

The LAF Wocket

ANNUAL REPORT 2016-17



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:

Thank you for being a member of the TASB Legal Assistance Fund (LAF). Your membership with LAF makes it possible to positively influence the outcome of important cases that have significant impact on public schools across Texas.

LAF is pleased to share this report on the Fund's ongoing activities, as well as a summary of selected cases that closed in Fiscal Year 2016-17.

Participation as *Amicus Curiae*

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

Successes on Behalf of Members

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

Prayer Before School Board Meetings

The American Humanist Association and a former student sued Birdville ISD and all seven board members in federal court, alleging the district and board members had a policy, practice, and custom of permitting, promoting, and endorsing prayers delivered by school-selected students at school board meetings in violation of the Establishment Clause of the First Amendment to the United States Constitution. Board members were sued in their individual and official capacity, and the plaintiffs sought punitive damages. LAF filed *amicus curiae* briefs arguing for board-member-qualified immunity and supporting the constitutionality of Birdville ISD's practice. The Fifth Circuit issued a unanimous opinion, concluding that Birdville ISD's policy of inviting students to deliver statements that could include invocations before school board meetings did not violate the First Amendment, determining that the district's practice was within the legislative-prayer exception to the Establishment Clause.

Damages Under Title IX

A former student sued South San Antonio ISD and its former employee, Michael Alcoser, asserting several claims, including under Title IX, arising from the sexual abuse of the student by Alcoser. It was undisputed that Alcoser abused the student while Alcoser was the vice-principal and principal of two elementary schools in the district; no one with the district other than Alcoser had knowledge of Alcoser's abusive conduct; and Alcoser's abusive conduct violated the district's policies. The district moved to dismiss on the ground that it lacked "actual notice" of the alleged abuse. The district court denied South San Antonio ISD's motion, and the case proceeded to trial, where the jury found the district liable for damages under Title IX, and awarded \$4.5 million in damages. The district appealed to the US Court of Appeals for the Fifth Circuit, where LAF, joined by NSBA, filed an *amicus curiae* brief arguing that a district can be held liable under Title IX only if an official who has authority to address the alleged discrimination and to institute corrective measures has actual knowledge of discrimination and fails to adequately

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ACTIVE CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE	STATUS
<i>Wallis v. Paxton</i>	Travis County District Court	March 2017	Abernathy, Roeder, Boyd & Hullett	Are a superintendent's self-evaluation and related documents confidential under Texas Education Code section 21.355, which provides that a document evaluating the performance of a teacher or administrator is confidential?	Brief not yet filed.
<i>PlainsCapital Bank v. Keller ISD</i>	Fifth Circuit Court of Appeals	August 2017	Walsh, Gallegos, Treviño, Russo & Kyle	Does the actual notice/deliberate indifference standard apply to claims under the ADA and Section 504 based on allegations that a teacher mistreated a disabled student?	Brief not yet filed.

PENDING CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE	STATUS
<i>Mission CISD v. Solis</i>	Eighth Court of Appeals (El Paso)	September 2016	J. Cruz & Associates	Does the commissioner of education have jurisdiction under Texas Education Code section 7.057 over a claim of entitlement to a Chapter 21 contract that was not raised at the local level?	Brief filed. Case submitted on briefs on March 30, 2017.
<i>Palazzolo v. Fort Worth ISD</i>	Texas Supreme Court	September 2016	Mounce, Green, Myers, Safi, Paxson & Galatzan	Must a terminated employee who requests a termination hearing under Chapter 21 file a whistleblower claim within 30 days of the termination of the grievance procedure?	Brief filed. Brief on the merits requested on June 7, 2017.
<i>Alamo Heights ISD v. Clark</i>	Texas Supreme Court	September 2016	Rogers, Morris & Grover	Are the second and third steps of the McDonnell Douglas burden-shifting framework part of the jurisdictional analysis when a plaintiff brings a Texas Commission on Human Rights Act (TCHRA) retaliation claim that relies solely on circumstantial evidence?	Brief filed. Petition for review granted. Oral arguments heard on September 13, 2017.

CLOSED CASES	COURT	LAF BOARD APPROVAL	LAF'S ATTORNEYS	ISSUE	OUTCOME
<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 section 16.071(a) operate to void notice requirements in a construction contract related to a contractor's claim for an increase in the contract price or an extension of time?	No. Section 16.071(a) did not render the seven-day notice requirements in the construction contract void.
<i>Jenkins v. Crosby ISD</i>	Third Court of Appeals (Austin)	March 2012	Underwood Law Firm	Are the positions of principal and assistant principal in the same professional capacity for purposes of reassignment?	Yes. Principals and assistant principals are in the professional capacity of "administrator." Superintendents have the authority to reassign a principal to an assistant principal position.
<i>Salazar v. South San Antonio ISD</i>	Fifth Circuit Court of Appeals	July 2015	Thompson & Horton	When a student alleges sexual harassment by an employee, if the official who would ordinarily take corrective action is the perpetrator, can his knowledge of his own wrongdoing be imputed to the district for purposes of liability under Title IX?	No. Title IX does not impose liability on a school district when its employee sexually abuses a student and the only employee or representative of the district who has actual knowledge of the abuse is the offender.
<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 (possible) sale out of state exempt from ad valorem taxation as goods in interstate or foreign commerce?	No. Stored natural gas is not in interstate commerce and is subject to ad valorem taxation.
RQ-103-KP	Texas Attorney General	March 2016	Thompson & Horton	Does a request for video surveillance under Texas Education Code section 29.022(a) require a district to place cameras in one classroom or all self-contained instructional settings within the district? Does the term "staff member" in Texas Education Code section 29.022 mean any district employee or only an employee who is assigned to a self-contained instructional setting described in the statute? When can a district discontinue video surveillance after a request under Texas Education Code Section 29.022 has been made?	A request under Section 29.022 triggers a requirement to place a camera in all classrooms in the district. "Staff member" means any employee. A district can remove the cameras only if a setting in which the camera had been placed is no longer a self-contained classroom or other special education setting under the law.
<i>American Humanist Assoc. v. Birdville ISD</i>	Fifth Circuit Court of Appeals	March 2016	Thompson & Horton	Does a public school district violate the Establishment Clause by permitting prayer at the beginning of a school board meeting?	No. The district's policy of inviting students to deliver statements that could include invocations before school board meetings did not violate the First Amendment. The district's practice was within the legislative-prayer exception to the Establishment Clause.
<i>Belton ISD v. Paxton</i>	Travis County District Court	September 2016	Abernathy, Roeder, Boyd & Hullett	Is a teacher's or administrator's written rebuttal to an evaluative document confidential under Texas Education Code section 21.355, which provides that a document evaluating the performance of a teacher or administrator is confidential?	Yes. A principal's written response to her evaluative memorandum is protected from disclosure under Section 21.355(a).
<i>Dallas ISD v. Woody</i>	Fifth Circuit Court of Appeals	December 2016	Walsh, Gallegos, Treviño, Russo & Kyle	Under the Individuals with Disabilities Education Act (IDEA), is a parent entitled to reimbursement for her disabled child's private school placement when the parent voluntarily enrolled her child in private school with no intention of attending public school?	Students are not ineligible for reimbursement if a parent first places the student in a private school and then requests the local public school district pay for tuition. A district is obligated to develop a program that offers Free Appropriate Public Education (FAPE), but both the district and the parent must follow the procedures for evaluating the child and developing a timely Individual Education Program (IEP). A school district is not obligated to provide temporary services or to have an IEP in place when school begins if the student is not transferring into the district.

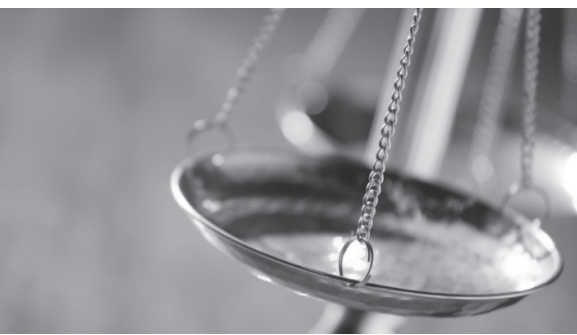


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The **LAF** Docket
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CONTACT US

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, 78767-0400, or e-mail him at legal@tasb.org.

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respond. The Fifth Circuit reversed the judgment, holding that Title IX does not impose liability on a school district when its employee sexually abuses a student and the only employee or representative of the district who has actual knowledge of the abuse is the offender.

Administrative Reassignments

Hermenia Jenkins was serving as an intermediate school principal in Crosby ISD when she was reassigned to the position of high school assistant principal. Jenkins filed a grievance complaining that her reassignment was an illegal change in her professional capacity and that the reassignment violated law and district policy. Generally, the superintendent has authority to assign and reassign all personnel within the same professional capacity stated in the contract, and the commissioner has long held that a reassignment from principal to assistant principal is not a change in professional capacity. However, Jenkins sought to distinguish her facts from previous cases and argued that principal of a campus is a one-of-a-kind position similar to superintendent that cannot be subject to reassignment except to another principal position. The Commissioner of Education held in favor of Crosby ISD, and on appeal, the Travis County District Court and the Third Court of Appeals in Austin upheld the decision. LAF filed *amicus curiae* briefs in support of the district at every level, arguing that a superintendent has authority to reassign an employee from principal to assistant principal.

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