dunn*, 1 F.3d at 1394 (citing Ad Hoc Comm. Report, *supra* note 56, at 22,705; State Judges Asbestos Litig. Comm. *supra* note 57, at B-2; Don J. DeBenedictis, *Model for Asbestos Settlements*, A.B.A.J., Apr. 1993, at 22).

60. *Dunn*, 1 F.3d at 1394 (citing *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 754 (E. & S.D.N.Y. 1991), vacated on procedural grounds, 982 F.2d 721 (2d Cir.

(assuming an adult mesothelioma victim can show a causal link to school asbestos exposure) and school employees (who may be able to show a stronger causal link), may very well be unable to obtain relief.⁶¹

These surveys are important since they provide a backdrop against which one can analyze the potential scope of school asbestos litigation. While schoolchildren are far less likely to be at risk than asbestos workers, their numbers are much higher, and, as shown in the following section, mesothelioma (the disease with the highest damages award) is the disease they are most likely to contract. These surveys also show that there are two crises that conventional common law tort procedures will be unable to ameliorate: a public health problem and a problem of inadequate and inequitable relief. Accordingly, a comprehensive administrative approach would need to address both problems.

The volume of asbestos-related cases in some courts led those courts to pursue resolution methods reminiscent of administrative agencies. For example, as a way to manage large numbers of civil litigation cases, courts used techniques such as shifting asbestos cases to one judge who would develop expertise in the area, using computers to process data on large numbers of cases to guide in settlements, and participating actively in settlements.⁶² These techniques show that an administrative approach was already being used in the area of asbestos litigation under the guise of the judicial process. A formal administrative process would offer the advantage of an ongoing, uniform process that would be used throughout the United States.

Such an administrative arrangement has been developed for processing a large number of cases and may be developed for arranging relief, albeit on a private basis.⁶³ In 1988, twenty of the most financially sound asbestos companies formed the Center for Claims

1992)); *Dunn*, 1 F.3d at 1394 (citing Stefan Fatsis, *Lower Sums for Victims of Asbestos*, quoted in PHILADELPHIA INQUIRER, Mar. 18, 1992, at C8).

61. *Dunn*, 1 F.3d at 1398 (Weis, J., dissenting) (discussing a state court's refusal to cap punitive damages) (citation omitted). In *Dunn*, the circuit court, although allowing a reduced punitive damages award, admonished district courts to, "consider whether the financial status of the defendant is such that future claimants will be unable to collect even compensatory damages because of the limited pool of resources available." *Id.* at 1390.

62. WILLGING, *supra* note 29, at 33.

63. Wayne Wooley, *Asbestos Hearing To Begin; Massive Settlement Draws Criticism*, THE LEGAL INTELLIGENCER, AP, Feb. 22, 1994, available in LEXIS, News Library, Curnws File. For a longer and more detailed discussion of the consolidation of asbestos suits and the use of preestablished criteria to give relief rather than litigation, see Parloff, *supra* note 22, at 75 (describing the proposed private settlement arrangement, nicknamed "Georgine" after Robert Georgine, president of the Building and Construction Trades Department of the AFL-CIO, and the plaintiff in *Georgine v. Amchem Prods., Inc.*, C.A. No. 93-0215, 1994 U.S. Dist. LEXIS 4659 (E.D. Pa. Mar. 30, 1994)).

Resolution ("CCR") and settled over 20,000 claims in the first year.⁶⁴ In July 1991, the federal Judicial Panel on Multidistrict Litigation transferred 26,639 cases in eighty-seven district courts to the Eastern District of Pennsylvania.⁶⁵ Thousands of other state cases also have been consolidated, such as West Virginia Mass Trial Number 3 which involves 11,000 claimants.⁶⁶

In the consolidated trial in the Eastern District of Pennsylvania, a private proposal for relief involving the CCR, nicknamed "Georgine," has been approved.⁶⁷ When originally proposed, Georgine created a controversy among constitutional and legal ethics scholars⁶⁸ since they perceived Georgine as requiring judicial performance of legislative and administrative functions. Under Georgine, claims are to be evaluated by a panel, and damages are to be awarded based on diagnosis and other factors. The arrangement also received a mixed reception from unions and victims' groups.⁶⁹ Particularly controversial is the proposal that the Georgine arrangement apply to future claimants who are not among the consolidated cases. Other concerns include possible bias by the attorneys who developed Georgine and their possible temptation by huge attorneys' fee awards, the restriction on the ability of claimants with non-malignancies to reenter the tort system, and whether the arrangement is adequately funded.⁷⁰

Although the Georgine arrangement is controversial as a tool in traditional asbestos litigation, it may nevertheless provide a useful model for school asbestos cases. The history and details of the school asbestos situation need to be reviewed before considering applying a Georgine arrangement. School asbestos litigation presents a potentially different type of claimant, one who may experience a much longer latency period before harm can be discovered, and one who requires a different type of relief: medical monitoring in the absence of physical harm.

D. *School Asbestos Gains Attention*

Experts believe that the susceptibility of children to asbestos-related diseases is higher than that of adults since children have higher respiratory and metabolic rates as well as lower body weights.⁷¹ The EPA conducted a survey in 1979 indicating that about one-third of schools had friable asbestos-containing materials to which about 3,000,000 children and 250,000 staff (including 21,600 custodians and

64. Parloff, *supra* note 22, at 76.

65. *Id.*

66. *Id.*

67. *Id.* at 75.

68. *Id.*

69. *Id.*

70. *Id.* at 77-78.

71. SUPPORT DOCUMENT, *supra* note 25, at 51-52.

maintenance workers) were exposed.⁷² However, the total number of persons at risk for premature death due to asbestos was estimated to be between 111 and 5868 students (with 960 being the "most reasonable estimate" for the number of children subject to premature death), 16 to 814 teachers and administrative staff (with 142 being the most reasonable), and 2 to 84 custodians (with 15 being the most reasonable).⁷³ Compared to the thousands of asbestos claims filed by asbestos workers, the number of potential school asbestos victims was small; one study reported that the probability of premature death was comparable to the probability of being struck by lightning.⁷⁴

Despite the low probability of premature death, the severity of the disease in children could not be ignored since the most severe asbestos-related disease was the one disease linked to children with low exposure. This disease, mesothelioma, received the most attention from school authorities.⁷⁵ While rare, the disease has a long latency period and often does not show up until the victim is in his or her sixties or seventies.⁷⁶ It is incurable and fatal. Worst of all, it showed

72. *Id.* at 1. "Exposed" simply meant that the person or persons occupied a building where asbestos was discovered. The person did not necessarily come anywhere near the source of friable asbestos.

73. *Id.* at 91. No effort was made to quantify loss in quality of life, such as reduced activity or medical costs, due to diagnosis or loss of function in persons who may not know of their condition. Nor was an effort made to compare the cost of asbestos abatement with the number of persons at risk of premature death to arrive at a per person cost. For example, some estimates put the cost of abatement for schools at \$3 billion. See Asbestos School Hazard Abatement Act of 1990, 20 U.S.C. § 4011 (Supp. IV 1992) (amending 20 U.S.C. § 4011 (1988)). This would result in a cost of almost \$3 million per person (using the "most reasonable estimates"), a figure that far exceeds the average settlements for asbestos workers with proven injuries. In fact, if the "most reasonable estimates" for premature death are used, and if claims are settled at \$265,000 (the mesothelioma settlement average), total settlement costs would be less than one-tenth of the total estimated asbestos abatement cost. It should be noted that school buildings can last 50 years or more. SUPPORT DOCUMENT, *supra* note 25, at 14. The figures of 3,000,000 children and 250,000 employees were based on estimates of the number of then-existing persons using buildings with asbestos and who were expected to be in such buildings long enough to be exposed. *Id.* Note that it did not count the number of persons who would use the buildings over the course of the buildings' life spans; this figure includes generations of students and staff, eventually including (logically) one-third of the general population, assuming that one-third of all schools have friable asbestos, and all persons attend school. When this additional fact is considered, the number of potential premature deaths increases, and the cost of abatement per person decreases, approaching costs similar to the abatement process. The SUPPORT DOCUMENT was also criticized for overstating the danger of school asbestos. See, e.g., GENERAL ACCOUNTING OFFICE, ASBESTOS IN SCHOOLS: A DILEMMA 2 (1982) [hereinafter GAO STUDY]. However, cases of mesothelioma were documented in persons living a mile from asbestos factories. SUPPORT DOCUMENT, *supra* note 25, at 26.

74. New York City Department of Health, *Asbestos: Common Questions*, CITY HEALTH INFORMATION, Jan.-Feb. 1994, at 1 (citation omitted).

75. KRISTIN OLSON, LEGAL ASPECTS OF ASBESTOS ABATEMENT: RESPONSES TO THE THREAT OF ASBESTOS CONTAINING MATERIALS IN SCHOOL BUILDINGS 2 (1986).

76. *Id.*

up in spouses and children of asbestos workers and was traced to short-term exposures received by casual, short-term contact with asbestos particles on the workers' clothing.⁷⁷ Thus, the dangers associated with short-term exposure which may occur in building renovations or in inadequately maintained structures, became known. Moreover, since no "safe" level of asbestos exists, the mere presence of asbestos became a source of concern.⁷⁸

1. The States Respond

A number of states acted without waiting for federal legislation.⁷⁹ Michigan's State Bureau of Environmental and Occupational Health began a two-year pilot study in two school districts in 1976, but did not enact legislation.⁸⁰ In January 1977, after asbestos hazards were discovered in Howell Township, New Jersey, New Jersey's Department of Education asked all school districts to inspect for asbestos and report findings to the Department.⁸¹ As a result, approximately 250 New Jersey school districts reported finding asbestos.⁸² New Jersey's Department of Health became involved and established a task force in 1977 to develop minimum specifications for asbestos removal before disbanding in 1979.⁸³ In 1980, New Jersey developed an asbestos control program in the Department of Health without formal legislation.⁸⁴ In 1977, Massachusetts enacted legislation and created a specialized commission to develop policies and procedures for administering a statewide program of school asbestos management.⁸⁵

77. WILLGING, *supra* note 29, at 5 n.9 (citing B. CASTLEMAN, *supra* note 29, at 98-103). See *supra* note 73 and accompanying text (cases of mesothelioma documented in persons living a mile from asbestos factories).

78. Although the New York State law and AHERA mentioned the lack of a "safe" level of asbestos, AHERA allows maximum ambient interior concentrations of .003 fibers per cubic centimeter (as detected by scanning electron microscopy) and .005 fibers per cubic centimeter (as detected by transmission electron microscopy). 15 U.S.C. § 2644(d)(4)(A), (B). Regulations promulgated under AHERA state that a level of 70 structures per square millimeter or less (as measured by transmission electron microscopy) is acceptable after asbestos-containing building material is removed, encapsulated, or enclosed. 40 C.F.R. § 763.90(i)(4).

79. Then-existing legislation connected with the Occupational Safety and Health Administration did not apply to schools since they were "not businesses affecting commerce." See GAO STUDY, *supra* note 73, at 3.

80. *Id.* at 34.

81. *Id.* at 34-35.

82. *Id.* at 34.

83. *Id.* at 34-35.

84. *Id.* at 35.

85. *Id.* at 33; see also SUPPORT DOCUMENT, *supra* note 25, at 12 (Massachusetts established the Special Commission on Asbestos in Schools and Public Buildings). For an update, see *Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 276-77 (1st Cir. 1990):

In 1975 the Massachusetts Legislature created a commission to assess the public health hazard of asbestos exposure in schools and public buildings and to investigate and prevent exposure to workers. 1975 Mass. Acts 58.

The state discovered that twelve percent of its school buildings contained friable asbestos.⁸⁶ The New York state legislature also predated the federal legislation in this area with the "School Asbestos Safety Act of Nineteen Hundred Seventy-Nine,"⁸⁷ which cited the concerns of its time:

1. The legislature finds that:
 - (a) substantial amounts of asbestos materials were used throughout school buildings during the period from nineteen hundred forty-six to nineteen hundred seventy-two for fireproofing, soundproofing, decorative and other purposes;
 - (b) in industrial use, exposure to asbestos fibers and particles in the air over a long period of time has been linked by reputable medical and scientific authorities to a significant increase in the incidence of diseases, such as asbestosis, bronchogenic carcinoma, mesothelioma and other malignancies;
 - (c) precise scientific data as to the levels at which asbestos materials constitute a hazard to health in non-occupational settings is not yet available and may not be available for many years to come because of the long period of time which elapses between the onset of exposure and the appearance of clinically detectable illnesses; however, mesothelioma has been found among individuals exposed to asbestos in some non-occupational settings;
 - (d) the presence of asbestos in the air in concentrations far exceeding the normal ambient levels has been found in schools, especially where the asbestos materials have reached a damaged, deteriorated or disturbed state as a result of abuse, abrasion, water leakage or forced air circulation; and
 - (e) in view of the fact that New York state has compulsory attendance laws for children of school age and these children must be educated in a safe and healthy environment, the presence and condition of asbestos in the schools is of special concern to the legislature.⁸⁸

Subsections 1(c) and 1(d) focus on the particular concerns of school authorities: lack of specific knowledge about the level of risk to

The Commonwealth's Department of Labor and Industries gradually assumed the duties of the Asbestos Commission and, in 1987, at the direction of the Massachusetts Legislature, the Department promulgated the detailed regulations [related to asbestos handler training requirements] challenged here. See Mass. Regs. Code tit. 453, §§ 6.00-6.17, 6.91-6.93.

86. SUPPORT DOCUMENT, *supra* note 25, at 12.

87. N.Y. EDUC. LAW §§ 430-436 (McKinney 1986), repealed by § 437 (1991).

88. *Id.* § 431(1), "Statement of legislative findings and purposes." Section 431(e) identifies a duty to provide a safe and healthy environment for children. Such a duty was identified as a common-law duty in *City of New York v. Keene Corp.*, 505 N.Y.S.2d 782, 786 (Sup. Ct. 1986).

schoolchildren's health but a general awareness that a risk is present and is significantly higher in buildings with poor maintenance.⁸⁹ Subsequently, a follow-up study of school asbestos conducted by the General Accounting Office ("GAO") indicated that the inspection of New York City facilities was thorough.⁹⁰ By 1982, all New York City schools had been inspected and, of 259 school buildings reporting asbestos, 197 had been abated.⁹¹ New York had a policy of zero tolerance of asbestos, while other school districts had priority rating systems.⁹² Thus, a public health problem had also become a problem of uneven standards and enforcement.

2. Early Federal Measures

The GAO was less kind in its evaluation of the federal measures developed in the early 1980s. These measures amounted to: (1) the Toxic Substance Control Act, which created a technical assistance program run by the EPA and contained a 1982 mandate to schools to conduct inspections and, significantly, to inform parent and teacher groups of the presence of asbestos;⁹³ and (2) the Asbestos School Hazard Detection and Control Act of 1980,⁹⁴ which charged the Department of Education with administering a program of financial assistance to states, record-keeping, establishing an informational program, and reviewing and revising EPA guidelines on when asbestos in schools could be termed hazardous.⁹⁵ The GAO study indicated that, while the EPA technical assistance program had at least some limited success, the Asbestos School Hazard Detection and Control Act accomplished little; no loans or grants were available, and asbestos hazard criteria were still lacking.⁹⁶ In addition, the GAO study expressed

89. The link between asbestos and "deferred maintenance" in current times may be under scrutiny. In the summer of 1994, Justice Schackman ruled that a suit by the United Federation of Teachers against the City of New York to compel proper building inspections could proceed. Daniel Wise, *Judge Permits Lawsuit Over School Conditions*, N.Y.L.J., July 19, 1994, at 1.

90. GAO STUDY, *supra* note 73, at 12-13, 35-36. The GAO contacted the State of New York as well as school districts with jurisdiction over public schools in New York City, Buffalo, and Rochester.

91. *Id.* at 15.

92. *Id.* These priority systems were developed so that more serious abatement projects could be implemented earlier.

93. *Id.* at i. The EPA did issue a document to help school districts, "Guidance for Controlling Asbestos-Containing Material in Buildings," but this was not considered adequate. See 15 U.S.C. § 2641(a)(3), which states, "The guidance provided by the Environmental Protection Agency in its 'Guidance for Controlling Asbestos-Containing Material in Buildings' is insufficient in detail to ensure adequate responses."

94. Pub. L. 96-270, 94 Stat. 487 (codified as amended at 20 U.S.C. §§ 3601-3611 (1988)).

95. GAO STUDY, *supra* note 73, at i. See also 20 U.S.C. § 3601 (1988). Note how the placement of this law under Title 20 puts this statute in Education, and not under Title 15, the Trade and Commerce area, where the Toxic Substances and Control Act is placed.

96. GAO STUDY, *supra* note 73, at ii-iii.

concern over the quality of inspections being conducted under the state and federal programs, since asbestos was still being found in buildings after inspections had been conducted.⁹⁷

In 1984, a federal funding system was initiated,⁹⁸ which was subsequently revised in 1990. The 1990 revision transferred administration of the Act from the Department of Education to the EPA.⁹⁹ Importantly, the updated legislation indicated that the original figure of three million children endangered by asbestos had increased to fifteen million.¹⁰⁰

3. New York City's Inspections Under AHERA

In 1986, Congress enacted AHERA.¹⁰¹ In 1988, pursuant to AHERA, New York City undertook an inspection of its school facilities.¹⁰² AHERA mandated that every school district appoint an individual to oversee a complete inventory of asbestos in school buildings and to develop a plan for the elimination of hazards.¹⁰³ The EPA was required to develop regulations, which were promulgated in 1987.¹⁰⁴ The EPA approved certain training programs for new inspectors.¹⁰⁵

Essentially, the three major goals of AHERA were to: (1) establish Federal regulations requiring inspections for asbestos-containing material, (2) mandate reinspection where appropriate, and (3) require the EPA to study the extent of the asbestos danger.¹⁰⁶ Under AHERA, every "local educational agency" was to develop a detailed asbestos management plan for its school buildings. The plan must include results of inspections, a plan for reinspection (due to wear and tear that may expose additional asbestos problems), and the identification of laboratories and consultants involved in the inspection.

97. *Id.* at 13.

98. Asbestos School Hazard Abatement Act of 1984, Pub. L. No. 98-377, 98 Stat. 1287 (codified as amended at 20 U.S.C. §§ 4011-4022 (1988)).

99. 20 U.S.C. § 4011 (Supp. IV 1992) (amending 20 U.S.C. § 4011 (1988)).

100. *Id.* The 15,000,000 figure was also used in OLSON, *supra* note 75, at 2 n.15 (citing Fay A. Silas, *Asbestos-Free: Schools, Others Sue Companies*, 71 A.B.A.J. 22 (1985)).

101. 15 U.S.C. § 2641.

102. 15 U.S.C. § 2641. *See also* Sam Dillon, *Confusion Ruled First Tests for Asbestos, Workers Say*, N.Y. TIMES, Sept. 13, 1993, at B1 (describing the testing process in response to federal regulations) [hereinafter Dillon II].

103. 15 U.S.C. § 2643(i)(F). *See also* 40 C.F.R. § 763.84(g)(1). Note that AHERA did not specify eliminating asbestos itself; it merely required eliminating the *hazard* of asbestos. A number of alternatives complied with this requirement, such as closing off an area.

104. 40 C.F.R. § 763(E), app. C.

105. *Id.* The EPA approved a five-day training program for New York City. Dillon II, *supra* note 102, at 1. The program consisted of three days of instruction on sampling techniques and two days on asbestos management. *Id.* The program appeared to be similar to other school inspection programs offered around the country at the time.

106. 15 U.S.C. § 2641(b).

AHERA set a deadline of 540 days from October 22, 1986 for inspections,¹⁰⁷ and of May 9, 1989 for management plans to be submitted to state governors.¹⁰⁸ The statute specifically required that the plan be available to the public.¹⁰⁹

Under AHERA, only accredited inspectors can conduct inspections, prepare management plans, and conduct response actions.¹¹⁰ Persons could be accredited either through a state accreditation program¹¹¹ or through an EPA-approved series of courses and examinations.¹¹² AHERA was modified slightly in 1990 to extend the accreditation requirement to those inspecting public buildings.¹¹³ The EPA was directed to publish a list of EPA-approved asbestos training courses,¹¹⁴ and was empowered to assess civil penalties of not more than \$5000 per day if local educational agencies failed to comply with inspection requirements.¹¹⁵ No person could be retaliated against in any manner, including job dismissal, for revealing potential violations to any other person.¹¹⁶

One underlying theme in AHERA is the high degree of citizen participation. "Any person" may petition the EPA to initiate a proceeding.¹¹⁷ Moreover, "any person" can commence a civil action to compel the EPA to meet its deadlines for developing regulations.¹¹⁸ Public availability of the asbestos management plan developed by a

107. 15 U.S.C. § 2644(b)(1). The due date would be approximately April 1988.

108. This date was set up as the latest date if a school district qualified for deferral. The original deadline was 720 days from October 22, 1986 (approximately November 1, 1988). See 15 U.S.C. § 2645(a), (d).

109. 15 U.S.C. §§ 2643(i)(5), 2644(d)(5).

110. 15 U.S.C. § 2646(a).

111. 15 U.S.C. § 2646(b). The EPA was to develop a model accreditation program. New York State and New York City have regulations that parallel the EPA regulations provided in 40 C.F.R. § 763(E), app. C.

112. 15 U.S.C. § 2646(c).

113. 15 U.S.C. § 2646(a)(1), (3), (b)(1)(A)(i), (iii) (Supp. V 1993).

114. 15 U.S.C. § 2646(f). The Administrator was to publish a list of EPA-approved asbestos training courses every three months in the Federal Register until August 31, 1991. After that date, the Administrator could do so whenever it "considers it useful." *Id.*

115. 15 U.S.C. § 2647(a), (c).

116. 15 U.S.C. § 2651(a). While this measure clearly protects custodians and teachers, its broad language also protects anyone, including students and parents, who discloses details about school asbestos to anyone else, including the media. This portion of the statute provides statutory protection that overrides any state and local employment-at-will doctrine. This is important since not all jurisdictions may necessarily follow clear public policy exceptions to the employment-at-will doctrine. Admittedly, since the employees at issue would likely be public employees, a dismissal following disclosure of facts relating to school asbestos could also involve a constitutional due process analysis. Although not challenged by caselaw, this subsection indicates that Congress did intend AHERA to preempt state and local law, in this case employment law, when it came to school asbestos, despite its general language of *not* preempting state laws. See 15 U.S.C. § 2647(g)(3).

117. 15 U.S.C. § 2647(e).

118. 15 U.S.C. § 2647(f).

school district was expressly provided for in the statute.¹¹⁹ The citizen participation provision, coupled with the statute's "no preemption" language,¹²⁰ indicates that Congress conferred statutory standing upon individuals to act as "private Attorneys General"¹²¹ who could use the EPA and the courts to put pressure on school districts. Congress' use of the term "any person" suggests that it did not intend to limit participation in AHERA enforcement to those with "particularized interests." This notion, however, begins to lose its luster when one considers the scope of the asbestos problem, the difficulty that schoolchildren will face in the future when trying to obtain relief, and the difficulties in school inspection.

New York City's schools were inspected in the early 1980s under a state program and in the mid-1980s under AHERA. These first two inspections were inadequate so the schools were inspected a third time in 1993; over 1000 buildings were inspected over a two-month period and "certified" as safe. Given the complexity of buildings, the small number of samples, and the small quantities necessary to comply with AHERA, it is possible that there will be a fourth inspection of New York City schools. In the long run, it may be more cost-effective for the administrative agencies to directly focus on identifying asbestos problems in schoolchildren rather than in the buildings they occupy.

The EPA issued its own asbestos regulations in 1987.¹²² Portions of these regulations are particularly relevant to New York City. Section 763.85(b) requires reinspections every three years.¹²³ The language of the regulation, however, limits reinspection to areas known or assumed to have asbestos-containing material.¹²⁴ Thus, in New York City's case, new inspections would be based on earlier faulty inspections, thereby allowing asbestos missed the first time to escape discovery in subsequent inspections.¹²⁵ Most likely, there will be a fourth

119. 15 U.S.C. § 2644(d)(5).

120. 15 U.S.C. § 2647(g)(3).

121. *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting): "[I]ndividual litigants, acting as private attorneys-general, may have standing as representatives of the public interest." (citation omitted). Prof. Schwartz writes that the courts have also acted to reduce standing requirements. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 500 (3d ed. 1991). In fact, part of the revolution in environmental and consumer law comes as a result of this change. *Id.* at 496.

122. 40 C.F.R. § 763.

123. 40 C.F.R. § 763.85(b)(1).

124. 40 C.F.R. § 763.85(b)(1): "all friable and nonfriable known or assumed ACBM [asbestos containing building material]." Note that this is not a *de novo* process.

125. In 1993, workers discovered asbestos in a previously inspected, supposedly asbestos-free, New York City school building only by accident. Myers, *supra* note 1. Note that 40 C.F.R. § 763.99(a)(3) exempts inspection of a building if "[b]ased on sampling records and inspection records, an accredited inspector has determined that no ACBM is present in the homogeneous or sampling area and the records show that the area was sampled before December 14, 1987, in substantial compliance with § 763.85(a)"

round of inspections; creating additional incentive for a program focusing on the health of schoolchildren rather than on inspections.

Following AHERA, a number of school districts turned to lawsuits to finance their abatement projects. These lawsuits were based on property damage theory rather than on any personal injury theory, and made no provision for personal injury to schoolchildren. AHERA has an express "no preemption" section and does not bar such litigation.¹²⁶ However, the asbestos manufacturing industry had already been subjected to lawsuits from its own workers and did not have "deep pockets" in this area of litigation.¹²⁷

4. The New York City Asbestos Problem: Did It Point Out AHERA's Weaknesses, or Did New York City Have a Problem Because AHERA Works?

Undoubtedly, the New York City experience highlighted problems with sampling techniques, a key AHERA regulation area.¹²⁸ Many of the City's school buildings were not only old, but had been renovated several times. While every building had been inspected in the early 1980s as part of the state program, practical problems existed. For example, one cannot use one sample of asbestos to extrapolate the amount of asbestos in an entire building. This is because asbestos concentrations can vary when used as a bonding agent, such as in plaster walls and ceilings; concentrations can range from "safe" levels (below one percent asbestos) to unsafe levels within a single stretch of wall or ceiling.¹²⁹ Remodeling and renovation magnifies the problem considerably and makes multiple sampling more important.¹³⁰ Moreover, it is interior areas that are most likely to be renovated. On the other hand, samples from areas such as roof tiles or boiler insulation

126. See 15 U.S.C. § 2649(a), (e), which state, respectively, as follows:

(a) [No preemption:] Nothing in this subchapter shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common.

(e) [Intent of Congress:] It is not the intent of Congress that this subchapter or rules, regulations, or orders issued pursuant to this subchapter be interpreted as influencing, in either the plaintiff's or defendant's favor, the disposition of any civil action for damages relating to asbestos.

127. Stanley, *supra* note 28, at 1701. AHERA did have a provision for federal funding, and separate federal funding legislation had been passed. However, most commentators felt the only significant source of funds would be from damage awards from litigation.

128. *Id.* at 1698; Dillon II, *supra* note 102, at B1.

129. Dillon II, *supra* note 102, at B1. Note how the one percent mixture is considered "safe." A better term would be "acceptable" since no medically safe level of asbestos exists. See CASTLEMAN, *supra* note 29 and GAO STUDY, *supra* note 73; Stanley, *supra* note 28, at 1690; N.Y. EDUC. LAW §§ 430-436 (McKinney 1986), repealed by § 437 (1991).

130. Dillon II, *supra* note 102, at B1.

usually yield straightforward, reproducible, reliable results; one sample can speak for the entire area.¹³¹

Specifically, EPA regulations require a minimum of seven samples from any wall, ceiling, or other surface area that is uniform in color and texture and larger than 5000 square feet.¹³² Seven samples for every 5000 square feet are not required; rather, just seven samples of any "uniform" area greater than 5000 square feet, no matter how much larger it is. If a school has greater than 300,000 square feet of wall space, which is not uncommon, it is conceivable that seven samples could suffice for one school. According to the City's contract with Envirosafe, the asbestos inspection contractor, an average of thirty samples were to be taken from each school's building materials that might contain asbestos.¹³³ Since Envirosafe was hired early in 1989, and inspections were to be completed by May 1989, the work entailed considerable overtime and rushed work.¹³⁴

Commentators on AHERA predicted chaos from the beginning.¹³⁵ The EPA deadline for the nation's 40,000 school districts was extended to May 9, 1989, since many districts could not obtain qualified inspectors.¹³⁶ The program was underfunded,¹³⁷ and because AHERA did not address reforming contractor's liability,¹³⁸ potential entrants in the field were discouraged from entering a highly risky business. Almost overnight, AHERA and similar earlier legislation¹³⁹ created a multibillion-dollar bonanza for those who *did* enter the asbestos abatement field.¹⁴⁰ School districts

131. *Id.*

132. 40 C.F.R. § 763.86(a)(3).

133. Negron II, *supra* note 7, at 7.

134. *Id.*

135. Stanley, *supra* note 28, at 1686.

136. *Id.* at 1688 n.22.

137. *Id.* at 1687.

138. *Id.* at 1688.

139. *See, e.g.*, Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601-2654 (1982 & Supp. V 1987)); Asbestos School Hazard Detection and Control Act of 1980, Pub. L. No. 96-270, 94 Stat. 487 (codified as amended at 20 U.S.C. §§ 3601-3611 (1988)); Asbestos School Hazard Abatement Act of 1984, Pub. L. No. 98-377, tit. 5, 98 Stat. 1287 (codified as amended at 20 U.S.C. §§ 4011-4022 (1988)).

140. Stanley, *supra* note 28, at 1686 n.4 (citing Leslie Whitaker, *Monster in the Closet*, TIME, Feb. 6, 1989, at 53 (asbestos abatement industry grew in revenue from \$200 million in 1983 to over \$2.7 billion in 1988)). The AHERA inspections caused the clock to begin running on asbestos abatement in some cases. For example, the Chicago school district lost out on a \$500 million claim against its insurance company since it filed its claim more than 12 months after discovering asbestos in its school buildings. In granting summary dismissal to the defendant insurer, the court noted that the school district knew it had an asbestos problem as early as 1978, and even forgiving that, the school district certainly knew by the 1980 inspections. *See* Affiliated FM Ins. Co. v. Board of Educ., 23 F.3d 1261 (7th Cir.), *cert. denied*, 115 S. Ct. 425 (1994); Michael Booth, *\$500M Dismissal Affirmed*, N.J.L.J., May 23, 1994, at 7.

were required to appoint someone to be responsible for the inspections.¹⁴¹

The New York City incident indicates a more thorough reinspection regulation is needed. Requirements that a minimum number of areas previously identified as asbestos-free be reinspected would provide greater confidence in the building's asbestos-free status. Further action should be outlined if areas shown to be asbestos-free on the first inspection turn out to contain friable or non-friable asbestos on the second inspection.

The history of early school asbestos projects is significant in determining the underlying rationale for AHERA. The very purpose of AHERA was to prevent shoddy abatement practices, nicknamed "rip and skip" by the Second Circuit, which endanger schoolchildren.¹⁴² While the Second Circuit interpreted AHERA's purposes to require qualified inspectors and "neat" abatement projects, this interpretation should also be applied to the other aspects of the inspection process, which is at the heart of the abatement project. In fact, early criticism of school asbestos programs lay in the preliminary inspection process, rather than in the subsequent abatement process.¹⁴³

II. AHERA'S CONSULTANT REGULATIONS

Appendix C to 40 C.F.R. § 763 presented the EPA's Model Contractor Accreditation Plan.¹⁴⁴ Under the plan, one can become an inspector following a three-day training course. Management planners follow a separate three-day program, and one who completes the four-day asbestos abatement contractor and supervisor's training course is qualified to be an abatement project designer. Asbestos abatement workers undergo a separate three-day course. Examinations are required.¹⁴⁵

The consultant regulations were adopted by a number of states in licensing persons who inspected for asbestos, developed management

141. 40 C.F.R. § 763.84(g). In New York City, that individual was Robert Pardi, an architect with the Board of Education's division of school buildings. Dillon II, *supra* note 102, at 1.

142. Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 58 (2d Cir. 1988).

143. GAO STUDY, *supra* note 73.

144. 40 C.F.R. § 763(E), app. C. Appendix C outlines curriculum and application requirements for sponsors wishing to have their courses accredited. Oddly, the regulations do not require minimum course entry requirements such as a high school diploma or English proficiency. However, the regulations do say that individual states may require a high school diploma. *Id.*

145. New York State and New York City have parallel requirements. See "Asbestos or Products Containing Asbestos; Licensing," N.Y. LABOR LAW §§ 902-905 (McKinney 1988); RULES OF THE CITY OF NEW YORK, tit. 15, ch. 1, subch. B, pt. 2, §§ 1-16 to 1-23 (covering training courses).

plans, and did the physical removal work in abatement projects.¹⁴⁶ Companies involved in asbestos abatement projects challenged the laws, asserting that worker requirements promulgated by the Occupational Safety and Health Administration preempted these state laws.¹⁴⁷ In general, courts have upheld the "public health" portions of the curriculum (how to recognize asbestos, how to prepare a work area for minimum dispersion of asbestos fibers) while holding that the occupational health and safety portions were preempted. These portions generally covered worker medical surveillance requirements or respiratory protection practices.¹⁴⁸ Thus, it is possible for states to improve upon AHERA's "public health" portion of the curriculum concerning the identification, location, sampling, and evaluation of the asbestos problem. They will not be preempted by the Occupational Safety and Health Act, and AHERA has an express "no preemption" clause. In fact, AHERA specifically allows more rigorous state requirements and does so in such broad language¹⁴⁹ that states essentially have a "free hand" in fashioning more stringent requirements for consultant practices. Furthermore, the 1990 amendments to AHERA, described in the Asbestos School Hazard Abatement Act of 1990, state that EPA enforcement actions shall not be viewed as "affecting occupational safety and health."¹⁵⁰ Indeed, it would be interesting to see if the decisions in *Associated Industries of Massachusetts v. Snow*, *Environmental Encapsulating Corp. v. City of New York*, and *National Solid Wastes Management Ass'n v. Killian* would have al-

146. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 280 (1st Cir. 1990) ("The training curriculum is adopted almost verbatim from a model curriculum developed by the federal Environmental Protection Agency pursuant to the Asbestos Hazard Emergency Response Act of 1986 (AHERA)") (citation omitted); *Environmental Encapsulating*, 855 F.2d at 58 ("AHERA requires training and accreditation — identical to that of the DEP [New York City's Department of Environmental Protection] program — of individuals working with asbestos in school buildings.") (citation omitted). More rigorous state laws are allowed under AHERA, see 15 U.S.C. § 2649(c) (state may establish more requirements), but only a few states have chosen to do so. See *National Solid Wastes Mgmt. Ass'n v. Killian*, 918 F.2d 671, 683 (7th Cir. 1990) (Illinois law challenged).

147. *Associated Indus.*, 898 F.2d 274; *Environmental Encapsulating Corp.*, 855 F.2d 48. See generally the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1970).

148. *National Solid Wastes*, 918 F.2d at 683; *Associated Indus.*, 898 F.2d at 283-84; *Environmental Encapsulating*, 855 F.2d at 59-61.

149. 15 U.S.C. § 2649(c) provides: "Nothing in this subchapter shall be construed or interpreted as preempting a State from establishing any additional liability or more stringent requirements with respect to asbestos in school buildings within such State." The use of "with respect to" language can open the door to many options by a state. Certainly more extensive training and sampling technique requirements would be upheld.

150. 15 U.S.C. § 2646 (note) (Supp. IV 1992): "In exercising any authority under [AHERA] . . . the Administrator of the [EPA] shall not, for the purposes of section 4 (b) (1) of [OSHA] be considered to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

lowed a broader application of state standards which "piggybacked" on the amended AHERA and EPA enforcement authority.

The experience, however, is that AHERA has become the standard, not the minimum upon which states could develop more appropriate consultant regulations. Massachusetts and New York, the most aggressive states in this area, eventually adopted AHERA standards rather than adopting more stringent standards.¹⁵¹ The Illinois law was challenged, but its public health portions were upheld since they were congruent with AHERA. States tend to match the federal programs precisely because asbestos management is a detailed process requiring the research and expertise that the states cannot be expected to develop. The states naturally look to the federal government, and more specifically, to the EPA, for leadership in this area. Essentially, then, school asbestos management is a federal program with the states "tagging along" for the ride.

This pattern of behavior suggests that preemption of state regulations in the area of school asbestos consultant regulations would not have a catastrophic effect on state programs. As the asbestos abatement industry matures and the problems in New York City become better known, the EPA is in the best position to objectively evaluate the situation. It could then take prompt action using its rulemaking authority since the AHERA statute does not mandate the content of consultant regulations. Preemption would serve a useful purpose since it would allow consultants to be drawn from various states whenever a major project is undertaken, such as was the case in New York City.

States differ in the remedies to which schoolchildren may be entitled because states differ in their approaches to granting awards for medical monitoring costs in the absence of physical injury. New York City may well have been an early case of faulty inspections. As more instances of faulty inspections are discovered, due to the haste of AHERA inspections, local school boards may find themselves facing considerable litigation which, like the cases affected by the Georgine arrangement, seeks awards to cover medical examinations when no physical injury has been manifested. As is shown below, AHERA is flawed by openly permitting parties to raise claims sounding in tort in both state and federal courts. Its practice of allowing citizens to serve as "mini-Attorneys General" may backfire by encouraging litigation for which realistic relief may not be available either due to state law on medical monitoring awards or a lack of school district resources. AHERA should be amended to develop a federal program of dispute resolution and relief to rationalize the problems of school asbestos.

One key feature of school asbestos claims is the young age of claimants at their first exposure. For this reason, any arrangement for relief

151. See *supra* note 146 and accompanying text.

due to faulty school inspections must include accommodation of medical monitoring in the absence of physical injury. For instance, claimants may develop "pleural plaque" on the lungs, a condition which is not life-threatening, but involves lifestyle restrictions such as not smoking, avoiding pollutants and dusty environments, and getting regular medical examinations.¹⁵² Early detection can be important in avoiding aggravating conditions. Under the Georgine arrangement, claimants must apply for relief when they get sick or they can get "green cards" which, in the case of pleural plaque, will extend the statute of limitations and allow them to reenter the system at a later date if and when they do get sick. Unions sponsored mass screenings that detected pleural plaque in union members, and that incidentally contributed to the growth in asbestos cases.¹⁵³

III. MEDICAL MONITORING

A. *CERCLA: No Recognition for Medical Monitoring*

Awards for medical monitoring in the absence of physical harm have received mixed treatment in federal courts. No federal appellate court has decided a case involving medical monitoring costs and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),¹⁵⁴ nor have any federal courts awarded medical monitoring costs under CERCLA.¹⁵⁵ However, CERCLA does not ignore the concept of medical monitoring entirely.¹⁵⁶ At issue is whether medical monitoring costs are recognized as permissible response costs in private actions brought under CERCLA.¹⁵⁷ As a general rule, federal courts have characterized the costs of medical monitoring for those exposed to toxic substances as a subset of medical treatment costs and, thus, recovery under CERCLA has been rejected.¹⁵⁸ Some cases have carved out medical monitoring costs from

152. Parloff, *supra* note 22, at 76.

153. Pleural plaque cases, nicknamed "the pleurals," are now a significant portion of the cases which started in the 1980s. Parloff, *supra* note 22, at 76.

154. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

155. Dan A. Tanenbaum, *When Does Going To The Doctor Serve The Public Health? Medical Monitoring Response Costs Under CERCLA*, 59 U. CHI. L. REV. 925, 938-39 (1992). A search conducted in preparation of this Note revealed no awards involving CERCLA and medical monitoring costs since Tanenbaum's Note.

156. 42 U.S.C. § 9604(i)(1) provided for the creation of the Agency for Toxic Substances and Disease Registry and provided for the medical care and testing of exposed individuals.

157. 42 U.S.C. § 9613(f)(1) provides for private recovery actions for contribution toward "response costs."

158. See *Werlein v. United States*, 746 F. Supp. 887, 901-05 (D. Minn. 1990) (residents' water supplies polluted by nearby United States Army site; court held that plaintiffs could not recover medical monitoring costs under CERCLA, but could recover them under common law tort); *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. (BNA) 1665, 1669 (E.D. Pa. 1988) (well water contamination); *Wehner v. Syntex Corp.*, 681 F. Supp. 651, 652-53 (N.D. Cal. 1987) (residents of Times Beach, Missouri and other "confirmed dioxin sites" suing for medical monitoring expenses and other

the larger universe of medical treatment and have identified it as a cost that furthers the goals of CERCLA, since monitoring helps to gauge the status of the land and the extent of environmental damage.¹⁵⁹ These cases analogize medical monitoring to techniques, such as monitoring wells and periodic sampling, used in monitoring land contaminated by pollution.

Clearly, the CERCLA cases are important since they illustrate that a federal law can govern how medical monitoring costs will be awarded, if at all. Given the high costs of asbestos litigation and the low probability that late litigants, such as schoolchildren, will have relief available to them, the AHERA statute should be revised to include an express treatment of medical monitoring costs with a remedial process.

B. *State Caselaw: Recognition of Medical Monitoring in the Absence of Physical Harm*

New York is one of a few jurisdictions which recognizes "medical monitoring" costs as a set of compensable damages separate and apart from damages for "increased risk" of harm.¹⁶⁰ In *Askey*, the court defined medical monitoring costs as those costs associated with diagnostic procedures that a litigant may reasonably require, and dis-

damages arising from dioxin contamination); *Chaplin v. Exxon Co.*, 25 Env't Rep. (BNA) 2009, 2011 (S.D. Tex. 1986) (class action filed by residents and workers against operators of nearby waste site).

159. See *Brewer v. Ravan*, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (former employees of a capacitor manufacturing plant exposed to toxic substances). However, even in *Brewer*, the district court said only that medical monitoring costs were *potentially* recoverable in private suits since they could be a way of assessing discharges or public health effects of environmental contamination.

160. For a discussion of this topic, see *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 U.S. Dist. LEXIS 16833 (W.D.N.C. Oct. 29, 1990) (federal court using North Carolina law to decline recognition of a tort damage of medical monitoring, deferring to the state legislature to recognize such awards, and citing *De Stories v. Phoenix*, 154 Ariz. 604, 610 (Ct. App. 1987) to identify Arizona as a jurisdiction that does recognize medical monitoring costs in absence of manifested injury). Cases in other jurisdictions recognizing awards include *Redland Soccer Club, Inc. v. Department of the Army*, 835 F. Supp. 803, 809-13 (M.D. Pa. 1993) (citing belief that state supreme court will eventually recognize medical monitoring costs, but disallowing costs in the instant case since plaintiffs did not provide evidence of presence of toxic substances at the surface where they would have been exposed, and showed no evidence of introduction of substances into their bodies); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 821-27 (Cal. 1993) (recognizing medical monitoring costs for persons affected by waste site if medical monitoring procedures are "reasonably certain," but also recognizing the comparative fault of plaintiffs who are smokers); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 978 (Utah 1993) (renovation workers exposed to asbestos); *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987) (residents' well water contaminated by toxic pollutants from township's landfill); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 209 (Mo. Ct. App. 1988) (residents exposed to toxic chemicals from plant).

tinguished these costs from "increased risk" damages, which are speculative.¹⁶¹

Addressing the subject of testing individuals, the *Askey* court indicated that, "[a]lthough damages resulting from enhanced risk of cancer and the threat of future harm not yet realized are not compensable in a tort action . . . *there is a basis in law to sustain a claim for medical monitoring as an element of consequential damage . . .*"¹⁶² Such claims are not easy ones to maintain. The *Askey* court added:

Consequences which are contingent, speculative, or merely possible are not properly considered in ascertaining damages . . . The future expense of medical monitoring could be a recoverable consequential damage provided that plaintiffs can establish with a reasonable degree of medical certainty that such expenditures are "reasonably anticipated" to be incurred by reason of their exposure. There is no doubt that such a remedy would permit the early detection and treatment of maladies and that as a matter of public policy the tortfeasor should bear its cost.¹⁶³

In the ten years following *Askey*, subsequent New York cases have upheld *Askey's* principles and the recoupment of medical monitoring costs, but have also demonstrated the difficulty of obtaining awards. In *Gerardi*,¹⁶⁴ the trial court interpreted *Askey* to require expert testimony establishing that medical monitoring costs will be incurred.¹⁶⁵ The *Gerardi* court, however, extended *Askey* further and allowed an award for negligent infliction of emotional distress, not for fear of possible future disease, but rather for emotional distress tied to the need for medical monitoring.¹⁶⁶

More recently, the issue of medical monitoring and workers' compensation has been addressed. In *Acevedo v. Consolidated Edison Co.*,¹⁶⁷ workers were dispatched to an explosion site where two other workers had been killed. They were not warned that friable asbestos fibers had been released into the air from insulating material.¹⁶⁸ Noting that neither party indicated whether the plaintiff-workers were eli-

161. *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242, 247 (App. Div. 1984). *Askey* was a suit by residents of the Love Canal area who demanded compensation for medical tests they were advised to undergo as a result of living in a contaminated area. In the earlier Love Canal case, a settlement was reached which provided for a testing and monitoring program for the site, but not for the people living in the area. *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067 (W.D.N.Y. 1982).

162. 477 N.Y.S.2d at 246 (emphasis added) (citations omitted).

163. *Id.* at 247 (citation omitted).

164. 566 N.Y.S.2d 1002 (Sup. Ct. 1991).

165. *Id.* at 1004. This requirement would entail physician testimony that periodic testing is recommended.

166. *Id.* at 1003.

167. 596 N.Y.S.2d 68 (App. Div. 1993).

168. *Id.* at 69-70.

gible for monitoring under federal regulations,¹⁶⁹ the court focused on whether a worker's claim for medical monitoring costs was barred by New York's Workers' Compensation Law.¹⁷⁰ The appellate court, citing New York's Workers' Compensation Law, reversed the trial court's denial of the company's motion for summary judgment. The New York law bars workers' suits against their employer for work-related injury, even if recovery is not available from the Workers' Compensation program.¹⁷¹ The court noted, however, that section thirteen of the Workers' Compensation Law provided compensation even if the worker is not disabled;¹⁷² accordingly, the court suggested that, if this particular issue had been brought before the court, New York's Workers' Compensation program would cover claims in this particular case. Significantly, the court's acceptance in *Acevedo* of the validity of claims for medical monitoring costs indicated that the Fourth Department's view was accepted in the First Department.

The recent action filed by Advocates for Children against the New York City Board of Education relies on this New York caselaw.¹⁷³ The suit suggests that medical monitoring can be "provided" or "financed" by the defendant, options that have only recently been developed in the literature,¹⁷⁴ and are worth noting in a reconsideration of AHERA. Local health departments operate a number of health programs for children, often in conjunction with the school system. The most notable are vaccination programs, hearing and vision testing, and in New York City, lead screening. The provision of a monitoring program for schoolchildren in improperly inspected school buildings or in

169. *Id.* at 70 (citing 29 C.F.R. §§ 1910.1001[1], 1926.58 (federal regulations setting standards for asbestos exposure)).

170. N.Y. WORK. COMP. LAW § 11 (McKinney 1992). The law states that Workers' Compensation "shall be exclusive and in place of any other liability whatsoever, to such employee." (emphasis added). The trial court in *Acevedo* denied the company's summary judgment motion and allowed the workers to sue since it felt medical monitoring costs, recognized in New York, would be barred under Workers' Compensation as no disability occurred. *Acevedo*, 596 N.Y.S.2d at 71-72.

171. N.Y. WORK. COMP. LAW §§ 10-11 (McKinney 1992). Although the statute generally bars workers from suing employers for work-related injuries, workers may still sue employers for injuries arising from the intentional torts of employers.

172. 596 N.Y.S.2d at 72: "[Under N.Y. WORK. COMP. LAW § 13,] there is no requirement that an employee establish that he or she lost wages as a result of the injury . . . disability may be found to commence 'at the time of physical impairment or need of medical care and before any loss of wages.'" (emphasis added) (citations omitted).

173. *Advocates For Children of N.Y., Inc. v. Board of Educ.*, No. CV-93 4269 (E.D.N.Y. filed Sept. 17, 1993).

174. *Id.* For an excellent review of alternative remedies in cases where toxic exposure leaves no current injury, but may entail future medical monitoring (e.g., medical checkups, blood tests, lung studies, etc.), see Amy B. Blumenberg, Note, *Medical Monitoring Funds: the Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661 (1992) (discussing alternatives to the traditional lump sum remedy in these cases and favoring the minority rules of periodic payment and direct service provision in cases presenting possible future injury; one example is a clinic operated by a nuclear power plant pursuant to possible exposure).

school buildings known to have had friable asbestos has not been discussed at any point in the New York City school asbestos controversy. In other potential "toxic tort" situations, health programs have been employed as remedies.¹⁷⁵ Health programs offer the opportunity to collect epidemiological data which can expand the expertise of administrative agencies in assessing future harms.¹⁷⁶ Such opportunity is lost when monetary damages are awarded and no further contact with the claimant is required.

Such "direct service provision" remedies discourage litigation since they do not present a lump sum award from which attorneys can draw a handsome contingency fee. For this reason, potentially impacted parties may find it difficult to obtain qualified representation. An administrative approach employing a direct service provision remedy would therefore need to add a quick, easily understood complaint process that would reduce the need for costly legal representation. While AHERA does have a citizen complaint provision,¹⁷⁷ it is applied to situations where a person seeks to initiate an investigation of a school building. AHERA's civil penalty provisions do not benefit children's current needs. They also do not have the same deterrence factor as conventional fines since the "wrongdoer" is a public agency whose professional and ethical sympathies usually lie in concert with the child anyway.¹⁷⁸ Damages and relief are left to tort-related court actions. Expansion of this provision to include a hearing process, in which an educational agency may provide services to schoolchildren in lieu of, or in addition to, the civil penalties outlined in AHERA, would more directly affect the harms to children from asbestos exposure.

To let the courts know when a party can leave the administrative process and proceed to the courts, this improvement in AHERA must be accompanied by a more thorough explanation of primary jurisdiction, exhaustion of administrative remedies, and judicial review. Currently, there is no administrative process for remedying the effects of asbestos on schoolchildren, and relief is up to the courts. AHERA specifies that, "[i]t is not the intent of Congress that this subchapter . . . be interpreted as influencing, in either the plaintiff's or defendant's favor, the disposition of any civil action for damages relating to

175. Blumenberg, *supra* note 174, at 707.

176. *Id.* But see Leah Beth Ward, *Now, Lifetime Medical Monitoring*, N.Y. TIMES, Sept. 25, 1994, § 3, Financial Desk, at 21 ("Medical monitoring bothers defense lawyers because it generates epidemiological data that could substantiate future tort actions. . . .").

177. 15 U.S.C. § 2647(d).

178. This contrasts with a for-profit organization where there may be direct pecuniary profit in violating a given regulation. AHERA provides for penalties to be deposited into an Asbestos Trust Fund, 15 U.S.C. § 2647(a), but this fund is dedicated to buildings, not persons, 20 U.S.C. § 4022.

asbestos."¹⁷⁹ The AHERA hearing should be a setting where the expertise of the agency can be used to develop a factual record; judicial review would only cover errors in the law, rather than the facts. A broad preemption provision covering state laws relating to school asbestos, going beyond consultant regulations and covering this area, is needed to prevent inconsistent findings by courts.

Primary jurisdiction is one method of comity between courts and administrative agencies that prevents premature judicial interference in a dispute. Typically, the doctrine arises when a plaintiff seeks relief from the courts in the absence of any administrative proceedings. Primary jurisdiction of a dispute in an administrative agency is favored when promoting uniformity is desired.¹⁸⁰ However, a key issue in vesting primary jurisdiction on an administrative agency is relief availability. If the agency cannot give the relief that the plaintiff seeks, then the administrative process is a needless waste of time.¹⁸¹ Thus, vesting primary jurisdiction in an administrative agency is valid when the agency has the expertise to resolve disputes and can fashion relief.¹⁸²

Undoubtedly, the school asbestos situation lends itself to vesting primary jurisdiction with the EPA. First, the EPA has the expertise to resolve disputes in the field due to the significant research it has conducted. Second, since medical monitoring, as shown below, is an uncertain remedy (not recognized at all in some jurisdictions), the EPA could provide some uniformity in the area. Third, the EPA has demonstrated, in the consultant regulation situation, that it has become the de facto pervasive authority in the area of school asbestos, even by the most aggressive state regulatory systems. Fourth, AHERA gives the EPA the ability to penalize school districts.¹⁸³ However, such penalties have a limit of \$5000 per day; this may need revision to reflect the costs of medical monitoring. Ideally, the penalty could be revised in favor of an insurance program which spreads the cost of a medical monitoring program. It would be necessary to revise AHERA's current "no preemption" clause and replace it with a preemption and a preclusion clause. When relief is uncertain, such changes would force dispute resolution out of the tort arena into a less expensive one.

179. 15 U.S.C. § 2649(e).

180. *Feldspar Trucking Co. v. Greater Atl. Shippers Ass'n*, 683 F. Supp. 1375, 1377 (N.D. Ga. 1987).

181. *Compare* *Lichten v. Eastern Airlines*, 189 F.2d 939 (2d Cir. 1951) (holding that plaintiff was required to exhaust administrative remedies before pursuing action in courts) *with* *Klicker v. Northwest Airlines*, 563 F.2d 1310, 1314 (9th Cir. 1977) (holding that pursuing relief in courts is justified without exhausting administrative remedies if administrative process cannot provide relief). *Klicker* is generally regarded as the better view. *See* SCHWARTZ, *supra* note 121, at 535.

182. SCHWARTZ, *supra* note 121, at 538.

183. 15 U.S.C. § 2647(a), (c).

Under the doctrine of exhaustion of administrative remedies, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."¹⁸⁴ However, as is the case with the doctrine of primary jurisdiction, a plaintiff may go to court directly if relief from administrative agencies is unavailable or would be futile.¹⁸⁵ Other grounds for avoiding the exhaustion requirement would be if the agency is partial, the agency is acting beyond its power, or the remaining questions are questions of law and not of fact.¹⁸⁶ This last exception to the exhaustion requirement is problematic since tort law on medical monitoring varies across jurisdictions. A much stronger AHERA, with a preclusion clause reflecting the reality of the federalization of school asbestos, would serve to guide courts that relief is to be found with the agency, not the courts.

A preclusion clause in AHERA must deal with the existing rule that provides a strong presumption in favor of judicial review of agency determinations.¹⁸⁷ "Final" EPA determinations may not be final.¹⁸⁸ The recent case of *Lindahl v. Office of Personnel Management*¹⁸⁹ established that "final" can mean that facts are finalized by the administrative process, but conclusions of law can still be appealed in the courts. This may not be as problematic as it appears. An additional preemption clause, indicating that AHERA supersedes other law in the area of school asbestos, would provide guidance to courts as to what law to apply. The prevailing view, that courts give deference to an agency's factual determinations that are supported by substantial evidence,¹⁹⁰ indicates that agency determinations will be adhered to unless the record evidence indicates they are patently unreasonable.¹⁹¹

184. *McKart v. United States*, 395 U.S. 185, 193 (1969) (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)).

185. A pithy statement of this exception to the doctrine of exhaustion of administrative remedies, and one that is often quoted by courts, can be found in *Orion Corp. v. State*, 693 P.2d 1369, 1378 (Wash. 1985) (excusing further administrative proceedings and allowing party to go to court when further administrative proceedings would be like "pump[ing] oil from a dry hole").

186. SCHWARTZ, *supra* note 121, at 547-57.

187. *Stark v. Wickard*, 321 U.S. 288 (1944).

188. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) (immigration statute that made agency determinations "final" only referred to the end of the administrative process and did not block access to courts).

189. 470 U.S. 768 (1985).

190. SCHWARTZ, *supra* note 121, at 637.

191. *Id.* at 640, stating:

When is an agency finding unfair? That is the case when the finding is not a reasonable one in light of the evidence in the whole record. Substantial evidence is such evidence as might lead a reasonable person to make a finding. The evidence in support of a fact-finding is substantial when from it an inference of existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence. *Id.* (citations omitted).

Medical monitoring costs and other environmentally-related health costs were not specifically addressed in any of the recent health reform proposals.¹⁹² An all-inclusive health program, if ever adopted, may be all the more reason for a federal approach to claims for medical monitoring arising out of school asbestos. Such health proposals serve to spread the costs of medical monitoring over a wider economic base and make relief more obtainable than is usual in the tort process.

CONCLUSION

The New York City school asbestos controversy illustrates that AHERA has two weaknesses. The statute's consultant requirements, worded as a "floor" for states to develop stricter requirements, has instead become the "floor and ceiling" standard for the states. The EPA can easily remedy this by utilizing the rulemaking powers granted to it under the statute. More importantly, AHERA should be amended to include an administrative process where citizens directly impacted by improperly inspected and abated school buildings can obtain prompt resolution of their medical monitoring claims. Such a process would recognize that schoolchildren will be the last litigants in the asbestos litigation saga and should not be denied meaningful relief. This is especially true since local health departments, allied with local school systems, are in a position to directly provide the medical monitoring services needed by the child.

192. As of January 1, 1993, there were seven major health reform bills before Congress:

1. S. 1757, H.R. 3600, 103d Cong., 1st Sess. (1993) (the Administration proposal, also known as The Health Security Act).
2. S. 491, H.R. 1200, 103d Cong., 1st Sess. (1993) (another Democratic proposal sponsored by Reps. McDermott and Conyers in the House and Sen. Wellstone in the Senate, also known as The American Health Security Act).
3. S. 1770, H.R. 3704, 103d Cong., 1st Sess. (1993) (a Republican proposal, sponsored by Rep. Thomas and Sen. Chafee, also known as The Health Equity and Access Reform Today Act).
4. S. 1533, H.R. 3080, 103d Cong., 1st Sess. (1993) (another Republican proposal, sponsored by Sen. Lott and Rep. Michel, also known as The Affordable Health Care Now Act).
5. S. 1743, H.R. 3698, 103d Cong., 1st Sess. (1993) (a third Republican proposal, sponsored by Sen. Nickels and Rep. Stearns, also known as The Consumer Choice Health Security Act).
6. H.R. 3918, 103d Cong., 2d Sess. (1994) (a fourth Republican proposal, sponsored by Rep. Arney in the House with a Senate counterpart to be sponsored by Sen. Gramm, also known as The Comprehensive Family Health Access and Savings Act).
7. S. 1579, H.R. 3222, 103d Cong., 1st Sess. (1993) (a bipartisan bill sponsored by Reps. Cooper and Grandy in the House and Sen. Breaux in the Senate, also known as the Managed Competition Act).

