

The LAF Docket

A NEWSLETTER OF THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND ■ SUMMER 2010

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.

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LAF may be interested in *your* case! If you think your district is involved in litigation with potential statewide impact, please contact TASB Legal Services. 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.



RECENT LAF DECISIONS



FIRST AMENDMENT

Jonathan Morgan and other students at Plano ISD sued the school district, alleging the district's policy FNAA(LOCAL) regarding distribution of non-school literature violated the U.S. Constitution. The plaintiffs alleged that over a three-year period students were not permitted to distribute various religious materials, including pencils inscribed with "Jesus is the reason for the season" and candy canes with cards describing their alleged Christian origin.

On December 1, 2009, the Fifth Circuit affirmed that Plano ISD's policy was facially valid. The court found that the policy contained content- and viewpoint-neutral regulations of student speech, that the district had significant legitimate interests furthered by the regulations, and that the policy was sufficiently narrowly tailored. The court rejected the plaintiffs' contention that the case was controlled by the standard of *Tinker v. Des Moines Independent School District*, which requires that restrictions must be "necessary to avoid material and substantial interference with schoolwork or discipline." Applying the less strict time, place, and manner test, the court concluded that the district's policy was reasonable and facially constitutional. On June 28, 2010, the U.S. Supreme Court denied plaintiffs' petition for writ of certiorari. *Morgan v. Plano ISD*, No. 08-40707 (Fifth Circuit Court of Appeals). LAF's Attorney: Christopher Gilbert, Thompson & Horton, LLP, Houston.

Jonathan Morgan and other students at Plano ISD sued elementary school principals Jackie Bomchill and Lynn Swanson, alleging that on various occasions the administrators prevented students from distributing literature expressing a religious viewpoint to their classmates. The principals filed a motion to dismiss based on qualified immunity, which shields government officials performing discretionary functions from individual liability for civil damages, but only insofar as their conduct does not violate clearly established rights of which a reasonable person would have known. Swanson and Bomchill argued that elementary school students did not have a First Amendment free speech right to distribute non-curricular and/or religious materials in school to their classmates; and even if they had such a right, it was not clearly established at the time of the alleged incidents. The district court denied the motion to dismiss.

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IN OTHER WORDS...

WHAT IS AN INTERLOCUTORY APPEAL ?

AN APPEAL IS CONSIDERED INTERLOCUTORY WHEN A PARTY TO A LAWSUIT ASKS AN APPELLATE COURT TO REVIEW A DECISION OF THE TRIAL COURT BEFORE THE TRIAL HAS CONCLUDED. INTERLOCUTORY APPEALS ARE ONLY PERMITTED UNDER VERY LIMITED CIRCUMSTANCES.

On June 30, 2010, the Fifth Circuit Court of Appeals affirmed the district court's denial of qualified immunity to Swanson and Bomchill. The court was not tasked with determining whether the principals' conduct actually violated the students' constitutional rights. The court's decision was a determination only that it was clearly established at the time of the alleged misconduct that elementary school students have a First Amendment right to be free from religious-viewpoint discrimination while at school. *Morgan v. Swanson*, No. 09-40373 (Fifth Circuit Court of Appeals). LAF's Attorney: Christopher Gilbert, Thompson & Horton, LLP, Houston.

The Waxahachie ISD student dress code for the 2007-08 school year limited most writing on student T-shirts except for writing related to school-sponsored activities or clubs, or colleges and universities. When a student wore a shirt emblazoned with the words "San Diego" to school, he was stopped by the assistant principal and was asked to change his shirt. The student called his father, who brought him another T-shirt, this one reading "John Edwards '08." He asked if he could wear his Edwards T-shirt and was informed that it, too, violated the dress code. The family filed suit, seeking an injunction against the enforcement of the dress code. After a hearing, the court denied the application for preliminary injunction, and the plaintiffs filed an interlocutory appeal in the Fifth Circuit. The plaintiffs were represented by Liberty Legal Institute, which argued that the district should follow a non-disruption standard for any student speech of a political (or, presumably, religious) nature. This was the same argument in *Morgan v. Plano ISD*, which related to student distribution of literature.



The Fifth Circuit Court of Appeals noted that viewpoint- and content-neutral school dress codes pass constitutional scrutiny if they further an important or substantial governmental interest, if the interest is unrelated to the suppression of student expression, and if the incidental restriction on First Amendment activities is no more than is necessary to facilitate the interest. The court then determined that the dress code at issue was, in fact, content-neutral; that the district had provided sufficient evidence demonstrating that the dress code furthered important governmental interests; and that the

dress code did not restrict student dress outside of school nor did it affect other means of student communication. Consequently, the dress code passed constitutional scrutiny. The court held that the student did not show a likelihood of success on the merits of his claim; therefore, the court upheld the district court's decision denying the injunction. *Palmer v. Waxahachie Indep. Sch. Dist.*, No. 08-10903 (Fifth Circuit Court of Appeals). LAF's Attorney: Christopher Gilbert, Thompson & Horton, LLP, Houston.

PUBLIC INFORMATION ACT (PIA)

This case arose from a request for information to the City of Dallas that did not state a period of time for the requested information. The City asked the requestor to clarify his request, and after receiving clarification of the time frame for the requested information, the City offered 221 pages of public information to the requestor. However, the City also withheld some of the responsive information in order to ask the attorney general whether it was excepted from disclosure based on the attorney-client privilege.

The attorney general concluded that the City's request for an attorney general decision was untimely because the City failed to submit the request within 10 business days—the City's request was 17 business days after the initial request and nine business days after the clarifying letter. The Amarillo Court of Appeals agreed with the attorney general that the City failed to meet the deadline, so the information was presumed to be public.

On February 19, 2010, the Texas Supreme Court held that when a governmental entity requests clarification of an unclear request for public information, the 10-day period to request an attorney general opinion is measured from the date the request is clarified. *City of Dallas v. Abbott*, No. 07-0931 (Texas Supreme Court). LAF's Attorney: Clay Grover, Rogers, Morris & Grover, LLP, Houston.

OPEN MEETINGS ACT (OMA)

Employee Michael Poliakoff sued Austin ISD for reasons related to his reassignment within the district. As part of discovery, Poliakoff requested a copy of the official tape recording of the closed session in which the school board met to discuss his employment dispute and receive advice of counsel. Because an official tape recording of a closed session is confidential by law, Austin ISD argued that such a tape may be reviewed by a court and revealed to the public only if there is an allegation that all or part of the closed meeting was conducted without the authority of an exception to the OMA. There was no such allegation in this case. In this case, the plaintiff sought review of the tape to hear the substance of the board's closed meeting deliberation and attorney-client consultation about him. Nevertheless, the trial court ordered the district to produce the tape for an *in camera* (private) review by the judge. Fearing that this production could jeopardize the confidential nature of the tape and set an unfortunate

precedent in future cases, Austin ISD filed a mandamus action to reverse the judge's order.

The Austin Court of Appeals and the Texas Supreme Court denied the petitions for writ of mandamus. On remand, the tapes were reviewed *in camera* and found to be privileged, so the district did not have to release the tapes to Poliakoff. *In re: Austin Indep. Sch. Dist.*, No. 09-0205 (Texas Supreme Court). LAF's Attorney: Sarah Weber Langlois, Ogden, Gibson, Brooks, Longoria & Hall, LLP, Houston.

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 and 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 has appealed the trial court's ruling to the Austin Court of Appeals. *North East ISD v. Kelley*, No. 03-09-00641-CV (Austin Court of Appeals). LAF's Attorney: Cheryl Mehl, Schwartz & Eichelbaum Wardell Mehl & Hansen, PC, Austin.

RED LIGHT CAMERAS

The commissioner of education asked the attorney general whether a school district is legally responsible for payment of a traffic fine incurred by an employee who runs a red light monitored by a camera. The attorney general responded that if a school district is liable for the fine, then the payment of that fine is not a gift or grant of public funds under the Texas Constitution. **Texas Attorney General Opinion No. GA-0747 (2010)**. LAF's Attorney: Cheryl Mehl, Schwartz & Eichelbaum Wardell Mehl & Hansen, PC, Austin.



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INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

In *Richardson Indep. Sch. Dist. v. Michael Z. and Carolyn Z.*, the court was asked to determine whether Richardson ISD provided a free, appropriate public education so that it was not required to reimburse the expenses of a special education student's residential placement. The Fifth Circuit Court of Appeals adopted a new test, holding that in order for a residential placement to be appropriate under IDEA, for purposes of reimbursement, the placement must be (1) essential in order for the disabled child to receive a meaningful educational benefit, and (2) primarily oriented toward enabling the child to obtain an education. Because the district court failed to make this determination, the case was remanded for further proceedings. *Richardson Indep. Sch. Dist. v. Michael Z. and Carolyn Z.*, No. 08-10604 (Fifth Circuit Court of Appeals). LAF's Attorney: Christopher Borreca, Thompson & Horton, LLP, Houston.

Another case arose from El Paso ISD's efforts to resolve disputes under IDEA with the parent of a 14-year-old student who suffered from attention deficit hyperactivity disorder. During a resolution session, El Paso ISD made a settlement offer that provided all the relief the parent requested plus reasonable attorney's fees; however, the parent rejected the offer, seeking instead to have the case determined by a special education hearing officer (SEHO). The SEHO found in favor of the parent on three of four allegations. Both the parent and El Paso ISD appealed the SEHO's decision to federal court, each claiming that they were the prevailing party and entitled to attorney's fees.

The court conferred prevailing party status upon the parent and permitted the parent to petition the court for attorney's fees, which are generally not available if a dispute under the IDEA is resolved without the need for a due process hearing. On appeal, the Fifth Circuit Court of Appeals determined that because the parent rejected a written settlement offer that included all the educational relief that he requested and reasonable attorney's fees, the parent unreasonably protracted the resolution of the dispute. The court vacated the award of attorney's fees but affirmed the dismissal of El Paso ISD's claim for attorney's fees because the district did not have prevailing party status. *El Paso Indep. Sch. Dist. v. Richard R.*, No. 08-50830 (Fifth Circuit Court of Appeals). LAF's Attorney: Christopher Borreca, Thompson & Horton, LLP, Houston.

Van Alstyne ISD v. Andre S. and Shannon S., as next friends for Chase S.: Chase S. was a special education student who attended school in Van Alstyne ISD, which is a member of the Grayson County Special Education Cooperative (Co-Op). Chase's individualized education program (IEP) team recommended that he be placed in a life skills program located at an elementary school campus in Gunter ISD—one of the Co-Op's member school districts—located 11 miles away from Chase's home. Despite the unanimous recommendation of the rest of the IEP team, Chase's parents did not want Chase to go to a school other than his home campus. Based on this objection to Chase's placement, his parents requested an IDEA due process hearing. After an evidentiary hearing, the special education hearing officer (SEHO) held that Van Alstyne ISD was to continue to implement the agreed upon IEP for Chase with placement in the regular education classroom at Van Alstyne Elementary School, with resource classroom support, and not to remove

him to the centralized self-contained life skills classroom in Gunter ISD. Van Alstyne ISD appealed the SEHO's decision, asserting that "educational placement," as used in the IDEA, means the child's educational program, not the physical location where the program is implemented. While the IDEA requires that parents be part of the team that creates IEP goals and objectives, it does not require parental participation in site selection. Once educational placement and services have been decided upon, the actual location where the services are provided is primarily administrative, provided the determination is consistent with the ARD committee decision.

On February 23, 2010, the U.S. District Court issued a final order agreeing with the district, vacating the hearing officer's decision, and dismissing the case with prejudice. *Van Alstyne ISD v. Andre S. and Shannon S., as next friends for Chase S.* (Eastern District of Texas, Sherman Division). LAF's Attorney: Paula Maddox Roalson, Walsh, Anderson, Brown, Gallegos & Green, PC, San Antonio.



NEW LAF CASES

PUBLIC INFORMATION

The *Dallas Morning News* sought a copy of the state employee payroll database from the Texas Comptroller of Public Accounts. 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 an open records letter ruling concluding that a state employee's date of birth is public information subject to disclosure under the Public Information Act. The comptroller filed a lawsuit against the attorney general, seeking declaratory

relief from compliance with letter ruling. *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172 (On appeal to the Texas Supreme Court). LAF's Attorney: S. Anthony Safi, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso.

IMPACT FEES

Spring ISD began construction of a new elementary school that was set to open for the 2009–10 school year. The Harris County Municipal Utility District (MUD) No. 205 charged the district \$619,524 in impact fees associated with water service to the school. The district ultimately paid the MUD in order to open the school in a timely manner, but reserved its right in writing to contest the fees. Texas Local Government Code section 395.022(b) specifically states that a school district is not required to pay impact fees imposed under Chapter 395 unless the board of trustees of the district consents to the payment of the fees by entering a contract with the political subdivision that imposes the fees. The attorney general recently rendered an opinion affirming that a school district is not required to pay impact fees unless the district's board of trustees consents to payment of such fees by entering into a contract with the political subdivision that imposes the fees. Spring ISD filed suit in Harris County District Court requesting declaratory relief, reimbursement of impact fees, costs of suit, and attorney's fees. *Spring Indep. Sch. Dist. v. Harris County MUD No. 205* (In Harris County District Court). LAF's Attorney: George Grimes, Walsh, Anderson, Brown, Gallegos & Green, PC, San Antonio.

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 a 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 appealed the commissioner's decision to Travis County District Court, and the appeal is currently pending. Separately, the couple 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 as well as 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. The Meadows are now appealing this decision to the Fifth Circuit Court of Appeals. *Meadows v. Lake Travis Indep. Sch. Dist.*, No. A-08-CA-819-SS (On appeal to the Fifth Circuit Court of Appeals). LAF's Attorney: Francisco M. Negrón Jr., National School Boards Association.

EMPLOYEE LEAVE

David Jaworski, a term contract employee for South San Antonio ISD, missed a substantial amount of work after sustaining injuries in an automobile accident. Jaworski ultimately worked 102 of 187 work days. He received compensation for 20 leave days—five state personal leave days, five local leave days, and 10 local emergency leave days. At the end of the school year, the school district deducted the value of 10 leave days—two and one-half state personal leave days, two and one-half local leave days, and five local emergency leave days—from Jaworski's last paycheck because he had not worked enough days to accrue the 20 days of leave that were advanced to him during his recuperation. Jaworski filed a grievance that was denied and has petitioned the commissioner of education for review of the district's decision. *Jaworski v. South San Antonio Indep. Sch. Dist.*, No. 019-R10-1209 (On petition for review to the commissioner of education). LAF's Attorney: Lynn Rossi Scott, Brackett & Ellis, P.C., Fort Worth.

DORMANT COMMERCE CLAUSE

Two 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.



Petition for review to the Texas Supreme Court was denied on March 12, 2010, but the appraisal districts have filed a motion for rehearing. *Harrison Cent. Appraisal Dist. v. The Peoples Gas Light and Coke*, No. 09-0053 (In the Supreme Court of Texas); *Midland Cent. Appraisal Dist. v. BP America Production Co. et al.*, No. 09-0273 (In the Supreme Court of Texas). LAF's Attorney: Don Cruse, Law Office of Don Cruse, Austin.

SOVEREIGN IMMUNITY

This 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 has sued to challenge the legality of this rule and assert claims for money damages. The UIL filed a plea to the jurisdiction on sovereign immunity and standing grounds, which the trial court denied. This appeal seeks reversal of the denial of the plea to the jurisdiction. *The Univ. Interscholastic*

League v. Southwest Officials Ass'n, Inc., d/b/a Texas Ass'n of Sports Officials, No. 03-10-00030-CV (In the Austin Court of Appeals). LAF's Attorney: Joe Tanguma, Walsh, Anderson, Brown, Gallegos & Green, PC, Irving.

AUTHORITY TO BIND THE BOARD OF TRUSTEES

In early 2007, the Beaumont ISD Board of Trustees announced that the school district would seek a \$388.6 million bond issue to build new schools. To promote consensus among voters, as well as to assist it in decisions about numerous proposed projects, the Beaumont ISD Board of Trustees formed a Community Advisory Bond Committee (CABC) that determined there was a possibility that the South Park Middle School building might be demolished and a new South Park Middle School would be built on the same location.

Prior to the vote on the bond issue, the Beaumont Chamber of Commerce disseminated to the community at large a publication that stated, "No demolition of old South Park." There is no evidence that the school board officially adopted a resolution at a properly noticed and convened meeting stating that there would be "no demolition of old South Park." Recommendations to the board were that the board explore possibilities that provide a new school on or near the current South Park Middle School and to try to preserve as much as possible of the original building.

At the permanent injunction trial, the former district public relations person testified that when she asked the superintendent what was going to happen to South Park, he told her that South Park would not be demolished but he did not know what was going to happen with the building. She further testified that she told the Chamber of Commerce that South Park would not be demolished. Based on the representation in the Chamber of Commerce publication, the Beaumont Heritage Society obtained a permanent injunction preventing the school district from using bond proceeds to demolish South Park Middle School. The trial court also awarded costs and attorney's fees to the Beaumont Heritage Society in excess of \$42,000. The district is appealing the permanent injunction to the Ninth Court of Appeals in Beaumont. *Beaumont Heritage Society v. Beaumont Indep. Sch. Dist.*, No. D-184-425 (In the Beaumont Court of Appeals). LAF's Attorney: Robert Luna, Law Offices of Robert E. Luna, P.C., Dallas.



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PENDING LAF CASES



SOVEREIGN IMMUNITY

Does a local governmental entity waive immunity from suit for breach of contract claims arising from the alleged breach of an implied contractual duty? Are compliance with contractual notice provisions and a claim for allowable damages jurisdictional prerequisites to a breach of contract claim? *City of Mesquite v. PKG Contracting, Inc.*, No. 08-0960 (Texas Supreme Court). LAF's Attorney: Ray Viada, Viada & Strayer, The Woodlands.

Do deed restrictions and restrictive covenants apply to school districts? Is school district property subject to a lien? Are school districts immune from *quantum meruit* claims? *Commerce Park North v. Spring ISD*, No. 936,887 (County Court at Law No. 2, Harris County). LAF's Attorney: George Grimes, Walsh, Anderson, Brown, Gallegos & Green, PC, San Antonio.

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