

# The LAF Docket

A NEWSLETTER OF THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND ■ WINTER 2008

## 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 Allyson Collins, editor, *The LAF Docket*, P.O. Box 400, Austin, Texas, 78767-0400, or e-mail her at [legal@tasb.org](mailto:legal@tasb.org).



## RECENT LAF DECISIONS

### TEXAS WHISTLEBLOWER ACT

Park, a lieutenant in the Montgomery County Sheriff's Office, alleged that the County violated the Texas Whistleblower Act, since he had suffered an adverse employment action after passing along complaints of sexual harassment by the county commissioner. After making the report, Park's duties for assigning officers to work security at a convention center were removed. Montgomery County argued that because Park received no extra compensation for these duties, he did not suffer an adverse employment action. LAF and the Texas Municipal League filed briefs with the Texas Supreme Court, and LAF's attorney argued in front of the justices, supporting the County's argument that there was no violation of the Act in this case. The Texas Supreme Court agreed with the County and LAF, holding that injuries of the sort alleged in this case do not rise to the level of an adverse personnel action under the Whistleblower Act. Rather, a personnel action is "adverse" under the Act if it would be likely to dissuade a reasonable, similarly situated employee from blowing the whistle. *Montgomery County, Tex. v. Park*, No. 05-1023 (Texas Supreme Court). LAF's Attorney: Ray Viada, Abrams, Scott & Bickley, LLP, Houston.

### SOVEREIGN IMMUNITY

Fort Worth ISD (FWISD) entered into a contract with Service Employment Redevelopment (SER) for SER to provide an alternative education program for the district. SER later sued the district, alleging that the district breached the contract by failing to allocate to the alternative programs the same expenditure per student that would be allocated to the student's regular school of attendance. LAF and the district argued that SER had not exhausted its administrative remedies prior to filing suit, as SER had not submitted its claims to the commissioner of education for review. The Texas Supreme Court held that this claim did not need to be appealed to the commissioner of education. However, the Court remanded the case to the trial court to allow SER to argue that Fort Worth ISD's immunity is waived by new immunity provisions in the Texas Local Government Code (Sections 271.151-271.160). *Fort Worth Indep. Sch. Dist. v. Serv. Employment Redevelopment*, No. 05-0427 (Texas Supreme Court). LAF's Attorney: Eric Schulze, Walsh, Anderson, Brown, Schulze & Aldridge, PC, Austin. *\*FWISD has filed a motion for rehearing with the Texas Supreme Court.*

### RELEASE OF TEACHER CERTIFICATION SCORES

After receiving several open records requests for administrator and teacher certification exam scores, the Texas Education Agency (TEA) requested an opinion from the Texas attorney general on the confidentiality of the information. Several education organizations (including LAF) submitted a letter brief to the attorney general, arguing that the exam scores should be confidential and not subject to release under the Public Information Act. On July 30, 2007, the attorney general ruled that much of the information requested was confidential, as it reveals the results of teacher certification exam scores (relying on Senate Bill 9, adding new Texas Education Code section 21.048(c-1)). TEA issued a response to the attorney general's ruling, stating that, for an educator who has taken a certification exam only once, TEA will release the fact that the educator has

## IN OTHER WORDS...

### WHAT IS A PETITION FOR REVIEW?

IF YOU FOLLOW A STATE COURT LAWSUIT FROM START TO FINISH, IT IS GENERALLY FIRST FILED IN A COUNTY DISTRICT COURT, THEN APPEALED TO ONE OF FOURTEEN COURTS OF APPEALS, AND THEN FINALLY TAKEN UP TO THE TEXAS SUPREME COURT. TO APPEAL A CASE TO THE TEXAS SUPREME COURT, A PERSON WOULD FILE A DOCUMENT CALLED A *PETITION FOR REVIEW* WITH THE COURT. AFTER THE PETITION IS FILED, THE OTHER SIDE HAS A CHANCE TO RESPOND TO THE APPEAL, THEN THE SUPREME COURT JUSTICES DECIDE WHETHER TO REQUEST MORE INFORMATION (CALLED A *BRIEF ON THE MERITS*), DENY THE PETITION (ENDING THE APPEAL), OR GRANT REVIEW (DECIDE THE CASE WITH OR WITHOUT ORAL ARGUMENT IN FRONT OF THE COURT).

taken the exam once but will withhold the test result (pass/fail) and the test score. For an educator who has taken an exam more than once, but has not failed the exam more than five times, TEA will withhold the educator's name for each time the educator took the exam because knowing that an educator took the same examination multiple times indicates failing results of the previous exams. For educators who have failed an exam more than five times, TEA will release all of those educators' results and scores in regard to that particular exam. **Texas Attorney General Open Records Letter Ruling OR2007-09618**. LAF joined a brief written by attorneys for the Association of Texas Professional Educators (ATPE).

### DEPOSITIONS OF PUBLIC OFFICIALS

The Metropolitan Transit Authority of Harris County ("Metro") was in the process of making controversial decisions about the location of light railways, but the Metro officials had not yet made any final decisions. Concerned citizens asked a court to permit them to take the depositions of Metro officials regarding the railways. The depositions were requested pursuant to Texas Rule of Civil Procedure 202, which allows depositions in anticipation of litigation in rare circumstances. Metro, LAF, and several other governmental entities argued that permitting such depositions would interfere with governmental decision-making and undermine the purpose of the Open Meetings Act. On May 22, 2007, the district court ruled that potential plaintiffs were not permitted to depose the Metro officials about their impending decisions. *Scarborough v. Metropolitan Transit Auth. of Harris County*, No. 2007-22066 (Harris County District Court, 215th Judicial Dist.). LAF joined a brief with the City of Houston, City of Pearland, Houston ISD, and Cypress-Fairbanks ISD.

## NEW LAF CASES

### TEXAS WHISTLEBLOWER ACT

Lopez, an employee of the City of Waco, was terminated for driving a City vehicle to an out-of-town meeting without authorization as required by City policy. Lopez alleged that he was fired in retaliation for a complaint he filed with Waco's equal employment opportunity (EEO) officer stating that his supervisor discriminated against him on the basis of race and age in violation of the City's EEO policy. Lopez sued the City under the Texas Whistleblower Act. The Waco court of appeals held that the Act did apply in this case. The City appealed this decision to the Texas Supreme Court, and LAF, joined by the Texas Municipal League and the Texas City Attorneys Association, argued that the City's internal, local policies should not be considered civil or criminal "laws" that invoke the anti-retaliation provisions of the Act. *City of Waco v. Lopez*, No. 06-0089 (Texas Supreme Court). LAF's Attorney: Ray Viada, Abrams, Scott & Bickley, Houston.

### PUBLIC INFORMATION ACT (PIA)

The City of Dallas received a request for information pertaining to the Dallas Fire and Police Departments. The City asked the requestor to clarify his request, as it was overly broad and vague. After receiving clarification, the City offered 221 pages of public information to the requestor but also withheld some information in order to ask the attorney general whether it was confidential based on the attorney-client privilege. Despite the potential confidentiality, the attorney general directed the City to release all of the information because the City had allegedly failed to meet the 10-day deadline for requesting an attorney general opinion. The City appealed the attorney general's ruling, and the trial court and Amarillo court of appeals held that the documents must be released. The City has appealed to the Texas Supreme Court, and LAF filed a brief jointly with the Texas Municipal League and the Texas City Attorneys Association supporting

the confidentiality of attorney-client privileged information. *City of Dallas v. Abbott*, No. 07-0931 (Texas Supreme Court). LAF's Attorney: Clay Grover, Feldman & Rogers, Houston.

### DISCIPLINE OF A TEACHER FOR EXCESSIVE FORCE

When Papa, a teacher with Presidio ISD, thought that a student was beginning to damage his property (his own high school yearbook), he pulled the student's arms behind his back, pushed the student against the wall, and attempted to remove the student from the classroom. As a result of Papa's actions, the district terminated Papa's contract, citing a violation of the district's corporal punishment policy and use of excessive force. The commissioner of education reversed the termination, finding that Papa was not acting to discipline the student but instead to prevent property damage by controlling the student. In looking at whether Papa's use of force was justified, the commissioner concluded that an educator is justified in using force against a student to the degree the educator reasonably believes is necessary to further an educational purpose or to maintain group discipline—in other words, was the action reasonable from the teacher's point of view? The commissioner concluded that Papa's actions were reasonable, as the student's actions clearly showed disrespect of Papa and would encourage other students to act with similar disrespect. Thus, Papa was immune from any employment consequence related to the incident. The district has appealed the commissioner's decision, and LAF will support the district's right to decide employment actions based on excessive force. *Presidio Indep. Sch. Dist. v. Papa*, No. D-1-GV-06-001362 (Travis County District Court, 98th Judicial Dist.). LAF's Attorney: Catherine Fryer, Bickerstaff Heath, Austin.

## PENDING LAF CASES

### OPEN MEETINGS ACT

In order to rely on the real estate exception to the Texas Open Meetings Act, must a governmental body be prepared to present evidence that it is presently engaged in negotiations with a third party regarding the value of the real estate? *City of Laredo v. Escamilla*, No. 06-1079 (Texas Supreme Court). LAF's Attorney: Laura Rodriguez, Walsh, Anderson, Brown, Schulze & Aldridge, PC, San Antonio. \**The Supreme Court denied the City's petition for review on August 31, 2007.*

Does the Texas Open Meetings Act require a governmental entity to provide comprehensive and exact details of issues to be considered at a properly posted open meeting? *City of Galveston v. Saint-Paul*, No. 01-06-00580-CV (First Court of Appeals, Houston). LAF's Attorney: Judge Harvey Brown, Wright, Brown & Close, LLP, Houston.

### PUBLIC INFORMATION ACT (PIA)

Which parts of an attorney's bill are protected by the attorney-client privilege, making them not subject to disclosure under the PIA? *Humble ISD v. Abbott*, No. D-1-GV-07-000097 (Travis County District Court). LAF's Attorney: Ellen Spalding, Feldman & Rogers, LLP, Houston.

### EMPLOYMENT ISSUES

Does a teacher on a 10-month employment contract have a right to additional compensation for attending a graduation ceremony that was not specifically listed on the district's 187-day work schedule? *Kelley v. North East ISD*, No. D-1-GN-06-001375 (Travis County District Court). LAF's Attorney: Cheryl Mehl, Schwartz & Eichelbaum, PC, Austin.

MONTGOMERY COUNTY,  
TEX. V. PARK, NO.  
05-1023 (TEXAS  
SUPREME COURT)

THE TEXAS SUPREME COURT  
HELD THAT A PERSONNEL  
ACTION IS "ADVERSE" UNDER  
THE WHISTLEBLOWER ACT IF  
IT WOULD BE LIKELY TO DIS-  
SUADE A REASONABLE, SIMI-  
LARLY SITUATED EMPLOYEE  
FROM BLOWING THE WHISTLE.

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Address Service Requested

## PENDING LAF CASES *continued*

### IMMUNITY

Is the denial of qualified immunity for a school district employee appropriate when it is disputed whether a constitutional right is clearly established? *Barrow v. Greenville ISD*, No. 06-10123 (Fifth Circuit). LAF's Attorney: Eric Schulze, Walsh, Anderson, Brown, Schulze & Aldridge, PC, Austin.

Are school districts "persons" subject to suit under the False Claims Act? If so, can they be held liable under the False Claims Act for relying on state-approved Medicaid reimbursement rates? *U.S. ex rel. Gudar v. Texas Dep't of Health, et al.*, No. 4:00cv01169 (Southern District of Texas). LAF's Attorney: Bill Boyce, Fulbright & Jaworski, LLP, Houston.

Does Texas Civil Practice and Remedies Code section 101.106(b) bar a plaintiff's suit against a school district on any claim if the plaintiff simultaneously elects to sue a district employee regarding the same subject matter? *Garcia v. Mission CISD*, No. 05-0734 (Texas Supreme Court). LAF's Attorney: Clay Grover, Feldman & Rogers, LLP, Houston.

Does a political subdivision waive immunity from suit by entering into a contract with a third party? *Texas Southern Univ. v. CMS Viron Corp.*, No. 07-0144 (Texas Supreme Court). LAF's Attorney: Thomas Brandt, Fanning, Harper & Martinson, PC, Dallas.

\*The Supreme Court denied TSU's petition for review on August 24, 2007.

### DISTRICT OPERATIONS

Are Plano ISD's former and current distribution of literature policies facially unconstitutional? *Morgan v. Plano ISD*, No. 4:04-CV-447 (Eastern District of Texas). LAF's Attorney: Christopher Gilbert, Bracewell & Giuliani, LLP, Houston.

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