

Danger in the Classroom: Asbestos in the Public Schools

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INTRODUCTION

Health hazards resulting from exposure to asbestos are generating a host of wide ranging legal questions, many of which have not been finally determined. For the most part, attention has focused on the occupational diseases of asbestos workers who inhaled the fibers.

Another subject which has recently drawn increased attention is the potential health problems caused by asbestos materials in school buildings throughout the United States. Because asbestos fibers are fire resistant,¹ possess good tensile strength, and feature above average thermal and electrical insulating properties, they were commonly used in school buildings for fireproofing and insulation² from after World War II until the last decade.³ In

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1. The Greek word "asbestos," from which the English word derives, means "not extinguished," indicating its prominent physical characteristic of being resistant to fire. WEBSTER'S NEW COLLEGIATE DICTIONARY 64 (1979 ed.).

2. UNIVERSITY OF THE STATE OF NEW YORK, GUIDANCE DOCUMENT FOR CONTROL AND ABATEMENT OF ASBESTOS CONDITIONS IN PUBLIC SCHOOLS 55 (Apr. 18, 1980) [hereinafter cited as N.Y.S. GUIDANCE REPORT].

3. OFFICE OF TOXIC SUBSTANCES, U.S. ENVTL. PROTECTION AGENCY, ASBESTOS-CONTAINING MATERIALS IN SCHOOL BUILDINGS: PART I 7 (1979) [hereinafter cited as 1979 EPA REPORT PART I]; 20 U.S.C. § 3601(a)(4) (1982); N.Y. EDUC. LAW § 431(1)(a) (McKinney Supp. 1983-1984).

public school building construction, asbestos has been widely used in cement products, plaster, fireproof textiles, vinyl floor tiles, thermal and acoustical insulation, and sprayed material.⁴

Not all such materials have been found to be hazardous. Hard asbestos-containing materials, such as vinyl floors, do not generally create exposure problems.⁵ Rather, it is principally soft or loosely bound materials, commonly referred to as "friable," that cause contamination and exposure problems.⁶ Friable materials crumble easily and release asbestos fibers into the air.⁷ Typically, friable materials have been sprayed or troweled on to surfaces for fireproofing, insulation, soundproofing or decoration.⁸ In school buildings, among the most likely places to find asbestos are sprayed-on or troweled-on ceilings, steel supported beams and columns, cafeteria walls and gymnasium ceilings.⁹

This article describes the problem of asbestos in schools and argues that federally-required and federally-funded inspection and removal of asbestos in schools are the appropriate remedies. Section I briefly describes some of the health hazards of exposure to asbestos. Section II examines and criticizes some existing state and federal statutes that address the problem of asbestos in schools. Section III examines potential solutions and concludes that the federal government should require and fund inspection and removal.

I. THE RECOGNIZED HEALTH HAZARD

Exposure to asbestos has been related to a number of serious medical disorders, among them a debilitating lung disease called asbestosis; a rare cancer of the chest and abdominal lining known as mesothelioma; and cancer of the lung, esophagus, stomach, colon and other organs.¹⁰

4. 1979 EPA REPORT PART I, *supra* note 3, at 2.

5. *Id.*

6. *Id.* at 3; OFFICE OF PESTICIDES AND TOXIC SUBSTANCES, U.S. ENVTL. PROTECTION AGENCY, GUIDANCE FOR CONTROLLING FRIABLE ASBESTOS-CONTAINING MATERIALS IN BUILDINGS 2-1 (1983) [hereinafter cited as 1983 EPA STUDY].

7. N.Y.S. GUIDANCE REPORT, *supra* note 2, at 2.

8. 1983 EPA STUDY, *supra* note 6, at 2-1; 1979 EPA REPORT PART I, *supra* note 3, at 7.

9. N.Y.S. GUIDANCE REPORT, *supra* note 2, at 2-3; 1979 EPA REPORT PART 1, *supra* note 3, at 3; 47 Fed. Reg. 23361 (May 27, 1982).

10. 1983 EPA STUDY, *supra* note 6, at 1-1; N.Y.S. Guidance Report, *supra* note 2, at 56; 1979 EPA REPORT PART 1, *supra* note 3, at 1; OFFICE OF TOXIC SUBSTANCES, U.S. ENVTL. PROTECTION AGENCY, ASBESTOS-CONTAINING MATERIALS IN SCHOOL BUILDINGS: PART 2 I-2-11—I-2-13 (1979); N.Y. EDUC. LAW § 431(1)(b) (McKinney Supp. 1983-1984).

Although to date there has not been a flood of litigation by former schoolchildren alleging injury from asbestos in their school buildings, it can hardly be assumed that no risk of injury exists, particularly in light of the scientific and legislative findings of the health hazards. In part, the absence of substantial litigation is due to the fact that asbestos-related diseases do not manifest symptoms until many years after exposure.¹¹ Furthermore, schoolchildren, unlike asbestos workers, are not obviously exposed to asbestos fibers. Thus, a middle-aged man suffering from lung cancer now is unlikely to think of his elementary school building as a potential cause of his illness. In addition, as discussed *infra* at Section III A, individual civil personal injury suits predicated upon exposure to asbestos in schools face classic toxic tort barriers to recovery.

School age children are more vulnerable to certain asbestos-related diseases than are adults. One reason is related to the long latency period characteristic of the diseases. Exposed children and adolescents have longer remaining lifespans than adults during which the disease may develop.¹² Other independent factors, including the higher rates of metabolism, air exchange, and activity of children, as well as the more rapid multiplication of cells during childhood, result in a greater risk to children than adults of developing cancer as a result of exposure to asbestos fibers.¹³

11. 1979 EPA REPORT PART 1, *supra* note 3, at 1.

12. *Id.*; 1983 EPA STUDY, *supra* note 6, at 1-2. See also *infra* note 14.

13. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT TO THE CONGRESS 55-56 (Sept. 21, 1981) [hereinafter cited as THE ATTORNEY GENERAL'S REPORT].

As noted in testimony before the House of Representatives Subcommittee on Elementary, Secondary and Vocational Education Oversight Hearings on Asbestos School Hazards:

Children are more likely than adults to survive sufficiently long for the carcinogenic effects of asbestos to be manifested. The lagtime associated with the induction of mesothelioma is typically between 35 and 50 years. The lagtime for cancer is between 20 and 30 years. Induced neoplasms in school age children exposed to asbestos . . . can be expected to manifest itself when these individuals reach middle age.

In addition, many schoolchildren smoke or will smoke cigarettes. . . . As noted earlier, Selikoff and his co-workers have reported that workers who smoke and who are occupationally exposed to asbestos have 92 times the risk of dying of lung cancer than do workers who did not smoke and have not been exposed to asbestos. Asbestos workers who smoked had eight times the lung cancer risk of other smokers.

In addition to these factors, children, because of physiological characteristics and activity levels, are at a higher risk than adults to the hazards of airborne carcinogens such as asbestos. Children have a higher rate of air exchange and metabolism than

Compared with asbestos workers, school age children have a significantly greater lifetime risk of developing mesothelioma, because the age at which one is exposed to asbestos is of great importance in determining lifetime risk.¹⁴ According to the U.S. Environmental Protection Agency (the "EPA"), studies of workplace exposure indicate that, for persons exposed to asbestos for several years, the probability of developing mesothelioma remains constant for an initial period and then increases continuously with time from the onset of exposure.¹⁵ These studies suggest that, since the initial exposure to asbestos occurs at an earlier age for schoolchildren than for adult workers, and since children have greater remaining lifespans, children face a greater risk of developing mesothelioma.¹⁶ Thus, the EPA estimates that a child exposed from ages five to ten faces at least ten times the risk of developing mesothelioma that an adult exposed to the same level of asbestos between the ages of thirty-five and forty faces.¹⁷

For a policy maker, asbestos in schools may pose an even greater problem than that of asbestos in the workplace, simply because more people are at greater risk.¹⁸ For example, approximately twenty percent of New York City's public schools and ten percent of New Jersey's schools have been found to contain asbestos materials in areas frequented by students.¹⁹ Nationally, according to a 1982 EPA report, some 3,000,000 students and

adults and consequently exchange a relatively greater volume of air. Thus, per unit of body weight, children breathe more air than adults. . . .

Added to this normal difference in air exchange rates is the fact that children are more active than adults. As the level of activity rises, so does the rate of exchange in the lungs—roughly in an exponential manner. . . . Moreover, such physical activity in children is often associated with mouth breathing and consequently with a loss of the body's normal nasal filtering capacity. Further, because children are shorter than adults, they are more likely to come in contact with asbestos dust that gets stirred up from the floor. . . ." *Oversight Hearings on Asbestos Health Hazards to Schoolchildren: Hearings on H.R. 1435 and H.R. 1524 Before the Subcomm. on Elementary, Secondary and Vocational Education, 96th Cong., 1st Sess. 298-300 (1979).*

14. 1983 EPA STUDY, *supra* note 6, at 1-2.

15. *Id.*

16. *Id.*

17. *Id.*

18. Ironically, state requirements for compulsory school attendance thus mandate children to be present in potentially hazardous buildings. See, e.g., N.Y. EDUC. LAW § 431(1)(e) (McKinney Supp. 1983-1984).

19. S. REP. NO. 710, 96th Cong., 2d Sess. 7 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1426, 1432.

270,000 teachers and other staff members regularly use public school buildings that have friable asbestos-containing materials.²⁰ The EPA has since upwardly and substantially revised its findings in this regard. According to a 1984 unpublished EPA survey, 31,000 schools nationwide contain friable asbestos, with as many as 15,000,000 children and 1,400,000 school employees exposed to the substance.²¹

Not only children are at risk. Teachers, administrators and service personnel who work in school buildings also face health hazards.²² The EPA has described how asbestos threatens school employees:

[C]ustodians sweep areas containing friable asbestos. They clean and dust in these areas; they change lights in ceilings covered with friable asbestos-containing materials; they undertake minor repairs and renovations. Without knowledge that these areas contain asbestos, these custodians will continue to undertake normal maintenance activities with no protection against unnecessary exposures, and may consequently risk serious injuries as a result. Moreover, all of these activities which cause peak exposures further contaminate the building and increase the prevailing concentrations. Sweeping, dusting, and cleaning suspend previously released fibers and disperse them throughout the building. Minor repairs and disturbances to the friable asbestos-containing materials release additional fibers. Both types of activities will increase prevalent concentrations which, in turn, will increase the risk to the larger population of children, teachers, and school administrators who occupy the buildings.²³

Thus, the Services Employees International Union, which counts approximately 100,000 school workers among its 850,000 mem-

20. OFFICE OF PESTICIDES AND TOXIC SUBSTANCES, U.S. ENVTL. PROTECTION AGENCY, SUPPORT DOCUMENTS FOR FINAL RULE ON FRIABLE ASBESTOS-CONTAINING MATERIALS IN SCHOOL BUILDINGS: HEALTH EFFECTS AND MAGNITUDE OF EXPOSURE 14 (Jan. 1982) [hereinafter cited as SUPPORT DOCUMENTS].

21. *Debate Intensifying Over Cleanup of Asbestos in Schools*, EDUC. WEEK, Aug. 22, 1984, at 10; *New Data Finds Asbestos a Peril in Home, at Job*, N.Y. Times, Aug. 7, 1984, at A1, col. 5.

22. The asbestos problem is not limited to schools on the elementary and high school level. College facilities face the same problem. See e.g., *Asbestos is Found in Rutgers Dorms*, N.Y. Times, Feb. 28, 1984, § 1, at 26, col. 1; *Study Finds Asbestos Risk in Kilmer Library at Rutgers*, N.Y. Times, July 30, 1984, at B3, col. 6; *Columbia Removing Asbestos From Its Buildings*, N.Y. Times, Feb. 3, 1985, § 1, at 39, col. 1.

23. 47 Fed. Reg. 23364-65 (May 27, 1982). Dr. Irving J. Selikoff, Director of the Environmental Sciences Laboratory, Mount Sinai School of Medicine of the City of New York, has stated that exposure to asbestos in schools increases the risk of cancer in adults. *Twenty Lessons From Asbestos*, EPA JOURNAL 23 (May 1984).

bers, has recently filed suit to compel the EPA to set standards for asbestos in schools.²⁴ According to the EPA, "safe" levels of exposure to asbestos cannot yet be quantified.²⁵ However, the EPA has stated that any level of exposure to asbestos involves some health risk.²⁶

II. LEGISLATIVE EFFORTS

A. *The New York Statute*

The New York State School Asbestos Safety Act of 1979 (the "New York Act")²⁷ was enacted in recognition of the potential health hazards resulting from substantial amounts of friable asbestos materials used throughout New York school buildings. To combat the problem, the legislature formulated a plan to require the inspection of schools, and encourage the removal or encapsulation of asbestos material where appropriate.²⁸

The New York Act gives authority to the State Commissioner of Education to inform school districts of the health hazards of asbestos materials;²⁹ to provide scientific and technical information

24. *Service Employees International Union v. Ruckelshaus*, Civ. No. 84-2790 (D.D.C. filed Sept. 11, 1984); *Union Says E.P.A. is Stalling on Asbestos Cleanup*, N.Y. Times, Sept. 12, 1984, at A19, col. 1. At the state level, the New Jersey Education Association, on behalf of New Jersey teachers and other school employees, has filed a class action against New Jersey school districts and unnamed asbestos manufacturers for damages from exposure to asbestos fibers. *New Jersey Educ. Ass'n v. Andover Regional Bd. of Educ.*, No. L-063600-84 (Super. Ct. N.J. 1984). See also *infra* note 90 and accompanying text.

25. 1983 EPA STUDY, *supra* note 6, at 1-1; 1979 EPA REPORT PART 1, *supra* note 3, at 1; 20 U.S.C. § 3601(a)(3) (1982) ("Medical science has not established any minimum level of exposure to asbestos fibers which is considered to be safe to individuals exposed to the fibers."); cf. N.Y. EDUC. LAW § 431(1)(c) (McKinney Supp. 1983-1984) ("[P]recise scientific data as to the levels at which asbestos materials constitute a hazard to health in nonoccupational 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.").

26. 1983 EPA STUDY, *supra* note 6, at 1-1.

27. N.Y. EDUC. LAW §§ 430-434 (McKinney Supp. 1983-1984).

28. Section 431(2) provides:

[I]t is the purpose of this article to cause the establishment of a state plan for identifying and eliminating those asbestos materials which constitute imminent health hazards in the schools by providing for:

(a) a determination of the extent and condition of those asbestos materials that constitute an imminent health hazard in schools to students, school personnel, parents and visitors to such schools; and

(b) the safe, orderly and expeditious elimination of asbestos conditions that pose an imminent hazard to health by containment, removal, or other methods.

Id. § 431(2).

29. *Id.* § 433(1).

to school districts regarding asbestos;³⁰ to require local school districts to inspect and report on asbestos in school buildings;³¹ to maintain records regarding asbestos materials in school buildings;³² to inform school districts of guidelines established by the State Commissioner of Health concerning asbestos health hazards;³³ to establish training programs for contractors and supervisory personnel engaged in the containment or removal of asbestos materials in schools;³⁴ to adopt minimum levels of asbestos air concentration in schools;³⁵ to apply for and accept grants and contributions for projects designed to identify and eliminate health hazards caused by asbestos;³⁶ and to cooperate with state agencies and the state legislature in promulgating policies regarding the elimination of asbestos-related health hazards.³⁷

Further, the statute requires local school authorities to inspect and report to the State Commissioner of Education on asbestos materials in schools;³⁸ to develop a plan for the containment or removal of hazardous asbestos materials and to estimate the cost thereof;³⁹ and to require contractors and supervisory personnel engaged in the containment or removal of asbestos materials to have received adequate training.⁴⁰

The New York Act does not require school districts to remove asbestos from school buildings. However, the Act has been held to empower the State Commissioner of Education to require a local school district to develop a plan to contain, encapsulate or remove asbestos material that poses an "imminent health hazard" under the Act's terms.⁴¹

A significant gap in the legislation is its failure to protect everyone who occupies a school building containing asbestos. Excluded from protection are persons who work in or use buildings

30. *Id.* § 433(2).

31. *Id.* § 433(3).

32. *Id.* § 433(4).

33. *Id.* § 433(5).

34. *Id.* § 433(6).

35. *Id.* § 433(7).

36. *Id.* § 433(8).

37. *Id.* § 433(9).

38. *Id.* § 434(1).

39. *Id.* § 434(2), (3).

40. *Id.* § 434(4).

41. Board of Educ. of Hilton Cent. School Dist. v. Ambach, 123 Misc. 2d 622, 626-27, 474 N.Y.S.2d 244, 246-47 (Sup. Ct. Monroe Co. 1984).

not utilized as public schools.⁴² In recent years, given the decline in school population within many New York communities, as well as the desire of school districts to receive some revenues from the vacant school buildings, school districts have begun to lease these vacant buildings for such purposes as youth and civic programs, pre-school development programs, adult education programs, and handicapped children programs. Under the New York Act, school districts, as landlords, are not required to correct the asbestos problem in the school buildings that house these programs.

B. *The New Jersey Statute*

In 1984, New Jersey's governor signed into law the State School Aid Act for Asbestos (the "New Jersey Act").⁴³ The New Jersey Act does not require action by school districts, but provides for state funds to assist local school districts that undertake removal or encapsulation of asbestos in school buildings.⁴⁴ The New Jersey Act provides a one-time allocation of \$10 million to the Department of Education for the 1985 fiscal year.⁴⁵ Districts wishing to receive state aid must apply to the Commissioner of Education. The Commissioner is to review conditions in the district, taking into consideration such factors as the degree of exposure, the amount of asbestos present, and the estimated cost of the removal or renovation.⁴⁶ After such review, the Commissioner is to decide whether the conditions present such a "potential health hazard because of asbestos" as to warrant expenditure of state monies.⁴⁷ If the response is affirmative, the district becomes entitled to reimbursement for seventy-five percent of its approved expenditures.⁴⁸

This allocation scheme is a constructive beginning. Whether the statutory scheme is workable, and whether the amount of

42. N.Y. EDUC. LAW § 434(4) (McKinney Supp. 1983-84).

43. State School Aid Act for Asbestos, 1984 N.J. SESS. LAW SERV. 226 (to be codified at N.J. STAT. ANN. 18A:58-68).

44. Although this Act requires no action by school districts, New Jersey has used other state statutory provisions to do so. In 1984, the State Education Commissioner required asbestos to be removed from 304 public schools before it would issue them certificates of occupancy. *Schools Delayed by Asbestos Work*, N.Y. Times, Sept. 1, 1984, at A1, col. 3.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

money appropriated is adequate, is not immediately clear. One question is whether the Commissioner will be able to apply the same standards to each application as the fund becomes depleted. Since the allocation is on a "first come, first served" basis,⁴⁹ it is possible that, as the pool of money shrinks, the Commissioner's view of what circumstances warrant state money may change to the detriment of districts which apply late.

Another question is the extent to which the position taken by the governor's office will influence the Commissioner. Early in 1984, New Jersey's governor created an Asbestos Policy Committee to study the management of asbestos in public schools. In an interim report, the Committee expressed its view that public "hysteria" in reaction to the school asbestos issue is unjustified since "there are no documented cases of lung cancer associated with low-level asbestos exposure over a lifetime."⁵⁰

C. *The Federal Statutes*

1. The Asbestos School Hazard Detection and Control Act of 1980

In June 1980, Congress enacted the Asbestos School Hazard Detection and Control Act of 1980 (the "Detection and Control Act").⁵¹ This statute explicitly recognizes that "the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to the health of schoolchildren and school employees who are exposed to such materials."⁵² Specifically, the Detection and Control Act directs the Department of Education (the "DOE") to establish a task force to assist states and local educational agencies to ascertain the extent of the danger to the health of schoolchildren and employees from asbestos materials in schools;⁵³ requires states receiving administrative funds for any applicable program to prepare a plan describing the manner in which information relating to programs established under the statute shall be distributed to local educational agencies;⁵⁴ provides for financial assistance to state and local educational agen-

49. *Id.*

50. ASBESTOS POLICY COMMITTEE OF THE GOVERNOR OF THE STATE OF NEW JERSEY, INTERIM REPORT 10 (Sept. 1984).

51. 20 U.S.C. §§ 3601-3611 (1982).

52. *Id.* § 3601(a)(6).

53. *Id.* § 3602(a), (e).

54. *Id.* § 3603.

cies to enable them to conduct an asbestos detection program to identify asbestos hazards in schools;⁵⁵ authorizes loans to local educational agencies for the mitigation of asbestos hazards which constitute an imminent danger to the health and safety of school-children and employees;⁵⁶ and assures that no employee of any local educational agency suffers any disciplinary action as a result of calling attention to potential asbestos hazards in schools.⁵⁷ In short, the federal statute encourages and supplements state and local efforts. It does not require inspection of schools or removal of asbestos. The EPA subsequently promulgated inspection requirements under another statute,⁵⁸ but there is still no federal removal requirement.

2. Absence of Federal Funds

Congress did recognize that the cost of inspection and remedial action would pose an enormous financial burden on school districts.⁵⁹ The magnitude and unforeseeability of the expense combined with the difficulty of borrowing money have made

55. *Id.* § 3604.

56. *Id.* § 3605.

57. *Id.* § 3608

58. Section 6 of the Toxic Substances Control Act ("TSCA"), Pub. L. 94-469, 90 Stat. 2020, empowers EPA to regulate hazardous chemical substances. 15 U.S.C. § 2605 (1982). Pursuant to this authority, EPA in 1982 promulgated regulations that require local educational agencies to identify asbestos hazards in schools by inspecting school buildings for friable asbestos and analyzing any such materials found. They must make public the results of such inspections by posting notices in the schools and notifying parent-teacher associations. In addition, local educational agencies must warn school employees of the risks of exposure to asbestos, and instruct them on how to minimize their exposure. 40 C.F.R. § 763.100-.119 (1984). Other federal regulations provide guidelines for detecting, assessing, containing and removing asbestos hazards from school buildings. 34 C.F.R. § 231 app. A, B & C (1984).

59. The House of Representatives Committee on Education and Labor noted in support of the Hazard Detection and Control Act:

Not all local educational agencies have available the resources to pay for the full costs of these programs, regardless of the seriousness of the hazard. . . . With several school districts having difficulty supporting even a basic educational program in the face of inflation, an unexpected expenditure of this nature would in many areas mean a reduction in educational services.

H.R. REP. NO. 197, 96th Cong., 1st Sess. 10 (1979) [hereinafter cited as H.R. REP. NO. 197].

The Senate Committee on Labor and Human Resources reported similarly. "The Committee recognizes . . . that anticipated costs have precluded hundreds of districts from undertaking detection abatement programs." S. REP. NO. 710, 96th Cong., 2d Sess. 9 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 1426 [hereinafter cited as S. REP. NO. 710].

appropriate action impossible for many school districts.⁶⁰ Moreover, Congress foresaw the serious potential health risk, the likelihood that the quality of educational programs might deteriorate as state and local funds were diverted to asbestos control programs, and the apparent inadequacy of such state asbestos abatement programs. These factors prompted it to include in the legislation a mechanism for federal financial assistance.⁶¹ Section 3605(a)(2) of the statute, entitled the "Asbestos Hazards Control

60. The House report states:

[A]s Dr. August Steinhilber, Assistant Executive Director, National School Boards Association, pointed out, some asbestos abatement projects will involve capital expenditures. If this is the case, the district will probably have to seek a bond issue to raise local money. In recent years, taxpayers have increasingly turned down new obligations of this sort. And in some States and localities, new tax limitation measures may make this route impossible. . . .

. . . Since very few people were aware of the potential hazards of asbestos in schools until quite recently, there would have been no way for districts to anticipate these expenditures in their school budgets.

H.R. REP. NO. 197, *supra* note 59, at 10.

The Senate reported:

In New York, for example, and many other states, local school districts must go to the voters to seek the bond issues and borrowing authority to raise funds for capital expenditures such as those required to remove or contain hazards. Such obligations have been turned down with increasing frequency, regardless of need or merit. Furthermore, some states and localities are constrained by statute from borrowing for such projects without first retiring other indebtedness, or cannot increase their tax rate to provide such funds.

S. REP. NO. 710, *supra* note 59, at 9.

61. The House report continued:

The committee feels that given the potential seriousness of asbestos hazards to the health of our nation's schoolchildren Federal funds ought to be made available for inspecting and controlling asbestos in the schools. . . . No district ought to be forced to make the unhappy choice of whether to impair a child educationally by cutting back on programs, or to impair the child's health through continued exposure to asbestos. By the same token, no district should be left in the position of knowing a hazard exists without being able to correct it. . . .

The lack of any asbestos program in many States and the inadequacy of programs in other ones also suggests that Federal assistance is warranted. According to the EPA telephone survey, 25 States have inspected less than one percent of their schools, and only six States have inspected more than 20 percent. And, according to Mr. Leslie Dach of the Environmental Defense Fund, many States which purport to have an active asbestos control program have done no more than initially notify school districts of the problem. According to Dr. Steinhilber of the National School Boards Association, "the States have been slow to move and tentative in their action in this area. Their reaction has been uneven and in some instances, counterproductive."

State officials testified that they also face budget problems, which make funding of comprehensive removal programs difficult. Both State and local officials reported a reluctance to undertake remedial action without Federal guidance and assistance.

H.R. REP. NO. 197, *supra* note 59, at 10-11.

Loan Program," permits the Secretary of the Department of Education to make interest-free loans to local educational agencies for fifty percent of the costs of removing or encapsulating asbestos-containing materials and restoring the school buildings to a usable condition.⁶²

The DOE has failed to request money for this program and Congress has failed to appropriate the necessary funds.⁶³ This failure to provide funds and the absence of a federal removal requirement seem to stem from the Reagan Administration's expectation that, once a school was inspected and the dangers reported to parent-teacher associations, parents themselves would take corrective action to protect their children.⁶⁴ The expectation that parents will act, however, presumes that they are able to pay for the inspection and removal of friable asbestos materials. Thus, in the absence of federal funding, only affluent school districts can take the necessary remedial steps. This conclusion has been borne out by a January 1984 internal EPA report which found that cleanup action was taken in most cases only in the "wealthy"

62. 20 U.S.C. § 3605 (1982).

63. U.S. DEP'T OF EDUC., *ASBESTOS IN THE SCHOOLS — A REPORT TO CONGRESS 3* (1983) [hereinafter cited as *ASBESTOS IN SCHOOLS*]; *Study Cites Lack of E.P.A. Action On Asbestos Peril in U.S. Schools*, N.Y. Times, Feb. 1, 1984, at A1, col. 1. See also McCormick, *Asbestos: The Clock is Ticking in Your Schools, and Inaction Could be Devastating*, AM. SCH. BOARD J. 33, 34 (Apr. 1984).

Without a doubt, asbestos is a financial burden for school systems. At President Reagan's behest, Congress repeatedly has refused to provide funds to accompany the federal regulations it requires schools to obey. Part of the Asbestos School Hazard Detection and Control Act of 1980, for example, called for \$700 million in grants and interest-free loans to help state and local education agencies identify and correct asbestos hazards in schools; no appropriations were made. Don't count on E.P.A. for changes in the funding situation either: Officials there say they have no plans to request or provide money for school systems to deal with asbestos problems.

Id. According to the president of the Service Employees International Union (see *infra* note 23), school districts are reluctant to look for an asbestos problem for fear they will find one they cannot afford to address. *Schools in a Jam over Asbestos Control*, ED. DAILY (Apr. 4, 1984).

64. *Study Cites Lack of E.P.A. Action on Asbestos Peril in U.S. Schools*, N.Y. Times, Feb. 1, 1984, at A1, col. 1; "[The EPA] has concluded that identifying hazards will provide local school districts with enough information to take corrective action on their own." 46 Fed. Reg. 23,726 (Apr. 27, 1981). This reliance on voluntary compliance is also implied in the Department of Education's 1983 Report to Congress. "Since the presence of asbestos in schools is a potential health hazard, particularly for children, it is a problem which causes public concern. This concern provides a strong motivation for voluntary compliance." *ASBESTOS IN SCHOOLS*, *supra* note 63, at 21.

school districts, "where cost will not impose a burden on taxpayers."⁶⁵

Inspection and removal of asbestos material by skilled personnel is an exceedingly expensive undertaking.⁶⁶ In an October 1983 report, the DOE estimated that 14,000 schools in the United States required asbestos abatement. The DOE has estimated the cost of abatement to average approximately \$100,000 per school building, for a total cost of \$1.4 billion.⁶⁷ In a 1984 internal report, the EPA estimated the number of schools involved to be 31,000, more than double the DOE's 1983 estimate.⁶⁸ Thus, the cost must be correspondingly doubled.

3. The Asbestos School Hazard Abatement Act of 1984

Congress attempted to address the need for such financial assistance programs in the Asbestos School Hazard Abatement Act of 1984 (the "Abatement Act").⁶⁹ Pursuant to this Act, Con-

65. *Study Cites Lack of E.P.A. Action on Asbestos Peril in U.S. Schools*, N.Y. Times, Feb. 1, 1984, at A1, col. 1; *Schools Lagging On Asbestos Cleanup Efforts*, N.Y. Times, Feb. 5, 1984, § 4, at 7, col. 1. It is ironic that the EPA does not require removal of friable asbestos in schools, but sees to the removal of friable asbestos from its own offices. Thus, when the EPA recently found the presence of friable asbestos in 12 of its own office buildings, it sealed off the contaminated areas and either temporarily evacuated its employees or required them to take safety precautions, such as wearing respirators. *Asbestos, Asbestos, Who's Got Asbestos*, N.Y. Times, Sept. 11, 1984, at B8, col. 5. Reaction to the comparative attention has been predictably critical. Dr. Myra Karstadt of the Mount Sinai School of Medicine commented, "It is nice that EPA is being so solicitous of its employees' health, but I think it's high time the agency showed equal concern for children exposed to asbestos in their schools. EPA's failure to require cleanup of asbestos-contaminated schools is inexcusable." *Id.*

66. *Asbestos Removal: Drudgery and High Tech*, N.Y. Times, Sept. 8, 1984, at A1, col. 3; *Huge Cost of Removing Asbestos Daunts Schools*, N.Y. Times, Oct. 5, 1983, at A21, col. 1.

67. ASBESTOS IN SCHOOLS, *supra* note 62, at 2, 20, 27. The costs of abating asbestos hazards depend on the procedures used. Although removal is, at least initially, the most expensive method (estimated to cost \$9.50 to \$12.00 per square foot), it is also the most desirable. *Id.* at 1-2; 1979 EPA REPORT PART 1, *supra* note 3, at 14-17. Obviously, less desirable stop-gap methods will be more attractive to cost-conscious local school districts in the absence of adequate federal funding.

68. *New Data Finds Asbestos a Peril at Home, at Job*, N.Y. Times, Aug. 7, 1984, at A1, col. 5. Moreover, in November 1983, the New York State Department of Education estimated the cost of eliminating reported asbestos hazards in the New York public school buildings to be approximately \$3.6 million. N.Y. STATE DEP'T OF EDUC., PROGRESS REPORT TO THE GOVERNOR AND LEGISLATURE ON ASBESTOS CONDITIONS IN NEW YORK STATE PUBLIC SCHOOLS 3 (1983). This estimate is based upon an average cost of \$7 per square foot of asbestos material which is subject to removal, encapsulation, or containment. *Id.*

69. Pub. L. No. 98-377, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1287.

gress transferred the authority for overseeing the removal of asbestos from the DOE to the EPA.⁷⁰

The Abatement Act establishes in the EPA an "Asbestos Hazards Abatement Program" requiring the governor's office of each state to create a "priority list" which ranks the schools most urgently needing asbestos abatement.⁷¹ Furthermore, each governor's office is required to determine these schools' financial need, based on such factors as the per capita income of the locality in which the school is situated and the ratio of the estimated project cost to the total budget of the local educational agency.⁷² Subsequently, the EPA is to compare the states' lists and compile its own "priority list" of schools it deems entitled to financial assistance.⁷³ The EPA's decision is to be based in part on "the extent to which the corrective action proposed by the applicant is cost effective compared to other techniques" of diminishing the asbestos hazard.⁷⁴ The Act then provides the impetus for action: in addition to possible eligibility for twenty-year interest-free loans,⁷⁵ local agencies may also receive federal grants for up to fifty percent of project cost.⁷⁶ This money is to come from appropriations of \$50 million for fiscal 1984 and 1985, and \$100 million for each of the next five years.⁷⁷ Congress appropriated the \$50 million for the 1984 fiscal year.⁷⁸

The Abatement Act is a significant step in attacking the asbestos problem.⁷⁹ Even though the authorized fund appears inadequate in light of the estimated cost of asbestos removal, it would still enable the schools to take some action to remove the most dangerous sources of asbestos.

However, it now appears that the EPA has elected not to carry out Congress' intent. In September 1984, Dr. John A. Moore,

70. *Id.* § 503(a)(1), 98 Stat. 1288.

71. *Id.* § 504(b), 98 Stat. 1289.

72. *Id.* § 504(b), 98 Stat. 1290.

73. *Id.* § 505(c), 98 Stat. 1290.

74. *Id.* § 505(c)(2)(B)(iv), 98 Stat. 1291.

75. *Id.* § 505(f), 98 Stat. 1291.

76. *Id.* § 505(e), 98 Stat. 1291.

77. *Id.* § 512(a), 98 Stat. 1295.

78. *Class Action Set in Asbestos Cases*, N.Y. Times, Oct. 2, 1984, at A18, col. 1.

79. However, the Act does not appear to provide for reimbursement of those school districts that have already removed asbestos hazards. In addition, school district officials have criticized the complexity of the Act's application forms. Telephone interview with William Searle, Assistant Director of School Finance, New Jersey State Department of Education (February 13, 1985).

EPA's Assistant Administrator for Toxic Substances, stated that the Agency would not ask Congress to appropriate any of the money provided under the Abatement Act for 1985 and 1986.⁸⁰ To date, the EPA has not requested these funds.⁸¹ The EPA's rationale is that if federal money is made available, school systems might defer any independent actions to remove asbestos hazards until they had access to federal funding.⁸² This view, which has been roundly criticized as defeating the remedial purpose of the Abatement Act,⁸³ renders the Abatement Act virtually useless.⁸⁴

School districts, many of which are already facing budgetary problems as a result of earlier cutbacks in state and federal funds, are confronted with the stark alternatives of somehow raising the funds necessary to ensure the safety of their school buildings, ignoring the problem, or closing the doors of those schools that require corrective measures.⁸⁵ The only realistic solution to the

80. *Hearings on Hazards of Exposure to Asbestos Before the Subcomm. on Commerce, Transportation and Tourism of the House Energy and Commerce Comm., U.S. House of Representatives, 98th Cong., 2d Sess., Sept. 26, 1984.*

81. *Class Action Set in Asbestos Cases*, N.Y. Times, Oct. 2, 1984, at A18, col. 1.

82. *E.P.A. Seeks No Money for School Asbestos Plan*, N.Y. Times, Sept. 27, 1984, at A18, col. 3.

83. *Id.* A partial "clarification" of this position was issued shortly afterwards by the EPA to the effect that the agency would spend the \$50 million already appropriated by Congress, but that it is "simply too early to know what funds will be needed in the future." *E.P.A. Tells Asbestos Stand*, N.Y. Times, Sept. 28, 1984, at B7, col. 4.

84. Although the EPA may shortly turn over to the Consumer Products Safety Commission and to the Occupational Safety and Health Administration the responsibility generally for asbestos hazards, it will continue to be accountable for dealing with the problem of asbestos in schools. *EPA to Transfer Authority over Asbestos to 2 Agencies*, N.Y. Times, Feb. 1, 1985, at B8, col. 3.

85. Ignoring the problem can only increase the potential liability of school districts. It is only a matter of time before individuals commence private actions against school districts and allege that exposure to asbestos fibers while at school caused or contributed to their illness. These lawsuits, however, must surmount the statute of limitations defense and the problem of proving causation. Causation is particularly difficult to prove since asbestos plaintiffs typically allege injuries that can be caused by a variety of factors, including smoking. J. KAKALIK, P. EBENER, W. FELSTINER, M. SHANLEY, *COSTS OF ASBESTOS LITIGATION 3* (Institute for Civil Justice, The Rand Corporation, No. R-3042-ICJ, 1983) [hereinafter cited as J. KAKALIK].

School boards, as plaintiffs against asbestos manufacturers, face those problems, plus others. For example, in actions based on strict product liability, recovery of the economic loss from inspecting, removing, or encapsulating asbestos materials may be foreclosed. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

For a discussion of some of the problems school board plaintiffs face, see *County of Johnson v. United States Gypsum Co.*, 580 F. Supp. 284 (E.D. Tenn. 1984), where the school district, after removing asbestos materials from the county high school and transporting students to other facilities, commenced an action to recover these costs from as-

problem is federal financial assistance for the essential remedial action. Without such funding for inspection, removal and encapsulation, many school districts have largely ignored the Detection and Control Act and EPA's inspection requirement.⁸⁶ This absence of federal monies, more than anything else, has caused school officials to look the other way and not take corrective measures necessary for the safety of schoolchildren.⁸⁷ The reluctance of the federal government to devise and fund a national solution to a recognized national problem only compounds the problem as state and local officials continue to seek funding.⁸⁸

III. POTENTIAL REMEDIES

A. *Litigation*

Litigation against asbestos manufacturers is one method by which school districts might obtain funds for necessary inspecting and corrective action. As of November 1984, approximately sixty school districts across the country had commenced actions

bestos manufacturers under a state consumer protection statute, and for common-law negligence, fraud, strict product liability, breach of warranty, and nuisance. The court dismissed the claims based upon the statute, breach of warranty, and nuisance, while sustaining the negligence, strict product liability, and fraud claims.

86. *See, e.g., Huge Costs in Removing Asbestos Daunts Schools*, N.Y. Times, Oct. 5, 1983, at A21, col. 1.

It is widely believed that the cost of asbestos abatement programs is one of the main reasons so many districts have not complied. Many smaller districts fear they do not have the resources to follow through with remedial actions and are therefore hesitant to arouse fears without being in a position to deal with the problem.

Id.

87. In addition to the legal consequences, the political fallout from an emotionally charged issue like asbestos can be considerable for those administrators and public officials who fail to stay on top of the problem. *See, e.g., Confusion in Jersey — Asbestos Issue is Creating an Image of a Kean Administration Under Siege*, N.Y. Times, Sept. 6, 1984, at B9, col. 1.

88. An example of the circular reasoning in the federal approach to the problem is found in the recommendations contained in THE ATTORNEY GENERAL'S REPORT, *supra* note 13, at x-xiii.

Abatement of school asbestos hazards currently rests in the hands of local and state governments, since Congress has not appropriated any funds under the [Hazard Detection and Control] Act to make federal grants and loans.

...
... Though the problem of friable asbestos in the schools is in one sense a national one, the absence of a federal law assigning liability suggests that a better solution is at the local or state level. The primary goal is to remedy hazardous situations as quickly as possible. Illusory hopes of federal assistance can obstruct rather than aid attainment of this goal.

Id. *See also supra* text accompanying notes 80-83.

against asbestos manufacturers.⁸⁹ A federal class action lawsuit seeking recovery of abatement costs on behalf of all elementary and secondary educational facilities against known asbestos manufacturers is pending in the Eastern District of Pennsylvania.⁹⁰ However, to expect such uncertain and time-consuming legal actions to provide an adequate solution to beleaguered school districts is optimistic at best. Litigation cannot adequately substitute for federal funding. For example, in a suit brought against asbestos manufacturers, plaintiffs will face classic toxic tort barriers to recovery.⁹¹

B. State Legislation

State legislation and funding is another possible solution. But most states have not enacted legislation addressing the problem.⁹² Even if every state enacts a statute, the scope and effective-

89. *New Asbestos Property Suits*, N.Y. Times, Nov. 13, 1984, at D2, col. 1.

90. In re Asbestos School Litigation, No. 83-0268 (E.D. Pa. Sept. 29, 1984) (order granting class certification). The court, characterizing the case as one where a "common core" predominated, stated that "school asbestos litigation is uniquely suitable to class action treatment." It cited the expenses saved through litigating in one instead of hundreds of forums, with only one set of attorneys for each side, and the benefits to thousands of school districts that otherwise could not afford to bring suit. It pointed out that those school districts that preferred to bring individual actions could still do so. Order at 23, 25.

91. Traditionally, plaintiffs seeking damages arising from exposure to hazardous materials such as asbestos must commence their lawsuits within a certain time of their exposure to the toxic substances. See, e.g., *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979); Note, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950). However, since illnesses resulting from exposure to asbestos invariably develop over a prolonged period of time, plaintiffs may not realize they are ill until after the statute of limitations has expired, precluding them from suing.

Many state courts and state legislatures have acted to address the inequities associated with the statute of limitations obstacle by adopting some form of a "discovery" rule in determining the time a statute of limitations begins to run. For example, New Jersey's Supreme Court has interpreted a personal injury statute of limitations to begin running at the time one discovers that one has a cause of action. *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 386 A.2d 1310 (1978). Vermont has statutorily defined the date a personal injury cause of action "accrues" to be the date the injury is discovered. VT. STAT. ANN. tit. 12, § 512(4) (Supp. 1984).

In addition, establishing causation is always a considerable problem in toxic tort actions. See J. KAKALIK, *supra* note 85.

92. Those that have approach the problem in different ways. For example, California does not require any action by school districts, but permits those that do conduct abatement programs to be reimbursed by the State. CAL. EDUC. CODE § 49410 (West Supp. 1984). Nebraska does not explicitly require inspection or removal, but requires each county to levy and collect property taxes sufficient to finance the removal of asbestos hazards. NEB. REV. STAT. §§ 79-4,206 — 4,207 (Supp. 1983). Louisiana does not explicitly require inspection or removal, but requires state universities to analyze for friable as-

ness of each will vary from state to state. The problem of school asbestos is a national one; so too should be the solution. A patchwork quilt of state statutes providing different levels of protection to schoolchildren around the country is not acceptable.

C. *The Federal Solution*

A federal "carrot and stick" approach provides a better solution. The "carrot" is congressional creation of a "superfund"—a pool of money—similar to the one created in the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").⁹³ CERCLA, which is a federal response to problems of hazardous waste disposal sites, provides for a \$600 million, four-year "Hazardous Substance Response Fund," composed of both fees assessed against industry, and federal appropriations.⁹⁴ CERCLA's superfund serves as a source of financing for cleanup of hazardous waste disposal sites.⁹⁵ An asbestos superfund to facilitate detection and control of asbestos hazards in schools should, like CERCLA's, be funded by both asbestos manufacturers and the federal government.

The "stick" is a strictly enforced federal requirement of both inspection of buildings and removal of hazards. Such a requirement is now being considered by the EPA.⁹⁶ In the last few months, the EPA has filed a large number of civil actions against allegedly recalcitrant school districts that do not comply with its identification and notification regulations.⁹⁷ Even so-called "pro-

bestos samples sent to them from local schools, at no charge to the schools. LA. REV. STAT. ANN. §§ 17:3701-3711 (West 1982).

93. Pub. L. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982) and in scattered sections of titles 26, 33, and 49 U.S.C. (1982)).

94. *Id.* §221(b), 94 Stat. 2801-02 (codified at 42 U.S.C. § 9631(b) (1982)).

95. *Id.* §221(c), 94 Stat. 2802 (codified at 42 U.S.C. § 9631(c) (1982)).

96. *U.S. Is Considering Rules to Clean Up Asbestos in Schools*, Wall Street Journal, Feb. 24, 1984, at 20, col. 3.

97. The stepped-up EPA litigation program enforcing 40 C.F.R. § 763.100-.119 (1984) (*see supra* note 57) has resulted in fines for 27 school districts for alleged non-compliance, the latest of which was a \$237,900 penalty levied against the Board of Education of the City of New York. *U.S. Fines School Board on Asbestos*, N.Y. Times, Aug. 4, 1984, at 48, col. 4. Mr. Steven Schwager, Chief School Business Executive for the New York City Board of Education, termed the fine "outrageous," stating that New York City has spent \$15 million in its asbestos removal program since 1978. *Id.*; *New Data Finds Asbestos a Peril in Home, at Job*, N.Y. Times, Aug. 7, 1984, at A1, col. 5. *See also Getting Tough on Asbestos*, N.Y. Times, Mar. 18, 1984, § 4, at 7, col. 2 (Goffstown, N.H. and Philadelphia public schools fined); *Federal Complaint on Asbestos Filed*, N.Y. Times, Apr. 10, 1984, at B2, col. 6 (Waterbury, Connecticut); *Asbestos Findings Close High School*, N.Y. Times, Apr. 4, 1984, at B5, col. 1

gressive" school districts, like New York City, which have spent considerable sums on asbestos removal, are now being fined, perhaps as an example to other school districts.⁹⁸ This hard-line approach, however, can increase corrective action only when funds become available.

CONCLUSION

Only recently has public attention focused on the potential health problems associated with asbestos in school buildings. It is now recognized that asbestos in school buildings threatens the future health of children, who are more vulnerable than adults to some asbestos-related diseases.

The gravity of the problem requires a viable systemic solution rather than a piecemeal attempt. The New York statute and federal regulations require inspection of schools for harmful asbestos material; the New Jersey law does not. None of these laws mandates removal or encapsulation. Even were such measures required by law, school districts would be financially hard-pressed to comply. School districts often lack funds for the expensive corrective measures, and federal funding is thus far virtually nonexistent.

An appropriate solution is a federal requirement of both inspection and removal of asbestos hazards. In addition, Congress should provide federal funding for both inspection and removal. Once funding is available, the EPA should aggressively enforce its administrative rules. This proposed approach offers hope for a realistic national solution to the problem of asbestos in the public schools.

(Dutchess County, New York); *35 U.S. School Boards Sue to Force Manufacturers to Remove Asbestos*, N.Y. Times, May 20, 1984, at A30, col. 1 (Brick Township, South Orange, Springfield Township, and Dunellen, New Jersey school districts fined).

98. See *supra* note 97.

