

# The LAF Docket

A NEWSLETTER OF THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND ■ SPRING 2011

## ABOUT LAF

The mission of the Legal Assistance Fund (LAF) is to favorably impact the outcome of legal issues that significantly affect public education. LAF is governed by the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys.

For more information, visit [legal.tasb.org/laf](http://legal.tasb.org/laf).



## CONTACT US

LAF may be interested in your case! If you think your district is involved in litigation with potential statewide impact, please contact the TASB Legal Services Division. Address all correspondence to Mark Tilley, editor, *The LAF Docket*, P.O. Box 400, Austin, Texas, 78767-0400, or e-mail him at [legal@tasb.org](mailto:legal@tasb.org).



## RECENT LAF DECISIONS

### SOVEREIGN IMMUNITY

This case arose from a contract between PKG Contracting and the City of Mesquite to construct a storm drainage system. Disputes arose over which party was responsible for moving certain utilities from the construction right-of-way. PKG sued the City for breach of contract for allegedly failing to remove power lines, delaying work, and costing extra time and money. The City filed a plea to the jurisdiction based on immunity from suit, which the trial court overruled. While the case was pending on appeal, the Legislature enacted Chapter 271 of the Texas Local Government Code, which waives immunity from suit for certain breach of contract claims. The case was remanded back to the trial court, and the City argued that it was still immune from suit. The City argued that Chapter 271 does not waive immunity for breach of an implied duty, that PKG failed to comply with notice provisions in the contract, and that PKG was claiming damages that are not allowed under the statute. The trial court again denied the City's plea to the jurisdiction, and the Dallas Court of Appeals affirmed. The City appealed the denial of its plea to the jurisdiction to the Texas Supreme Court by filing a petition for review.

On December 3, 2010, the Texas Supreme Court declined to grant the City's petition for review, thereby denying greater protection to local governments in breach of contract cases and weakening their ability to dispose of meritless claims on a plea to the jurisdiction. As a result, if a breach of contract claim is brought against a school district, immunity from suit will be narrowly applied, and a court will have jurisdiction to reach the merits in most cases. Consequently, many more contract claims will need to go through a full trial or the summary judgment process before final resolution. *City of Mesquite v. PKG Contracting, Inc.*, No. 08-0960 (Texas Supreme Court). LAF's Attorney: Ray Viada, Viada & Strayer, The Woodlands.

Another sovereign immunity case arises from a dispute over a rule change by the University Interscholastic League (UIL) that would require UIL-member school districts to use UIL-registered sports officials to officiate UIL-sanctioned varsity contests. Previously, school districts could use an official for such contests as long as the official was registered with either the UIL or the Texas Association of Sports Officials (TASO). Prior to the rule change, TASO—a private association—had a virtual monopoly over sports officiating for Texas schools, which prompted complaints from some school districts that TASO-member officials were colluding and threatening boycotts to try to force the school districts to pay more than the amounts called for in the UIL fee schedule. TASO sued to challenge the legality of this rule and also asserts claims for money damages. The UIL filed a plea to the jurisdiction on sovereign immunity and standing grounds, which the trial court

*continued »*

# IN OTHER WORDS...

## WHAT IS THE TRFRA?

THE TEXAS RELIGIOUS FREEDOM RESTORATION ACT (TRFRA) WAS PASSED INTO LAW BY THE TEXAS LEGISLATURE IN 1999. THE LAW IS MEANT TO PROTECT RELIGIOUS FREEDOM BY PROVIDING THAT A STATE GOVERNMENT AGENCY, INCLUDING A SCHOOL DISTRICT, MAY NOT SUBSTANTIALLY BURDEN A PERSON'S FREE EXERCISE OF RELIGION UNLESS THE GOVERNMENT AGENCY DEMONSTRATES THAT THE BURDEN IN QUESTION IS THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENTAL INTEREST. THE LAW IS MODELED ON THE FEDERAL RELIGIOUS FREEDOM RESTORATION ACT, WHICH WAS ENACTED IN 1993 AND WAS SUBSEQUENTLY DETERMINED BY THE U.S. SUPREME COURT TO ONLY APPLY TO FEDERAL LAWS.

denied. On appeal, UIL sought reversal of the denial of the plea to the jurisdiction based on the fact that the UIL is a state entity covered by sovereign immunity. On August 27, 2010, the Austin Court of Appeals issued an opinion agreeing that the UIL is entitled to sovereign immunity and dismissing the suit. *The Univ. Interscholastic League v. Southwest Officials Ass'n, Inc., d/b/a Texas Ass'n of Sports Officials*, No. 03-10-00030-CV (Third Court of Appeals–Austin). LAF's Attorney: Joe Tanguma, Walsh, Anderson, Brown, Gallegos & Green, PC, Irving.

### EMPLOYMENT ISSUES

John Kelley's 10-month probationary contract provided that he would work the schedule set by the district. The administration published a work schedule and calendar that required 187 days of service. The faculty was directed to attend graduation, which fell outside 187 days. Kelley attended graduation but alleged that he was entitled to an additional day's pay. After the board denied his request, he appealed to the commissioner of education. The commissioner dismissed the appeal, concluding that the additional duty day fell outside the contract; therefore, he lacked jurisdiction to order the district to compensate Kelley for the additional duty day.



Following years of litigation over the proper venue for Kelley's appeal, the Travis County District Court ultimately held for Kelley and remanded the case back to the commissioner to determine the proper calculation of damages. North East ISD appealed the trial court's ruling to the Third Court of Appeals in Austin. On December 9, 2010, in a 2–1 decision, the Third Court of Appeals held that North East ISD breached Kelley's contract and the commissioner had jurisdiction over his claim. The court concluded that the district's duty and salary schedules provided "necessary material terms" and, therefore, Kelley had contracted to work for 187 days. The court of appeals remanded the case to the commissioner for further proceedings. North East ISD has filed a petition for review with the Texas Supreme Court. *North East Indep. Sch. Dist. v. Kelley*, No. 03-09-00641-CV (Third Court of Appeals–Austin). LAF's Attorney: Cheryl Mehl, Schwartz & Eichelbaum Wardell Mehl & Hansen, PC, Austin.

### FIRST AMENDMENT

This case arose from a parental request for an exemption from Needville Elementary School's dress code on behalf of their son, A.A., who was preparing to enroll in kindergarten. A.A.'s religious belief that his hair should be worn long was in conflict with the school's dress code, which was established to teach hygiene, instill discipline, prevent disruption, avoid safety hazards,



and assert authority. The school district accommodated A.A. by allowing him to wear his hair “in a tightly woven single braid down his back with the hair behind his ears, out of his eyes, and the braid tucked into the collar of his shirt.” When A.A. attended school wearing two braids, he was placed in in-school suspension. A.A.’s parents, through the American Civil Liberties Union, filed suit in federal district court, obtaining a permanent injunction directing Needville ISD to allow A.A. to return to class and wear his hair as he wanted.

On July 9, 2010, the Fifth Circuit Court of Appeals issued an opinion based on state law grounds. The court limited its ruling to the application of the Texas Religious Freedom Restoration Act (TRFRA). The TRFRA prohibits a governmental agency from substantially burdening a person’s free exercise of religion unless there is a compelling state interest imposed through the least restrictive means. The court determined that A.A. and his father had provided sufficient evidence to demonstrate that they maintained their hair length as part of a sincerely held religious belief. The court further determined that the district’s compromise was a substantial burden—requiring A.A. to tuck his hair in his shirt was a significant infringement on his religious exercise and implicated real consequences in the form of in-school suspension. Finally, the court concluded that the district’s stated reasons for the policy were not compelling state interests that withstood strict scrutiny. *A.A. v. Needville Indep. Sch. Dist.*, No. 09-20091 (Fifth Circuit Court of Appeals). LAF’s Attorney: David M. Feldman, formerly of Feldman, Rogers, Morris & Grover, L.L.P., Houston.

### PUBLIC INFORMATION

The *Dallas Morning News* sought a copy of the state employee payroll database from the Texas Comptroller of Public Accounts under the Texas Public Information Act. The comptroller believed that certain information contained in the database, including date-of-birth information, was confidential and sought an opinion from the attorney general as to whether its disclosure was required. The attorney general issued a letter ruling concluding that a state employee’s date of birth is public information subject to disclosure. The comptroller filed a lawsuit against the attorney general, seeking declaratory relief from compliance with letter ruling. On December 3, 2010, the Texas Supreme Court ruled that, because state employees’ privacy interests substantially outweighed the minimal public interest in the information, disclosure of state employees’ birth dates would constitute a clearly unwarranted invasion of personal

privacy, and the dates were excepted from disclosure under Texas Government Code section 552.102(a). *Texas Comptroller of Public Accounts v. Attorney Gen. of Texas*, No. 08-0172 (Texas Supreme Court). LAF’s Attorney: S. Anthony Safi, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso.

### VISITORS TO SCHOOLS

Yvonne and Larry Meadows, parents of three school-aged children residing in Lake Travis ISD, challenged the district’s requirement that visitors provide a driver’s license before being permitted to enter secure areas of campus. Mrs. Meadows was refused permission to enter areas of her child’s elementary school under the district’s visitor policy because she would not submit her driver’s license or information found on her driver’s license for a sex offender background check. Mr. and Mrs. Meadows pursued an administrative appeal that was ultimately denied by the Board of Trustees for Lake Travis ISD. On appeal, the commissioner of education denied the parents’ claims. The Meadowses filed suit in Travis County District Court against the elementary school principal and the school district alleging causes of action under the Texas Education Code and Texas Family Code and alleging constitutional and civil rights violations. Lake Travis ISD removed the case to federal court. On August 18, 2009, District Court Judge Sam Sparks granted the school district’s motion for summary judgment and dismissed the case. On appeal, the



Fifth Circuit determined that the Meadowses failed to show that they had been deprived of a constitutional right. The court acknowledged that parents do have a constitutional right to direct their children’s education, but Mr. and Mrs. Meadows put forth no case law for the proposition that this right extends so far as to include the unfettered right of a parent to visit all areas of a school campus while students are present. Even assuming *arguendo* that the Meadowses had a fundamental



right to access all areas of their children’s school while children are present, the school district’s regulation still passed strict scrutiny because it both addressed a compelling state interest and

was narrowly tailored to achieve it. The court also held that the district court did not abuse its discretion in assessing costs against the parents. Therefore, the court affirmed the grant of summary judgment and the award of costs to Lake Travis ISD. *Meadows v. Lake Travis Indep. Sch. Dist.*, No. 09-50850 (Fifth Circuit Court of Appeals). LAF’s Attorney: Francisco M. Negrón Jr., National School Boards Association.

### DORMANT COMMERCE CLAUSE

These cases arise from a natural gas distribution company in Harrison County and oil companies in Midland County protesting the ad valorem taxation of natural gas and oil inventories that are stored underground in significant volumes. In both cases, the lower courts held that the Dormant Commerce Clause does not allow taxation of the gas or oil. If such property cannot be taxed, many school districts will suffer a significant drop in income. Further, without a decision from the Texas Supreme Court, school districts across Texas are subjected to different rules. Those under the jurisdiction of the Eastland and Texarkana Courts of Appeals cannot tax this type of property. Schools in other jurisdictions may face legal challenges if they do tax this type of property. The petition for review to the Texas Supreme Court was denied on March 12, 2010, and the appraisal districts’ motion for rehearing was denied on December 3, 2010. The appraisal districts have filed a petition for writ of certiorari to the U.S. Supreme Court. *Harrison Cent. Appraisal Dist. v. The Peoples Gas Light and Coke*, No. 09-0053 (Texas Supreme Court); *Midland Cent. Appraisal Dist. v. BP America Production Co., et al.*, No. 09-0273 (Texas Supreme Court). LAF’s Attorney: Don Cruse, Law Office of Don Cruse, Austin.

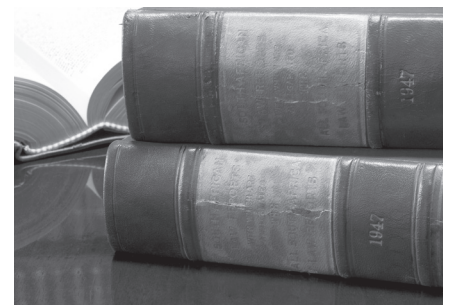
## NEW LAF CASES

### PUBLIC INFORMATION

Eagle Mountain-Saginaw ISD (EMSISD) received a request for documents under the Texas Public Information Act (PIA) for all employee evaluations regarding Superintendent Dr. Cole Pugh. The district sent a request for opinion to the attorney general arguing that the superintendent’s evaluation, Personal Development Plan, Board memorandum, and Dr. Pugh’s responses to the Personal Development Plan and Board memorandum were excepted from public disclosure under the PIA. Specifically, the district asserted that documents evaluating the performance of a teacher or administrator are confidential under Texas Education Code Section 21.355. On September 14, 2010, the attorney general issued an Open Records Letter Ruling, which concluded that the cover letter to the Personal Development Plan and the superintendent’s responses could not be withheld and must be released despite the fact that such documents contained quotations from the evaluation, direct responses to the evaluation, and self-evaluations of the superintendent. EMSISD has filed suit in Travis County against the attorney general seeking a declaratory judgment that the attorney general’s letter ruling is erroneous and that the documents in question are confidential and properly withheld from public disclosure under the PIA. *Eagle Mountain-Saginaw Indep. Sch. Dist. v. Abbott*, No. D-1-GN-10-003411 (Travis County District Court). LAF’s Attorney: Sara H. Leon, Powell & Leon, L.L.P., Austin.

### WEINGARTEN RIGHTS

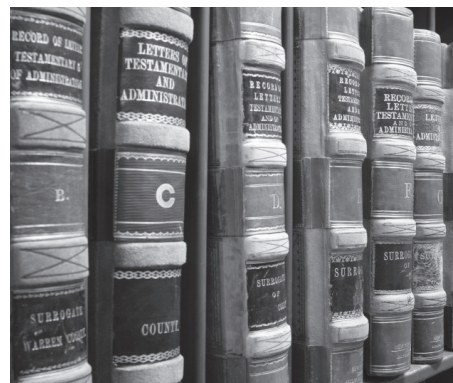
City of Round Rock firefighter Jaime Rodriguez and the Round Rock Fire Fighters Association filed action against the City of Round Rock and its fire chief, seeking a declaration that the fire chief’s refusal to allow a representative from the union to be present at a disciplinary interview violated Rodriguez’s representation rights. The Travis County District Court granted summary judgment for Rodriguez, and the City and fire chief appealed. On appeal, the Austin Court of Appeals considered whether Section 101.001 of the Texas Labor Code provides municipal employees represented by a labor organization with rights equivalent to so-called “Weingarten rights”—a private



employee’s right, upon request, to representation by a labor organization during an internal investigatory interview when the employee reasonably believes the interview may result in disciplinary action—named for the 1975 U.S. Supreme Court decision *National Labor Relations Board v. J. Weingarten, Inc.* The Austin Court of Appeals held that Section 101.001 affords rights equivalent to “Weingarten rights” to public employees. The City and fire chief have appealed this decision to the Texas Supreme Court. *City of Round Rock v. Rodriguez*, No. 03-09-00546-CV (Texas Supreme Court). LAF’s Attorney: Laura F. Hill, Texas Municipal League, Austin.

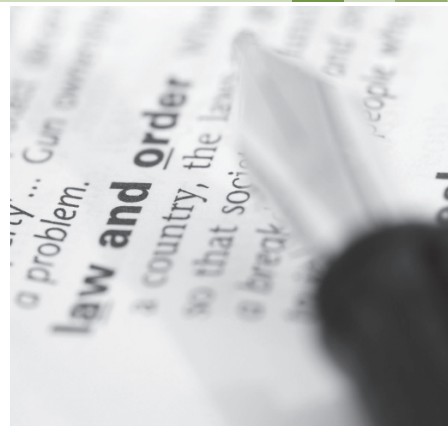
### LAW ENFORCEMENT NOTIFICATION

When a student on parole from the Texas Youth Commission (TYC) enrolled at a high school in the Austin Independent School District, the district requested information from TYC regarding the nature of the offense that led to the student’s placement in TYC. In response, TYC shared only that the student was committed as a result of a probation violation and that he was on probation for having a weapon in a prohibited place. The principal of the high school then asked for more information regarding any charges and convictions pertaining to the student and the type of weapon and facility where the student



was found in possession. Article 15.27 of the Texas Code of Criminal Procedure requires TYC, within 24 hours after learning of a paroled student’s transfer to a new school, to provide notice to the superintendent containing a statement of the offense on which the student’s adjudication was

grounded and a statement of whether the student is required to register as a sex offender. “Statement of offense” is not defined in the statute. TYC requested an opinion from the attorney general to determine what information it is required to provide to school districts under Article 15.27. TYC argues that it must only provide to the school the statement of offense upon which the youth’s commitment was based. Austin ISD argues that Attorney General Opinion DM-294 (1994) requires TYC to provide the nature of the charges against an arrested or detained student, the identities of any alleged victims who are students or school personnel, and all other information about an arrest or detention of a student that will enable school officials to take appropriate action to prevent violence, protect students and school personnel, and further educational purposes. **RQ-0933-GA** (Texas Attorney General). LAF’s Attorney: S. Anthony Safi, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso.



## LEGAL RESEARCH LIBRARY

TASB Legal Services offers online legal resources to assist school officials and school attorneys in their work. TASB’s **Legal Research Library** is an online, searchable archive of valuable school law resources, including a complete collection of *TASB School Law Update* newsletters, recent full-text decisions from the commissioner of education, a historical index of summaries of past commissioner decisions, friend of the court briefs filed by the TASB Legal Assistance Fund, and summaries of education-related bills passed by the Texas Legislature.

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## PENDING LAF CASES

### INSURANCE APPRAISALS

Should an insurer have the burden to invoke and initiate the appraisal process without undue delay after the insurer is aware that an insured does not agree with the amount of a loss as determined during the insurer's investigation and adjusting of a claim? *In re Universal Underwriters of Texas Ins. Co.*, No. 10-0238 (Texas Supreme Court). LAF's Attorney: Brendan K. McBride, McBride Law Firm, San Antonio.

### EMPLOYEE LEAVE

Was a school district permitted to deduct from a teacher's final paycheck the value of leave days that were taken but not actually accrued? *Jaworski v. South San Antonio Indep. Sch. Dist.*, No. 019-R10-1209 (Texas Commissioner of Education). LAF's Attorney: Lynn Rossi Scott, Brackett & Ellis, P.C., Fort Worth.

### AUTHORITY TO BIND THE BOARD OF TRUSTEES

Can a school district be bound by representations made during a bond election that were not made through a resolution presented to and voted on by the board of trustees? *Beaumont Heritage Soc'y v. Beaumont Indep. Sch. Dist.*, No. D-184-425 (Ninth Court of Appeals–Beaumont). LAF's Attorney: Robert Luna, Law Offices of Robert E. Luna, P.C., Dallas.

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