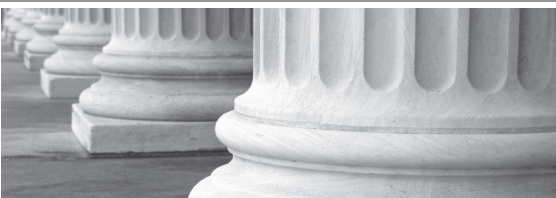


The LAF Wocket

ANNUAL REPORT 2015-16



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.

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Dear LAF Member District:

This annual report is intended to provide a snapshot of active and pending cases for which the Legal Assistance Fund (LAF) Board has approved assistance, as well as a summary of cases that have closed during Fiscal Year 2015-16.

In the past year, LAF received 11 requests for assistance. The LAF Board approved all 11 of those requests. LAF also filed 10 *amicus curiae* briefs in jurisdictions including the Texas Attorney General, Texas Courts of Appeals, Texas Supreme Court, Fifth Circuit Court of Appeals, and the U.S. Supreme Court.

LAF has played an important role in securing favorable outcomes in several significant court cases affecting public schools.

Advertising in Schools. *Little Pencil, LLC v. Lubbock ISD* (Fifth Circuit Court of Appeals): The superintendent of Lubbock ISD denied a request by Little Pencil, LLC, to advertise on the jumbotron at the district's football stadium because the requested advertisement consisted of an image of a tattooed Jesus Christ and the website address jesustattoo.com. Little Pencil claimed that the district's denial was impermissible viewpoint discrimination against its religious message. The company sued the district alleging that the school district's policies and practices violated its First Amendment rights to freedom of speech and free exercise of religion and denied it due process and equal protection of the law. The district asserted that its jumbotron was not intended as a public forum, and it reserved the right to refuse to run any advertisement. The district defended its decision by pointing out that tattoos are illegal for minors and a violation of both the student dress code and employee handbook. The district court dismissed the case, holding that the district's jumbotron was a limited public forum and that the district's rejection of the advertisement was reasonable in light of the purpose of the forum and the venue in which the forum was located. The court also upheld policy GKB (LOCAL) finding that it was not unconstitutionally vague. The Fifth Circuit upheld the decision on appeal and Little Pencil did not file a petition for writ of certiorari to the U.S. Supreme Court.

Nonrenewal Hearings. *Los Fresnos CISD v. Vazquez* (Third Court of Appeals—Austin): Los Fresnos CISD nonrenewed the contract of teacher Jorge Vazquez after a parent complained that Vazquez disparaged students by making fun of their weight and appearance. The district relied on written student statements to support the nonrenewal at the nonrenewal hearing. On appeal to the commissioner, Vazquez argued that the district should not have considered the statements because they were inadmissible hearsay under the Texas Rules of Evidence (TRE). The commissioner held that the statements were properly admitted and upheld the nonrenewal. The Travis County District Court reversed the commissioner's decision. On appeal, the Third Court of Appeals in Austin overturned the district court's decision and upheld the original commissioner's decision, holding that hearsay, like student statements, can be admissible in a nonrenewal hearing and, it was reasonable for the district to rely on the student statements in conducting its investigation and for the board to admit them as evidence.

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LEGAL ASSISTANCE FUND (LAF) ANNUAL REPORT 2015-16

ACTIVE CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE
<i>El Paso County v. Sunlight Enterprises</i>	Eighth Court of Appeals (El Paso)	June 2016	Mounce, Green, Myers, Safi, Paxson & Galatzan	Does Texas Civil Practice & Remedies Code support a contractor's claim for an increase in the contract price?
PENDING CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE
<i>Jenkins v. Crosby ISD</i>	Third Court of Appeals (Austin)	March 2012	Underwood Law Firm	Are the positions of principal and assistant principal protected positions?
<i>Salazar v. South San Antonio ISD</i>	Fifth Circuit Court of Appeals	July 2015	Thompson & Horton	When a student alleges sexual harassment by a teacher, can his knowledge of his own actions be used to respond for purposes of liability under Title IX?
<i>ETC Marketing v. Harris County Appraisal District</i>	Texas Supreme Court	October 2015	J Cruz & Associates	Is natural gas stored in Texas awaiting later production?
RQ-103-KP	Texas Attorney General	March 2016	Thompson & Horton	Does a request for video surveillance under E-Verify fall within instructional settings within the district? Does the term "staff member" in Education Code include a staff member in an instructional setting described in the statute? When can a district discontinue video surveillance?
<i>American Humanist Assoc. v. Birdville ISD</i>	Fifth Circuit Court of Appeals	March 2016	Thompson & Horton	Are school board members entitled to qualify for public meetings with student speakers who are not members of the board?
CLOSED CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE
<i>Little Pencil, LLC v. Lubbock ISD</i>	Fifth Circuit Court of Appeals	July 2014	Mounce, Green, Myers, Safi, Paxson & Galatzan	Was a school district's rejection of a religious advertisement of the advertiser's First Amendment rights?
KP-43	Texas Attorney General	June 2015	Thompson & Horton	What authority does the State Board of Education (SBOE) have over school districts and charters regarding instructional materials?
KP-50	Texas Attorney General	October 2015	TASB	Does Texas Penal Code section 46.03(a)(1) prohibit the carrying of a firearm in a school district where educational activity is being conducted to include walkways of the school property?
<i>Los Fresnos ISD v. Vazquez</i>	Third Court of Appeals (Austin)	November 2014	Rogers, Morris & Grover	Are written student statements admissible evidence in a nonrenewal hearing?
<i>Seth B. v. Orleans Parish SD</i>	Fifth Circuit Court of Appeals	May 2015	Thompson & Horton	May a school district deny reimbursement to a parent under the IDEA for an Independent Educational Evaluation (IEE) that does not meet the requirements of the IDEA?
<i>Texas Farm Bureau v. Texas Commission on Environmental Quality (TCEQ)</i>	Thirteenth Court of Appeals (Corpus Christi and Edinburg)	September 2013	Lloyd Gosselink Rochelle & Townsend	Does the TCEQ have the authority to adopt and implement rules regarding Water Rights During Drought or Emergency Water Shortage?
<i>Clint ISD v. Marquez</i>	Texas Supreme Court	January 2013	Thompson & Horton	Can parents sue a school district under state law and the Texas Constitution to require the district to equitably fund different campuses without first exhausting administrative remedies?
<i>Rideau v. Keller ISD</i>	Fifth Circuit Court of Appeals	May 2015	Richards Lindsay & Martin	Can parents assert a claim under the Americans with Disabilities Act for their own mental anguish based on alleged discrimination against their disabled child?
<i>Engelman Irrigation District v. Shields Bros.</i>	Texas Supreme Court	March 2015	Viada & Strayer	Can the holding in <i>Tooke v. City of Mexia</i> be applied to a previous case that was overturned in <i>Missouri Pacific Railroad Co. v. Brownsville Navigation District</i> ?
<i>Fisher v. University of Texas at Austin</i>	U.S. Supreme Court	March 2012	NSBA	Is the University of Texas at Austin's use of race in undergraduate admissions consistent with the Supreme Court's decisions interpreting the Equal Protection Clause in <i>Grutter v. Bollinger</i> and <i>Fisher I</i> ?
<i>McIntyre v. El Paso ISD</i>	Texas Supreme Court	September 2008	Thompson & Horton	Are home school parents who allege a violation of the school district's policies required to exhaust administrative remedies before filing suit against the district?
KP-100	Texas Attorney General	October 2015	TASB	Does Texas Penal Code section 46.03(a)(1) prohibit the carrying of a firearm in a school district where educational activity is being conducted to include walkways of the school property?
<i>Kell v. El Paso ISD</i>	Texas Supreme Court	March 2016	Fanning Harper Martinson Brandt & Kutchin	May an educator employed under a term contract, who receives a nonrenewal, refuse to request a hearing, and after the employment ends, file a grievance and subsequent whistleblower lawsuit?

	STATUS
Under section 16.071(a) operate to void notice requirements in a construction contract that pertain to a contract price or an extension of time?	Brief not yet filed.
	STATUS
Is the current principal in the same professional capacity for purposes of reassignment?	Brief filed. Case ready to be set—October 26, 2015.
Can an act by an employee, if the perpetrator was the official who would ordinarily take corrective action against the employee, be imputed to the district and satisfy the requirements of actual knowledge and a failure to act under Title IX?	Brief Filed. Oral Arguments heard April 28, 2016
Is a transfer (possible) sale out of state exempt from ad valorem taxation as goods in interstate or foreign commerce?	Brief filed. Oral arguments set for December 6, 2016
Do Education Code section 29.022(a) require a district to place cameras in one classroom or all self-contained classrooms?	Brief filed. Opinion due by September 13, 2016.
Does Education Code section 29.022 mean any district employee or only an employee who is assigned to a self-contained classroom?	
Has surveillance after a request under Education Code section 29.022 been made?	
Do school employees have qualified immunity in their individual capacity from a lawsuit challenging the board's practice of starting school early?	Brief filed. Consolidated and expedited appeal.
	OUTCOME
Was there a violation of the Texas Constitution on football stadium's jumbotron a violation of the Texas Constitution?	No. The football field was a limited public forum and the district's content-based, viewpoint-neutral limitations were reasonable in the light of Texas law against tattoo parlors serving minors and district policies against visible tattoos.
Can school districts (e) have to promulgate rules governing the process of promulgating administrative materials?	The State Board of Education has only those powers and duties specifically delegated by statute and may not substitute its judgment for the lawful exercise of those powers and duties by the trustees of the school districts.
Are handguns prohibited on the grounds of a school including parking lots, driveways, sidewalks, or other parking areas?	Handguns are prohibited from places on which a school-sponsored activity is occurring, which places can include grounds otherwise excluded from the definition of "premises" such as public or private driveways, streets, sidewalks or walkways, parking lots, parking garages, or other parking areas.
Is a nonrenewal hearing?	Yes. Hearsay is admissible and can constitute substantial evidence in a nonrenewal hearing. It is reasonable for a district to rely on student statements in conducting investigations and for the board to admit them as evidence.
Under the Individuals with Disabilities Education Act (IDEA) what does not meet required criteria?	Yes, but the appropriate standard under the IDEA should be whether an IEE substantially complies with the criteria.
Do rules relating to "Suspension or Adjustment of License?"	No. TCEQ's police power and general authority does not allow it to exempt junior preferred water rights from suspension based on public health, safety, and welfare concerns.
Does the Texas Constitution for failing to equally and fairly distribute administrative remedies?	No. Whether funds are distributed in a manner that violates the Education Code and Texas Constitution is a matter properly belonging to the administration of the school laws, and therefore falls under the jurisdiction of the commissioner of education. Section 7.057(a) required plaintiffs to exhaust their administrative remedies before seeking relief in the courts.
Does the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act authorize parents to recover damages against their child for injuries of the parent's child?	No. Neither the ADA nor Section 504 authorize parents to recover damages as a "bystander" to the injuries of the parent's child.
Can a previously-decided case that relied on non-binding precedent from <i>McIntyre v. District</i> be applied retroactively in order to void judgments that have already been finalized and for which direct appellate review has been exhausted?	Judicial opinions such as <i>Tooke v. City of Mexia</i> may not be applied retroactively in order to void judgments that have already been finalized and for which direct appellate review has been exhausted.
Is a race-conscious admissions program constitutional under the Equal Protection Clause of the Fourteenth Amendment, including when applied to the school in 2008?	The race-conscious admissions program in use by the University of Texas at Austin when Abigail Fisher applied to the school in 2008 is lawful under the Equal Protection Clause.
Can a lawsuit against a school district and its employees be reached without deciding whether the district violated the school laws, so the commissioner has no jurisdiction over the claims, and the McIntyres have no administrative remedies to exhaust?	The McIntyres' claims are not predicated on a violation of the school laws, and their constitutional claims may be reached without deciding whether the district violated the school laws, so the commissioner has no jurisdiction over the claims, and the McIntyres have no administrative remedies to exhaust.
Are handguns prohibited on the grounds of a school including parking lots, driveways, sidewalks, or other parking areas?	Yes. The Penal Code prohibits handguns from places on which a school-sponsored activity is occurring, which can include grounds otherwise excluded from the definition of "premises" such as public or private driveways, streets, sidewalks or walkways, parking lots, parking garages, or other parking areas.
Does a terminated or nonrenewed employee receive proper notice of proposed termination or employment termination or nonrenewal occurs, file a lawsuit to preserve whistleblower claims?	No. Terminated or nonrenewed employees must invoke chapter 21 hearing, not local grievance process, to preserve whistleblower claims. <i>Petition for Review denied; Eighth Court of Appeals decision upheld.</i>

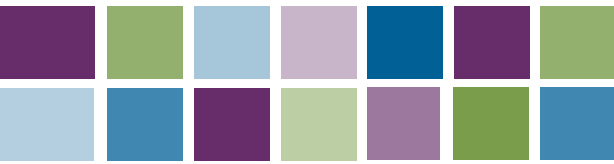


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Exhaustion of Administrative Remedies. *Clint ISD v. Marquez* (Texas Supreme Court): Parents of students attending Clint ISD filed suit against the school district in state district court claiming that the district does not equally or equitably fund students at different, comparable campuses within the district in violation of the Texas Education Code and Texas Constitution. The El Paso County District Court dismissed the lawsuit agreeing with the district that the parents had failed to exhaust their administrative remedies at the district level before filing suit. The Eighth Court of Appeals in El Paso reversed the district court, reasoning that the parents had alleged violations of the Texas Constitution, which is an exception to the rule requiring exhaustion. The Texas Supreme Court held that whether the Clint ISD board distributed education funds in a manner that violates the Texas Education Code and Texas Constitution was a matter “properly belonging to the administration of the school laws,” and therefore was under the jurisdiction of the commissioner of education. The Supreme Court concluded that Texas Education Code section 7.057(a) required the parents to exhaust their administrative remedies before seeking relief in the courts.

Thank you for your continued support of the TASB Legal Assistance Fund (LAF).

Sincerely,

Mark Tilley
 Lead Attorney for Legal Resources,
 LAF Coordinator, TASB Legal Services

CONTACT US

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-