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A LOOK INSIDE . . .

Our lead article this month delves into the intricacies of Texas purchasing and procurement law and recent changes by the Texas legislature. Written by Lufkin school law attorney Wayne D. Haglund of the Haglund Law Firm, the article is an invaluable resource to those school administrators who deal with school district purchasing and procurement. We follow up with reports on fourteen court cases, including two from the 5th Circuit, and five decisions from the Commissioner's office. Here are the highlights.

Labor and Employment

Kilgore v. Brookeland ISD (page 6) is a great example of the burden shifting analysis that courts will use in discrimination cases. The employee has the initial burden of proof, and then the employer must articulate a legitimate, nondiscriminatory reason for the employment action at issue. Once that occurs, the employee must then rebut that reason with evidence of discrimination.

Texas law provides certain procedural protections to police officers when they are recommended for termination. *Baldridge v. Brauner* (page 7) demonstrates that those protections apply equally to school district police officers.

In *Walker v. Hitchcock ISD* (page 8), Ms. Walker lost her Whistleblower case at trial and filed an appeal challenging the jury's verdict on several grounds. This case shows the kinds of attacks unsuccessful litigants will lodge on appeal of an adverse jury verdict.

The Law Dawg's Award for Most Interesting Case of the Month goes to *Smith v. Dallas ISD* (page 9) for its detailed analysis of when assault leave is available to a school employee. This case is also the subject of our Web Exclusive this month, featuring commentary from seasoned school law attorney Robb Decker of the Walsh Anderson firm's San Antonio office.

Temporary disability leave was the issue in *Waters v. Houston ISD* (page 10). This is the second round before the Commissioner of Education in this case. Here, the Commissioner looked at whether, under Education Code § 21.409, the woman was entitled to return to a full-time position after she received a physician's release allowing her to resume work. This is must reading for all school administrators, especially personnel directors. The case also examines whether the district provided Waters a fair grievance hearing.

Religion

This month also brings us the latest installment in the ongoing litigation known as the "Candy Cane Case," *Morgan v. Plano ISD* (page 13). While the case is still pending on other issues, the court here dismissed a portion of the lawsuit related to claims that the district violated the Texas Religious Freedom Restoration Act, because the plaintiffs failed to comply with strict notice requirements in the statute.

Special Education & Disability Discrimination

In *Prew v. Llano ISD* (page 14) the trial court dismissed most claims, but let the employee proceed on hostile work environment allegations against the school district under Section 504 of the Rehabilitation Act, when she alleged that she suffered harassment by the school administration based on her disability and for filing grievances.

R.C. v. Keller ISD (page 15) demonstrates that special education hearing officers may place less emphasis on what disability label a student is given, as long as the district provides appropriate services to the student. In this case, the district provided the student FAPE despite the disagreement over the student's disability label. The case also highlights the need for parent cooperation.

Leander Independent School District prevailed in *A.P. v. Leander ISD* (page 16), against very litigious parents, because it provided the student an appropriate placement in the least restrictive environment.

Students

In the latest peer harassment lawsuit we report, *Turner v. Houston ISD* (page 16), the trial court granted immunity for the student's state law claims, and dismissed federal claims because the allegations simply did not rise to the level of a constitutional violation. The lawsuit also did not state valid claims under the Americans with Disabilities Act or the Rehabilitation Act.

We hope you enjoy all of these legal developments, and the Law Dawg's examination of the Third Circuit's "I (heart) Boobies" bracelet case.

NAVIGATING THE UNCHARTERED WATERS OF PROCUREMENT OF CONTRACTS

By Wayne D. Haglund
Attorney at Law
Haglund Law Firm, P.C.
Lufkin, Texas

Navigating the purchasing and procurement laws and requirements of various types of contracts presents challenges to Texas school administrators. Are there differences between procuring the services of the construction consultant and the services of an architect or engineer; between contracting for the services of a technology consultant and contracting for the purchase of software; and between procuring HVAC equipment and construction services? Are there special rules for acquiring school buses? Additionally, school districts often are presented with contracts prepared by vendors and third party consultants and asked to sign with no further input or review. This article will examine the procurement laws and include a discussion of best practices in procurement and contracting.

Please note that S.B. 1093 passed by the 83rd Texas Legislature (2013) recodifies Chapter 2267 of the Texas Government Code into the newly-created Chapter 2269 of the Texas Government Code. This change is due to the fact that the 82nd Legislature enacted two (2) separate Chapter 2267s that dealt with two (2) separate issues. Any and all references in this article to statutes codified under Chapter 2267 will be recodified with the same section numbers in Chapter 2269, effective September 1, 2013.

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Texas School Administrators' Legal Digest
1601 Rio Grande, Ste. 455 • Austin, TX 78701
512-478-2113 FAX 512-495-9955
Email: info@legaldigest.com
Website: www.legaldigest.com

I. THE BASICS

Understanding the roles of the parties in procurement and contracting.

In procurement and contracting, most school districts rely upon their business managers and staff to guide them through procurement and contracting phases. In many cases, the school district will rely upon their suppliers, architect/engineer, and contractors. Through a lack of experience, and understanding of the changing legal requirements, school districts may fail to understand the conflicting roles that these parties have in the procurement and contracting process. By the time that a problem arises, it is too late to resolve the structural problems built into the procurement process and the contract document that has resulted.

The first rule of procurement and contracting is to engage the district's lawyer first, before any other action is taken. This is particularly true in the context of construction projects. Most school districts either fail to engage their legal counsel at all, or only consult the legal counsel after the procurement process has been completed, the contracts signed, and a question or problem arises. This is too late in the day for the legal counsel to be effective and to save the district valuable resources. (It costs more to undo a problem than it would to avoid the problem.) It is absolutely the best use of the district's legal counsel to engage them well before procurement begins and before any contract is signed.

Many vendors or contractors will tell the district that there is no need to involve legal counsel because the vendor/contractor employs a standard contract "that everyone always signs." That statement, "standard contract" or "everyone signs our contract" is the contracting equivalent of, "I will sell you waterfront property in the desert." When a school district official hears this, he or she should immediately stop everything and call the district's legal counsel.

II. THE ROLE OF THE VENDOR/CONTRACTOR

The role of the vendor/contractor is to secure the business from the district and to make a profit off the district's business. The agenda or priorities of the vendor/contractor is **NOT** to ensure that the district complies with the law, **NOT** to see that the district avoids claims, **NOT** to see that the district obtains the most favorable contract terms possible in the marketplace, and **NOT** to see that the district is protected against unnecessary exposure to risk, liability, and unnecessary or hidden costs by the terms of the contract documents.

In light of this analysis of the roles, which party should you trust to guide the district through the procurement process and to provide a set of contract documents that protects the interests of the district? In a very real sense, it is administrative malpractice to NOT involve the district's lawyer at the earliest possible stages of the procurement of a major contract or construction project.

The district should NEVER consider accepting or signing

the "form contract" of a vendor or contractor. Such "form contracts" are generally drawn by the trade organization of the vendor or contractor and are extremely one-sided in favor of the vendor or contractor. As a general rule, most of the services and obligations which you expect from the vendor/contractor are not expressed in terms that would be enforceable in court if the vendor/contractor breaches the form contract. Some "form contracts" contain terms that conflict with Texas law.

As a general rule, such "form contracts" shift the risk of loss, of defects, liability, or delay in completion of the contract off of the vendor/contractor and onto the owner…. the district. No district administrator should be expected to understand the nuances of contract language and terms; nor should a district administrator be charged with keeping up with developments in the case law governing the enforceability of contracts.

The district can save time and expense in the contract negotiation process by having its lawyer prepare and its board of trustees approve the district's preferred form contract terms prior to initiating the procurement process. The district's contract, which protects the interest of the district, ensures that it will be enforceable and ensures that any dispute will be resolved in a court where the jury is made up of jurors who are residents of and who pay ad valorem taxes to the district. Invariably, the "standard form" contract provided by vendors/contractors will provide that disputes will either be resolved by binding arbitration and not by a jury, or in the alternative, that any dispute will be heard by a court in the state and county where the vendor's/contractor's principal office is located rather than in the county where the school is located.

III. THE ROLE OF THE DISTRICT'S LEGAL COUNSEL

The role of the legal counsel for the district is to offer guidance in its day-to-day actions to comply with the requirements of federal and state law and local policy. It is also the responsibility of the legal counsel to assist the district in obtaining the most favorable terms in its contracts and to assist in avoiding complaints, conflicts, and litigation which can result in exposure to liability and the expenditure of significant amounts for legal defense costs. In this role, the legal counsel is a valuable asset in navigating the requirements of complex procurement laws, in negotiating and drafting contracts that protect the district, and in avoiding claims and liability. While it is difficult to measure the value of avoiding conflicts and claims by sound advice from counsel, it is clear that contract terms that favor the district serve to discourage claims and litigation and to avoid unnecessary costs.

IV. CHAPTER 44 OF THE TEXAS EDUCATION CODE

The 2011 Texas legislature made significant changes to the statutes that govern procurement, contracting, and delivery methods for school districts, including for school district construction projects. Before House Bill 628 (HB 628), all school district contracts were governed by the provisions of Chapter 44 of the Texas Education Code. House Bill 628 moved the authorized methods for delivery of school district construction services from Chapter 44 of the Texas Education Code to Chapter 2267 of the Texas Government Code. Senate. B.ill 1093 of the 2013 Texas legislature will transfer the provisions of Chapter 2267 to the newly-created Chapter 2269 of the Texas Government Code effective September 1, 2013.

Section 44.031 of the Texas Education Code, entitled "Purchasing Contracts," provides that except as set out in Subchapter B of the Texas Education Code, all school district contracts for the purchase of goods and services, except contracts for the purchase of produce or vehicle fuel, valued at $50,000 or more in the aggregate for each twelve-month period shall be made by the listed methods, that provides the best value for the school district. The methods listed under section 44.031(a) of the Texas Education Code are:

1. Competitive bidding for services other than construction services;
2. Competitive sealed proposals for services other than construction services;
3. A request for proposals, for services other than construction services;
4. Interlocal contract;
5. A method provided by Chapter 2269 Texas Government Code for construction services;
6. The reverse auction procedure as defined by § 2155.062(d), Texas Government Code;
7. The formation of a political subdivision corporation under § 304.001, Texas Local Government Code.

The issue that House Bill 628 did not answer is whether a school district may procure construction services by a method not provided by Chapter 2269 of the Texas Government Code. This issue will be addressed later is this article.

Section 44.031(b) of the Texas Education Code states that except as provided by Chapter 44, Subchapter B, in determining to whom to award a contract, the school district shall consider the following factors:

1. The purchase price;
2. The reputation of the vendor and of the vendor's goods or services;
3. The quality of the vendor's goods or services
4. The extent to which the goods or services meet the district's needs;
5. The vendor's past relationship with the district;
6. The impact on the ability of the district to comply with laws and rules related to historically underutilized businesses;
7. The total long-term cost to the district to acquire the vendor's goods or services.
8. For a contract for goods and services, other than goods or services related to telecommunication and information services, building construction and maintenance, or instructional materials, whether the vendor or the vendor's ultimate parent company or majority owner:
    a. Has its principal place of business in this state; or
    b. Employs at least 500 persons in this state; and
9. Any other relevant factors specifically listed by the district in its request for bids or proposals.

In awarding a contract under § 44.031 of the Texas Education Code which employs a competitive sealed bid, a school district that has its central administrative office located in a municipality with a population of less than 250,000 may consider a bidder's principal place of business in the manner provided by § 271.9051 of the Texas Local Government Code. This subsection does not apply to the purchase of telecommunication services or information services.

Section 44.031(d) of the Texas Education Code authorizes the board of trustees to adopt rules and procedures for the acquisition of goods and services. The school district should always adopt such written rules and procedures before entering

into large contracts and purchases.

Texas Education Code § 44.031(h) is adopted in two (2) different versions. They essentially provide that if school equipment or a facility or personal property is destroyed or severely damaged as a result of an unforeseen catastrophe, emergency or major operational or structural failure, the board may determine that the delay posed by the procurement methods under Education Code Chapter 44 would prevent or substantially impair the conduct of classes or other essential school activities. In that case, contracts for the replacement or repair of the equipment or facility may be made by methods other than those required by Chapter 44.031.

There is a provision authorizing purchases from sole source providers, including items which are subject to patent, copyright, secret process, or monopoly, and other sole source providers.

Section 44.031(l) provides the exclusive method for purchase or lease of one or more school buses. That section provides that each proposed contract for the purchase or lease of one or more school buses, including a lease with an option to purchase, must be submitted to competitive bidding when the contract is valued at $20,000 or more.

Education Code § 44.0312 provides that the board of trustees may, as appropriate, delegate its authority regarding an action authorized or required by Subchapter B of Chapter 44 to a designated person, representative or committee. The important distinction here is that the board cannot delegate that authority which the legislature has limited to be exercised by the board of trustees only, rather than by the "district." With regard to the procurement of construction services, § 2269.053 of the Texas Government Code provides that the board of trustees may delegate any authority under this chapter regarding an action authorized or required to be taken to a designated representative, committee or other person.

In both § 44.0312 of the Texas Education Code and in § 2269.053 of the Texas Government Code dealing with the procuring of construction services, the district is required to give notice of the delegation and the limits of the delegation in its request for bids, proposals or qualifications. Notice of the delegation, the limits of the delegation, and of the name or title of each person designated by rule must be included in the request for bids, proposals or qualifications, or in an addendum to that request.

V. APPLICATION OF EDUCATION CODE SECTION 44.031 AND GOVERNMENT CODE CHAPTER 2269 TO JUNIOR COLLEGE DISTRICTS

Except as to the purchase, acquisition or license of library goods and services for a library operated as part of a junior college district, Education Code Chapter 44.031 applies fully to junior college districts. Chapter 2269 of the Texas Government Code, governing procurement of construction services, also applies fully to junior college districts.

VI. BEST VALUE DETERMINATION

The concept of the "best value" determination in the selection of a contract delivery method is a requirement of both § 44.031 and of Chapter 2269 of the Texas Government Code for all school district procurement, purchases, and contracts, including construction services. The determination of which method provides the "best value" to the school district is a threshold determination that must be formally made by the board of trustees at the very outset of the procurement process. The term "best value" is not defined in the statute.

Under Texas Government Code § 2269.056, if the board considers a construction contract delivery method using a method other than competitive bidding, it must, before advertising, determine which method provides the best value for the district. This provision makes competitive bidding the default method for procurement of construction services for school districts. To satisfy this requirement, a board should carefully document the objective criteria and factors considered in arriving at the "best value" determination.

In this context, it would serve the district well to use its authority to establish, by rule, its own procedure and criteria to determine the procurement and contracting method. The district should work with its legal counsel to create an established rule for use in the determination of best value and administrating the procurement and contracting process.

When it comes to selecting the delivery method for construction services, school districts are charged with determining "best value" when it selects the offeror that submits the bid or proposal for the district based upon the established and published selection criteria on the weights and ranking evaluation. Districts should carefully consider and adopt specific criteria for determining the "best value" to the district for each of these decisions. While there may be some overlap, the criteria may also be different. Without the guidance of experienced legal counsel, few districts are likely to comply with all of the specific requirements of the statutes.

VII. PROCUREMENT OF CONSTRUCTION SERVICES

A. WHAT ARE CONSTRUCTION SERVICES?

Oddly, there is not a definition of "construction" or "construction services" found in Texas statutes. However, the term "public work contract" is defined both in Chapter 2269 and in Chapter 2253 of the Texas Government Code. In those two chapters, the term "public work contract" is defined as a "contract for constructing, altering, or repairing a public building or carrying out or completing any public work." The definition in the two statutes is identical.

The Texas Legislature enacted two (2) statutes labeled Chapter 2267 of the Texas Government Code in 2011, each with an effective date of September 1, 2011. The Chapter 2267 of the Texas Government Code, now Chapter 2269, applicable here is entitled "Contracting and Delivery Procedures for Construction Projects." Government Code Chapter 2269 is substantially a recodification and an extension of similar provisions that previously were contained in Chapter 44 of the Texas Education Code. Chapter 2269 states that it applies to a public work contract made by a governmental entity authorized by state law to make a public work contract.

Section 2269.003 of the Texas Government Code is entitled "Conflict of Laws; Requirement to Follow Procedures of this Chapter." The subtitle for this Chapter given by the Legislature is "Delivery Procedures for Construction Projects." Government Code Section 2269.003 states at subsection (a): "Except as provided by this section, this chapter prevails over any other law relating to a public work contract." The exceptions in that section are limited to conflicting provisions in law regarding contracting

NAVIGATING continued on page 17

LAW DAWG

by Jim Walsh
Attorney at Law
Walsh, Anderson, Gallegos, Green & Treviño, P.C.

THE DAWG'S GUIDE TO FUNDRAISING BRACELETS, BODY PARTS AND THE FIRST AMENDMENT

Q. Dawg, I am an assistant principal of the middle school and I am concerned about what I just heard. I heard that the Supreme Court ruled that it was OK for kids to wear these "I (heart) BOOBIES" bracelets in public school. There goes the neighborhood.

A. Well, that's not exactly right. It was not the Supreme Court. It was the 3rd Circuit Court of Appeals, sitting *en banc*.

Q. I don't care what they were sitting on. What were they thinking?

A. Sitting *en banc* does not actually refer to where or how they were sitting. It means that all of the 3rd Circuit judges participated in the decision, rather than just a panel of three judges. Cases get heard *en banc* because they are particularly important, and the judges are divided about them. In this case the final vote was 9-5 in favor of the kids wearing the bracelets. So I gather you don't like this decision?

Q. Anyone who has been around 7th grade boys recently can tell you that this is a bad decision.

A. That's what the lawyer representing the school district tried to explain. He accused the judges of "throwing a burning match on a boiling cauldron of hormones." But it didn't work.

Q. OK. So how are we supposed to make sense of this in the school district? Can kids wear any bracelet they want, with any kind of language on it????

A. No. A previous case had held that schools could prohibit language in the school setting that is "lewd, vulgar, profane or plainly offensive." This case takes the word "lewd" and divides it into three kinds of lewd.

There is PLAINLY LEWD language.

There is AMBIGUOUSLY LEWD language that a REASONABLE OBSERVER could interpret as LEWD and that COULD NOT PLAUSIBLY BE INTERPRETED as commenting on political or social issues.

There is AMBIGUOUSLY LEWD language that a REASONABLE OBSERVER COULD PLAUSIBLY INTERPRET as commenting on political or social issues.

According to the majority opinion, you can prohibit the first two in the school setting, but not the third. Since the word "boobies" is only ambiguously lewd, as opposed to "plainly lewd" and since the purpose of the bracelets was to reduce breast cancer, a "reasonable observer" could "plausibly interpret" the bracelets as commenting on an important social or political issue. Voila: First Amendment!

Q. You are kidding about all this, right? I mean this is one of those tongue-in-cheek Law Dawg columns, right?

A. Nope. That's pretty much what the court said.

Q. Well! The problem is that 7th grade boys are not "reasonable observers." So help me out here: what sort of words would be "plainly lewd."

A. The court decision cites George Carlin's famous comedy routine about the seven words you cannot say on television. I'm sure you are aware of some of them. The seven words include a word that refers to the female breast but it is not the B-word. It is the more offensive T-word. This came up during the oral argument of the case when one of the judges asked about "the T-word." The lawyer representing the school district could not figure out what the judge was referring to until he sat down for awhile and his colleagues explained it to him.

Q. That guy needs to watch cable.

A. Agreed.

Q. So the court says we have to allow the B-word, but we can prohibit the T-word.

A. That's right.

Q. Well bless my prostate. You know, breasts are not the only bodily organs that can get cancer. And I expect all those other organs have their supporters and fundraising schemes also.

A. Right you are! So get ready for "I (heart) PROSTATES!" And "I (heart) RECTUMS!" And "I (heart) TESTICLES!"

Q. I'm calling TRS right now.

A. Good plan! The case is B.H. v. Easton Area School District, 2013 WL 3970093 (3rd Cir. 2013).

Got a comment or question for the *Dawg?* Send it to jwalsh@wabsa.com.

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LEGAL DEVELOPMENTS

GOVERNANCE

Elections

DID THE SCHOOL DISTRICT IMPROPERLY DENY THE APPLICATIONS FOR CANDIDACY FOR THE SCHOOL BOARD ELECTION?

Case citation: In re Rodriguez, __ S.W.3d __, 2013 WL 3945990 (Tex. App. – Beaumont 2013).

Summary: Marcelino Rodriguez, Donna Jean Forgas, and Linda Marie Wiltz Gilmore filed applications for positions on the ballot for the Beaumont Independent School District Board of Trustees. At the time, the district had undergone redistricting and sought approval from the United States Department of Justice (DOJ), but the DOJ had objected to the district's redistricting plan. The district ultimately denied the three candidate applications, and Rodriguez, Forgas, and Gilmore filed suit seeking to compel the district to place their names on the ballot.

In their suit, Rodriguez, Forgas, and Gilmore argued that by operation of § 11.052 of the Texas Education Code, all seven positions on the Board should have been filled in the May 2013 election; consequently, they claimed that the district had a mandatory duty to accept their applications and put their names on the ballot for the May 2013 election. In earlier litigation, the appeals court held that state law required the district to fill all trustee positions in the election and the district should have accepted the applications for those positions that were timely filed. [*See,* In re Rodriguez, 397 S.W.3d 817 (Tex. App. – Beaumont 2013); *Texas School Administrators' Legal Digest,* May 2013].

The school board certified the candidates for the May election. However, as part of the preclearance process, the board filed a declaratory judgment action in the United States District Court for the District of Columbia and sought preclearance from the Department of Justice under Section 5 of the Voting Rights Act. The federal court issued an order prohibiting the district from holding the May election. When the board cancelled the May election and rescheduled it to November, Rodriguez, Forgas, and Gilmore filed another lawsuit in Jefferson County, Texas. As a result, two cases remained pending over the election dispute, in the U.S. District Court for the District of Columbia and in Jefferson County. In addition, the United States Supreme Court has since declared unconstitutional section 4(b) of the Voting Rights Act. [*See,* Shelby County Ala. v. Holder, 133 S.Ct. 2612 (U.S. 2013); *Texas School Administrators' Legal Digest,* July/August 2013]. Rodriguez, Forgas, and Gilmore in this lawsuit have requested that the court enforce the writ of mandamus that it originally issued, calling for the district to conduct the election, with their names on the ballot.

Ruling: The appeals court dismissed the case. Although courts of appeal may issue a writ of mandamus to compel the performance of a duty imposed by law in connection with the holding of an election, courts should also avoid a premature adjudication. In this case, the parties asked the appeals court to make decisions about a potential November 2013 election. However, challenges to that election are also pending in federal and state district courts. Because the parties' claims remain subject to on-going litigation in both federal and state courts, the appeals court here declined to address the merits of claims.

LABOR & EMPLOYMENT

Discrimination

DID THE DISTRICT TERMINATE THE BUS DRIVER BECAUSE OF HIS AGE?

Case citation: Kilgore v. Brookeland ISD, __ Fed. Appx. __ 2013 WL 4031038 (5th Cir. 2013) (unpublished).

Summary: Donald Kilgore worked as a bus driver for the Brookeland Independent School District until his employment terminated in May of 2011. That spring, the district decided to reorganize its bus routes due to possible budget cuts. The district chose to eliminate Kilgore's position, because he had the most job performance issues. At the time of his termination, he was 72 years old. The superintendent met with Kilgore to inform him of the decision, and indicated that the position was being eliminated due to budget cuts, and that Kilgore was "eligible for retirement."

Over the summer of 2011, the Texas Legislature passed a budget that allowed the district to retain all of its bus routes. The district then hired another person to fill the position that Kilgore previously held. According to the superintendent, he selected the other person over Kilgore because he preferred to have a bus driver without performance issues.

After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and receiving an EEOC notice of right to sue, Kilgore filed suit against the school district. He claimed that his termination amounted to age discrimination in violation of the Age Discrimination in Employment Act (ADEA). The district requested judgment in its favor prior to trial, maintaining that age did not play a role in its employment decision. The trial court granted judgment in favor of the school district on Kilgore's discrimination lawsuit. [*See,* Kilgore v. Brookeland ISD, 2012 WL 6114954 and 2012 WL 6115057 (E.D. Tex. 2012) (unpublished); *Texas School Administrators' Legal Digest,* March 2013]. Kilgore appealed the judgment to the Fifth Circuit Court of Appeals.

Ruling: The Fifth Circuit affirmed the judgment in favor of the district on Kilgore's age discrimination claims. Kilgore first argued that the superintendent's comment that Kilgore was "eligible for retirement" was sufficient direct evidence to create a genuine issue of material fact with respect to his discrimination claim. The appeals court disagreed, stating: "Nothing in the superintendent's comment suggests that Kilgore was terminated *because of* his eligibility for retirement; therefore, the comment is not direct evidence of discrimination."

The appeals court also held that although Kilgore met his initial burden to establish a *prima facie* case of discrimination, he was unable to rebut the district's legitimate nondiscriminatory reasons for its employment decision. Kilgore demonstrated that he was discharged from his position as a bus driver for Brookeland ISD; he was qualified for the job; he was 72 years old; and he was replaced by a younger person.

There was a dispute regarding whether Kilgore was terminated (1) in the spring of 2011, when the district decided not to give him a letter of reasonable assurance or (2) in late summer when the district hired the other candidate to fill Kilgore's position. Regardless of the date of termination, the district presented legitimate reasons for each action. First, the district declined to send a letter of reasonable assurance because it planned to re-

duce the number of bus drivers because of possible budget cuts. Later, it made the decision to hire the other bus driver rather than Kilgore because it preferred a bus driver without performance issues. It was then up to Kilgore to prove that the reasons given by the district were not true and that discrimination was the real reason. According to the appeals court, Kilgore failed to do so. He did not produce evidence calling into doubt the budgetary concerns. He also did not challenge cited work performance problems. Thus, he failed to create a genuine issue of material fact on whether the district terminated him because of his age. The appeals court upheld the judgment in favor of the district.

Things to Remember: ***This is a good illustration of the "burden shifting" that courts apply in cases of alleged discrimination. It was not too hard for the plaintiff to establish his "prima facie" case, at which point the burden shifted to the employer to articulate a legitimate, non-discriminatory reason for its action. The district was able to do that, thus putting the burden back on the plaintiff. Serve, volley, return. Game over.***

Retaliation

DID THE SCHOOL DISTRICT RETALIATE AGAINST THE CUSTODIAN?

Case citation: Martinez v. South San Antonio ISD, 2013 WL 3280275 (W.D. Tex. 2013) (unpublished).

Summary: Inez Martinez worked as a custodian with the South San Antonio ISD. In March of 2010, the school district fingerprinted a number of non-certified employees to comply with Texas Education Code § 22.0833. The district directed its general counsel to obtain and review the court files of employees, including Martinez, who appeared to have criminal histories to determine the status of their conviction records.

At the time, the district's termination policy stated that it would discharge an employee if the employee had been convicted of a felony under Texas Penal Code Title 5, unless the date of the offense was more than 30 years before June 15, 2007, and the employee satisfied all terms of the court order. In addition, the school district "may discharge an employee if the District obtains information of the employee's conviction of a felony or of a misdemeanor involving moral turpitude that the employee did not disclose to ... the District." In August of 2010, following the investigation, the general counsel advised the district that it had the discretion to terminate Martinez for his failure to disclose a 1975 felony conviction for burglary, considered by the district to be a crime of moral turpitude. The district terminated Martinez two days later.

Meanwhile, in June of 2010, Martinez's former father-in-law who worked for the school district, filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging age discrimination and retaliation. Then, in July of 2010, Martinez's wife, also a district employee, filed an EEOC charge of discrimination, claiming retaliation due to her affiliation with her father and his EEOC claims. Martinez's wife, at the time, also was running for election on the district's board of trustees.

Following his termination, Martinez sued the school district claiming retaliation in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). In response, the district filed a motion requesting judgment in its favor prior to trial.

Ruling: The trial court entered judgment in favor of the district, holding that Martinez failed to establish retaliation claims under Title VII and the ADEA. The trial court observed that there were "serious fact issues about why he was fired." Nevertheless, Martinez ultimately had to prove that "but for" Martinez engaging in some protected conduct, the district would not have terminated him. According to the trial court, Martinez failed to meet that burden.

Martinez testified that he believed his termination was actually due to a conspiracy to terminate all of Martinez's family working for the district. The conspiracy was allegedly orchestrated by Board President Manuel Lopez, once Lopez learned that Martinez's wife would be running against him for a position on the board. Further, according to the trial court, Martinez failed to produce any evidence that EEOC-protected activity undertaken by him in support of his wife or former father-in-law was a but-for cause of his termination.

Although Martinez could pursue a claim that he was fired in retaliation for his father-in-law and spouse's filing of EEOC charges, he failed to produce any competent summary judgment evidence to support this claim. To the contrary, he stated that he was fired because his wife opposed then Board President Manual Lopez. He claimed further that the superintendent did Mr. Lopez's bidding by firing him, and that he was unaware of any other reasons for his termination. Although the trial court noted "troubling discrepancies" in the case, the trial court concluded that Martinez failed to establish a causal link between any alleged protected activity/association and his termination. Thus, the district was entitled to judgment in its favor.

Termination

DID THE SCHOOL DISTRICT PROPERLY TERMINATE THE DISTRICT POLICE OFFICER?

Case citation: Baldridge v. Brauner, 2013 WL 3327238 (Tex. App. – Houston 2013) (unpublished).

Summary: Edward Baldridge was employed by the Spring Branch Independent School District Police Department when he responded to a call from Dr. Walter Holmsten complaining that his fence had been damaged by several adult softball players while they were using the Spring Branch Middle School baseball field. Holmsten asked Baldridge to stop the people from using the field, but Baldridge informed Holmsten that it was a public facility and he could not force the players to leave. In response, Holmsten threatened to contact people he knew on the district's board of trustees and they would have his job. Baldridge promised to attend the next school board meeting to refute any unfounded allegations. Baldridge then sought out and spoke with the softball players who denied damaging the fence. He advised them to stay off of the Holmsten property and reported back to his radio dispatcher. He then called the dispatcher, a personal friend, on a "back line" on his personal cell phone. Upset by Holmsten's characterization of the ball players as "shady," he referred to Holmsten as a "son-of-a-bitch" and an "idiot" during the ensuing conversation.

The next day, Holmsten complained to the District Associate Superintendent Ruben Reyes about the incident. Reyes contacted Chief of Police Chuck Brauner, who investigated the incident. Upon Brauner's request, Holmsten submitted his complaint in writing. The day after he was contacted by Reyes, Brauner noted

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Baldridge wearing a Bluetooth device while on duty, in violation of the department's dress code. On May 5, 2008, Brauner issued a counseling report to Baldridge, advising him of the dress code policy violation. Baldridge signed and acknowledged receipt of the report.

On May 23, 2008, Brauner recommended to the District Human Resources Director that Baldridge's employment be terminated. Brauner's recommendation included allegations concerning the incident with Holmsted, as well as the dress code violation. Baldridge was unaware of the investigation into the Holmsten incident until Brauner presented him with a termination notice four days later. The May 27, 2008 termination notice stated that Holmsten had "a legitimate complaint," Baldridge "took no action to resolve the matter," and "did not request a Call Slip issued for this Call for Service." It also indicated that Baldridge did not respond in an acceptable and professional manner and that his conduct included "other matters of record that clearly identify unacceptable job performance and repeated failure to follow Standards of Operation during [Baldridge's] tenure with the SBISD Police Department." Baldridge was not provided a copy of Holmsten's written complaint or Brauner's memo before his employment was terminated, and he did not learn of the full details of Brauner's investigation until the discovery phase of this lawsuit.

After his termination, Baldridge filed suit claiming that the district and Brauner violated Government Code § 614.023 in how they handled his termination. The trial court denied Baldridge's request for judgment in his favor, and entered judgment in favor of the district. On appeal, Baldridge argued that the trial court erred because: (1) the district was required under § 614.023 to provide him with a copy of any complaints filed against him that formed part of the basis for the termination of his employment, (2) it failed to do so, and (3) it was not allowed to circumvent the requirements of § 614.023 by alleging other unrelated bases for terminating his employment.

Ruling: The court of appeals affirmed the judgment in favor of the district. The appeals court first concluded that governmental immunity did not bar the claims. Baldridge's claims sought: (1) declarations that the district violated Government Code § 614.023, and (2) withdrawal of the disciplinary action, reinstatement to his original position and rank, and to otherwise be "made whole"; and (3) court costs and attorney's fees. According to the appeals court, declaratory judgment, mandamus, and injunctive relief claims alleging termination in violation of Government Code § 614.022 and § 614.023 and seeking only prospective reinstatement were not barred by governmental immunity.

Baldridge argued that his employment was terminated because of the Holmsten incident, the district and Brauner were required to give him a copy of Holmsten's complaint before taking disciplinary action against him, and they failed to do so in violation of § 614.023. In response, the district argued that (1) Baldridge's employment was not terminated because of the Holmsten incident, but rather because of internal performance issues relating to how Baldridge handled Holmsten's complaint, and these types of internal performance issues are not subject to the requirements of § 614.023, and (2) Baldridge's employment was terminated for reasons other than the Holmsten incident, such as the Bluetooth incident.

Government Code chapter 614, subchapter B requires that any complaint against a law enforcement officer or fire fighter covered by this chapter be in writing and signed by the person making the complaint. Section 614.023 provides that a copy of the signed complaint must be given to the officer within a reasonable time and that disciplinary action may not be taken unless a copy of the signed complaint is given to the officer. Further, the officer may not be indefinitely suspended or terminated from employment based on the subject matter of the complaint unless: (1) the complaint is investigated; and (2) there is evidence to prove the allegation of misconduct. Baldridge claimed that Holmsten's letter was clearly a "complaint" subject to § 614.023, and that Brauner's notice indicated that Baldridge's employment was being terminated based on the Holmsten incident. Baldridge never addressed the other performance issues that the district argued were sufficient to justify the termination of Baldridge's employment.

According to the appeals court, the summary judgment evidence established that Baldridge's employment was terminated based upon his response to the Holmsten incident and other, unrelated internal performance issues including the Bluetooth incident. Assuming without deciding that § 614.023 applies to internal performance issues such as the Bluetooth incident, the appeals court concluded that the district complied with § 614.023 when it terminated Baldridge based upon the Bluetooth incident. Baldridge was informed of the allegation against him—wearing a Bluetooth device while on duty in violation of departmental policy. Brauner gave Baldridge a counseling report that advised Baldridge of the dress code policy violation prior to the termination of Baldridge's employment. Baldridge signed and acknowledged receipt of the report. Brauner, who witnessed Baldridge wearing the Bluetooth device while on duty, investigated the claim by discussing the matter with Baldridge. Thus, the trial court properly granted judgment in favor of the district.

Things to Remember: ***It would be interesting to see what would happen if this "signed, written complaint" statute applied to educators.***

Whistleblower Act

DID THE JURY PROPERLY RULE IN FAVOR OF THE DISTRICT ON THE WHISTLEBLOWER CLAIMS?

Case citation: Walker v. Hitchcock ISD, 2013 WL 3771302 (Tex. App. – Hous. [1st Dist.] 2013) (unpublished).

Summary: Doreatha Walker sued the Hitchcock Independent School District for suspending her and recommending termination from her job as Head Start Director. She contended that the district had retaliated against her for reporting unsafe mold levels and other improprieties in violation of the Texas Whistleblower Act. The jury found that Walker had not made those reports in good faith or that the reports were not the cause of her suspension and recommendation of termination. The trial court entered judgment in favor of the school district.

On appeal, Walker argued that the trial court erroneously charged the jury, improperly admitted evidence, incorrectly applied the res judicata doctrine, and unfairly imposed time limits during the trial. She also complained that her directed verdict motion, requesting judgment prior to jury deliberations, was improperly denied. She also challenged the sufficiency of the evidence to support the judgment. Finally, Walker questioned the composition and conduct of the jury.

Ruling: The appeals court affirmed the trial court's judgment in favor of the district. To prove a claim under the Whistleblower Act, a public employee must demonstrate that she reported a violation of law in good faith and that the adverse employment action by the employer would not have occurred had the report

not been made. To meet the causation requirement, the employee is not required to show that her reports of illegal conduct were the sole reason for the employer's adverse action. Instead, she must present some evidence that "but for" her reports, the employer's suspension or termination would not have occurred when it did.

Walker claimed the instructions and charge that the court gave to the jury was improper, but she did not explain how the charge was incorrect or resulted in the rendition of an improper judgment. Thus, her challenge to the charge and jury questions was without merit. Walker's argument concerning the damages portion of the charge also failed, because the jury ruled in favor of the district. Thus, any error concerning damages that could have been awarded to Walker, was harmless error.

Walker next argued that the district was allowed to introduce as evidence at trial material from her administrative proceedings, while she was not, and that this was an improper application of the res judicata and collateral estoppel doctrines. Before trial, Walker had appealed her termination in administrative proceedings before a TEA hearing examiner and the Commissioner of Education. Under the doctrine of collateral estoppel, the trial court allowed the parties to present the findings from the administrative hearing, but not to dispute those findings. In the administrative action, it was found that Walker had increasingly poor relations with her superiors and other adults involved in the Head Start program in the months before her suspension. The hearing examiner found that Walker's behavior violated several of her job requirements and described several incidents in which her attitude led to conflict, such as when she refused to leave the Head Start building and had to be escorted away by police. From these findings, the examiner concluded that the district was authorized to terminate her probationary contract.

Collateral estoppel, also known as issue preclusion, prevents relitigation of particular issues already resolved in a prior suit. Since TEA issued a final decision and the district had an adequate opportunity to fully and fairly litigate her termination, the hearing examiner's findings were binding on the trial court. On appeal, Walker did not indicate where in the record that the district did anything more than reference the examiner's findings, as it was entitled to do. Further, because she attempted to dispute the administrative findings, the trial court acted properly in stopping her from relitigating the issue of why she was terminated. Thus, the trial court did not err in its application of the collateral estoppel doctrine.

Walker also challenged several of the trial court's evidentiary rulings during the trial. To overturn a jury verdict, Walker had to show that the erroneous evidentiary rulings probably resulted in an improper judgment. Here, she complained that the court excluded a newspaper article she sought to admit into evidence explaining that mold existed in the Head Start Building. The trial court properly excluded it as hearsay and duplicative of facts already in evidence. The trial court properly allowed evidence of emails from other employees complaining of Walker's argumentativeness and strange behavior. The emails were admitted to prove that the district received reports of the conflict caused by Walker. The trial court also prohibited a line of questioning by Walker into the alleged past retaliation of other employees. The appeals court held this was proper because Walker failed to show how the testimony would have altered the judgment and because any possible error was harmless.

The trial court also did not err when it imposed limits on the length of the trial. The record showed that Walker took a lot of time questioning witnesses and that the trial court warned her about using too much time. When limits were imposed, it impacted the district's presentation of its case, rather than Walker's. No error was shown in the time limits set by the trial court. Ultimately, the appeals court held that sufficient evidence existed to support the jury's verdict in favor of the district.

Assault Leave

WAS THE TEACHER ENTITLED TO ASSAULT LEAVE?

Case citation: Smith v. Dallas ISD, Dkt. No. 072-R10-0710 (Comm'r Educ. June 5, 2013).

Summary: David Smith worked as a physical education teacher for the Dallas Independent School District, when he requested assault leave. The record showed that on January 7, 2009, while performing lunch duty on the playground, Smith demonstrated a football move to some children. Later, a 12-year-old, 5th grader jumped on Smith's back. Smith requested assault leave from the district. After the request was denied, Smith filed a grievance. The district denied the grievance at each level and Smith appealed to the Commissioner of Education.

Ruling: The Commissioner upheld the district's decision to deny Smith assault leave. The Commissioner observed that a school employee who is physically assaulted during the performance of his duties is entitled to assault leave for the number of days necessary to recuperate from all physical injuries sustained as a result of the assault, up to a maximum of two years from the date of the assault. A person commits a criminal assault if the person intentionally, knowingly, or recklessly causes bodily injury to another, or intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the conduct as offensive or provocative.

According to the Commissioner, to award assault leave, a school district is not to determine whether the person who caused the injury intended that the employee be injured, so as to be unable to return to work. Instead, the district must determine whether the person who caused the injury committed an assault as defined by the Penal Code and whether, as a result of the assault, the employee was unable to return to work.

Here, the Commissioner held that the student committed an assault under Penal Code § 22.01(a)(3) because the evidence showed that the student intentionally caused physical contact with Smith and the student should have known that Smith would find that contact offensive. Nevertheless, Smith was not entitled to assault leave because Smith failed to prove that he sustained an injury that required him to take time off in order to recuperate. Smith had the burden of proof on each element of his assault leave claim. Because Smith did not prove that he sustained an injury requiring time to recuperate, the district properly concluded that he was not entitled to assault leave.

Things to Remember: ***This is a lengthy, exhaustive analysis of assault leave claims, and thus is recommended reading for HR Directors. What might surprise some people is that an "assault" does not require an intent to injure—it can be an offensive touching. However, if that's the kind of assault you are dealing with, it is less likely to satisfy the other required element, a physical injury that requires recuperation. This case well illustrates that point. The Commissioner concluded that this was an "offensive touching" case, and the teacher was unable to persuade the board or the Commissioner that he was actually physically injured. One other interesting issue in this case involved the local policy, DEC (Local). Because the policy was not actually introduced into the record at the local level, the Commissioner held that he could not consider it.***

Labor and Employment, continued

Nonrenewal

DID SUBSTANTIAL EVIDENCE EXIST TO SUPPORT NONRENEWAL OF THE EDUCATOR CONTRACT?

Case citation: Gordon v. Greenville ISD, Dkt. No. 050-R1-06-2013 (Comm'r Educ. July 22, 2013).

Summary: Richard Gordon worked for the Greenville Independent School District when the district proposed his nonrenewal. The district listed seven policy reasons for the proposed nonrenewal, including deficiencies pointed out to him, the failure to fulfill duties or responsibilities, incompetency or inefficiency, insubordination, the failure to comply with policies and directives, the failure to meet the district's standards of professional conduct, and any reason constituting good cause for termination. After Gordon's nonrenewal, Gordon appealed to the Commissioner of Education, arguing that the nonrenewal was not supported by substantial evidence and was arbitrary and capricious. He claimed further that the district retaliated against him for filing grievances and a lawsuit. He also alleged that the district did not provide him with a fair hearing.

Ruling: The Commissioner upheld the district's decision to nonrenew Gordon's contract. The Commissioner first held that Gordon had not properly briefed his argument concerning whether the board's nonrenewal decision was arbitrary and capricious. Specifically, Gordon failed to cite to the local record or cite to any authority in support of his position. As a result, he waived that argument on appeal.

The Commissioner next concluded that the record contained substantial evidence to support Gordon's nonrenewal. The record showed that Gordon failed to properly prepare for and participate in Language Proficiency Assessment Committee meetings, after being counseled as to his deficiencies. He failed to complete a related growth plan. In addition, the record showed that Gordon slept while on duty. Thus, the record supported Gordon's nonrenewal.

Temporary Disability Leave

DID THE DISTRICT FAIL TO RETURN THE TEACHER TO WORK FOLLOWING TEMPORARY DISABILITY LEAVE?

Case citation: Waters v. Houston ISD, Dkt. No. 039-R2-05-2013 (Comm'r Educ. June 20, 2013).

Summary: Linda Waters worked as a teacher for the Houston Independent School District when she became ill and was placed on leave from January 31, to May 2, 2005. Beginning on October 20, 2005, Waters was placed on temporary disability leave for an additional 180 days. Waters did not return to work after January 31, 2005.

Believing that the district was preventing her from returning to work, she filed her first grievance. The board heard the grievance on September 7, 2006. At the grievance hearing, a district official indicated that there was a middle school teaching position available to Waters. The board, however, denied the grievance. Waters did not appeal the decision to the Commissioner of Education within 45 days.

When Waters attempted to assume her job at the middle school on September 14, 2006, she was informed that the job had been taken by another teacher. On September 19, 2006, Waters filed a second grievance which alleged many of the same issues raised in her first grievance, in addition to a claim that she was improperly denied the middle school teaching position.

By letter dated September 26, 2006, the district's executive general manager of human resources informed Waters that her second grievance would not be heard because it included issues previously decided by the board. The human resources officer stated further that she could file a new grievance only as to the issue of whether Waters should have been allowed to return to work at the middle school. However, Waters did not amend her second grievance and the district did not hear the second grievance.

The following month, Waters received notice of her proposed termination. The woman did not request a hearing and the board ultimately voted to terminate the contract. Waters appealed the board's actions to the Commissioner of Education challenging the district's decision not to allow her to return to work. She also alleged that she did not receive notice of the proposed termination. The district responded that Waters did not exhaust administrative remedies on her two grievances and the decision to terminate her contract. The Commissioner determined that the school district improperly declined to hear her second grievance. [*See,* Waters v. Houston ISD, Dkt. No. 009-R10-1007 (Comm'r Educ. April 30, 2010); *Texas School Administrators' Legal Digest,* October 2010]. As a result, Waters was entitled to a grievance hearing concerning her second grievance.

The case returned to the district for reconsideration of the second grievance. The district hired an attorney to hear the Level II grievance, who was certified by the Texas Education Agency as a hearing examiner. During the Level II grievance hearing, both parties presented documents and testimony. Ultimately, however, the board voted to deny the grievance at Level III. Waters again appealed to the Commissioner of Education.

Ruling: The Commissioner granted the appeal, in part, holding that the district was required to place Waters in an active duty position at the beginning of the 2006 fall term. The Commissioner first held that the Level II grievance hearing conducted by the attorney hired by the district was proper. A school district has wide discretion in determining what type of grievance process will be granted, so long as the process provides for a fair hearing sufficient to protect the interests at stake. Here, the district provided Waters with an evidentiary hearing that was fair and sufficient to protect the interests at stake.

With respect to the leave issue, the Commissioner observed that, under Texas Education Code § 21.409, a school district is required to place a teacher, who is on temporary disability leave, on active duty after receiving a physician's release no later than the start of the next term. According to the Commissioner, the district received the physician's release from Waters on January 19, 2006. Thus, Education Code § 21.409 required the district to place Waters on active duty no later than the start of the fall 2006 term. The Commissioner concluded that Waters was entitled to lost pay and benefits from September 14, 2006, until January 11, 2007, the date of her termination.

Things to Remember: ***Attorneys should study the Commissioner's interesting comments in this decision about the nature of a grievance hearing: "A grievance hearing is not judged by the evidentiary standards of a Texas civil or criminal proceeding or a federal civil or criminal proceeding. But this does not mean that a grievance hearing is not an evidentiary hearing. A grievance hearing is* sui generis*. The Commissioner has stated that school boards have wide discretion as to how to conduct grievance hearings. [Cite omitted]. However, grievance hearings must be fair hearings sufficient to protect the interests at stake."***

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Nonrenewal

WAS THE TEACHER'S NONRENEWAL SUPPORTED BY SUBSTANTIAL EVIDENCE?

Case citation: De La Paz v. Harlingen CISD, Dkt. No. 045-R1-05-2013 (Comm'r Educ. July 15, 2013).

Summary: Dalaina Rachel De La Paz worked for the Harlingen Consolidated Independent School District, when the district provided her notice of proposed nonrenewal dated April 12, 2013. The notice set out 31 actions of De La Paz that allegedly violated eleven separate policy reasons for the nonrenewal. The actions fell into four categories: student complaints, parent complaints, colleague complaints, and supervisor complaints. The board of trustees ultimately voted to nonrenew De La Paz's contract, and the woman appealed to the Commissioner of Education. The ultimate issue on appeal was whether the nonrenewal was supported by substantial evidence.

Ruling: The Commissioner held that substantial evidence existed to support the nonrenewal. The Commissioner observed that a contract may be nonrenewed if the district proves by a preponderance of the evidence that one or more of its pre-established reasons for nonrenewal have been violated. On appeal to the Commissioner, the issue becomes whether substantial evidence exists in the local record to support the nonrenewal. Here, while De La Paz highlighted inconsistencies in witness testimony, there still was substantial evidence to support the reasons given for her nonrenewal.

On appeal, De La Paz challenged some of the documents admitted into evidence at the nonrenewal hearing. However, she had failed to raise objections to those documents during the nonrenewal hearing. The Commissioner could not address those issues that were not raised at the local level. De La Paz's claim that a board member should have recused himself from the decision also failed because it was not raised at the local level.

De La Paz claimed that the real reason for her nonrenewal was discrimination based on her religion and race, and retaliation for filing grievances. The record, however, did not support those claims. According to the Commissioner, the evidence supported the policy reasons given for De La Paz's nonrenewal. She failed to raise any procedural or substantive issues sufficient to warrant reversal of the nonrenewal decision. Thus, the Commissioner dismissed the appeal.

PRACTICE & PROCEDURE

Dismissal of Claims

DID THE LAWSUIT CONTAIN SUFFICIENT FACTS TO STATE CLAIMS UNDER § 1983?

Case citation: Johnston v. Humble ISD, 2013 WL 3992194 (S.D. Tex. 2013) (unpublished).

Summary: Misti Johnston, individually and on behalf of R.J., a child, sued the Humble Independent School District (HISD) and Michael Trost, claiming that Trost touched R.J. inappropriately and made R.J. feel "uncomfortable" and "awkward." Johnston's suit was brought under 42 U.S.C. § 1983 for the violation of rights protected by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, and for assault and battery and intentional infliction of emotional distress under the common law of the State of Texas. Johnston also asserted claims against HISD for negligent hiring, training, and supervision of Trost. In response, both the district and Trost sought dismissal of the suit.

Ruling: The trial court dismissed the suit for the failure to state a claim upon which relief could be granted. The trial court observed that to establish a claim under Section 1983, a plaintiff must show (1) the deprivation of a right secured by the United States Constitution or the laws of the United States and (2) that the deprivation was committed by a person or persons acting under color of state law.

In this case, Johnston claimed that the district and Trost violated rights guaranteed by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution based on allegations that Trost touched R.J. inappropriately and made R.J. feel "uncomfortable" and "awkward." However, Johnston failed to identify the specific constitutional rights she claims the defendants violated or explained why, if true, the facts alleged in her complaint stated legally cognizable claims for violations of constitutionally protected rights against either defendant. Thus, the trial court concluded that the § 1983 claims based on rights guaranteed by the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution failed to state a claim for which relief may be granted. The trial court dismissed claims Johnston asserted against the district and Trost under federal law.

The trial court also declined to rule on the state law claims. The trial court observed that in the usual case the general rule is to dismiss state law claims when the federal claims they supplement are dismissed. Because the court concluded that the federal claims in this action were subject to dismissal for failure to state a claim for which relief may be granted, and because this action was at an early stage, the court declined to exercise supplemental jurisdiction over any claims that Johnston alleged under state law. Those state law claims were dismissed, without prejudice, to being reasserted in a state court of appropriate jurisdiction.

Exhaustion of Administrative Remedies

WAS THE TERMINATED EMPLOYEE REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES?

Case citation: Houston ISD v. Rose, 2013 WL 3354724 (Tex. App.—Houston 2013) (unpublished).

Summary: Latasha Rose worked as a magnet coordinator for the Houston Independent School District when the superintendent recommended program changes as part of a reduction in force (RIF). Among the program areas targeted was the position of "Coordinator" at Rose's campus. The district's principal recommended Rose's position for elimination due to a reduction in funding and because the position had the least impact on instruction and direct student learning. Based on that recommendation, Rose was nonrenewed as part of the RIF. The Commissioner denied Rose's appeal.

Meanwhile, while that was pending, Rose filed suit in state court alleging that the district violated her state constitutional rights. She sought a court declaration that the district violated her rights, reinstatement, and an injunction barring the district from further violating her constitutional rights. In response, the district filed a plea to the jurisdiction, arguing that the trial court lacked jurisdiction over the matter because Rose failed to exhaust her administrative remedies. The trial court granted the plea, in part, but declined to dismiss Rose's request for a declaration that the district violated her constitutional rights. The district appealed the trial court decision.

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Ruling: The appeals court vacated the trial court ruling and dismissed the case for lack of jurisdiction. Generally, if an agency such as the Texas Education Agency, has exclusive jurisdiction over a matter, a party must exhaust all administrative remedies before seeking judicial review. In this case, it was undisputed that Rose pursued the administrative process through an appeal to the Commissioner of Education, but she did not seek judicial review of the Commissioner's decision. Instead, she filed suit before fully exhausting administrative remedies.

Rose argued that two exceptions to the exhaustion requirement applied in this case. First, she claimed that exhaustion was not necessary because her claims were premised on violations of the Texas Constitution. The appeals court held, however, that a determination of the constitutionality of the district's actions "necessarily implicates the validity of the district's actions affecting Rose's employment status and, because that determination requires the resolution of disputed fact issues, Rose has not shown that the exception for constitutional violations applies to her claims."

Rose next claimed that she did not have to exhaust administrative remedies, because to do so would have been futile. She argued that the board prevented her from challenging the motive of her termination, "thereby depriving her protected interests without procedural safeguards." According to the appeals court, however, the record contained no evidence that the board failed to fully consider the allegations in Rose's grievance or that procedural irregularities precluded consideration of her allegations on appeal to the Commissioner. Rose failed to establish that exhaustion of her claims would have been futile. Because Rose failed to exhaust her administrative remedies before filing suit, the appeals court held that the suit should have been dismissed for lack of jurisdiction.

Things to Remember: ***Exhaustion of administrative remedies requires not just an appeal to the Commissioner, but also a judicial appeal of the Commissioner's decision. That's the part that this plaintiff skipped.***

DID THE CHARGE OF DISCRIMINATION SUPPORT AGE AND GENDER CLAIMS?

Case citation: Smith v. Houston ISD, 2013 WL 3864301 (S.D. Tex. 2013) (unpublished).

Summary: Scwyana Smith worked for the Houston Independent School District when she was discharged as part of a reduction in force. Smith filed a charge of discrimination with the Texas Workforce Commission Civil Rights Division, checking boxes for "race," "religion," and "retaliation." The charge stated that Smith believed she had been discriminated against on the basis of her race and religion and that the district retaliated against her in violation of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission later issued Smith a notice of right to sue. Smith sued the district and, in addition to race, religion, and retaliation claims, Smith added allegations of gender discrimination and claims under the Age Discrimination in Employment Act (ADEA). In response, the district requested dismissal of the gender and age claims, arguing that Smith had not exhausted administrative remedies.

Ruling: The trial court dismissed Smith's age and gender discrimination claims for lack of jurisdiction. Both Smith's lawsuit and the charge of discrimination showed that Smith had not pursued administrative remedies for age or gender discrimination. Her failure to include those allegations in the charge of discrimination barred the claims. Further, because the last alleged unlawful employment practice was her termination on May 12, 2011, it was too late to remedy the defect in the charge. The charge had to be filed within 180 days of the alleged unlawful employment practice. The trial court, therefore, dismissed the age and gender claims for lack of jurisdiction because Smith failed to exhaust administrative remedies.

WAS THE TEACHER REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE FILING SUIT?

Case citation: Cross Roads ISD v. Carnes, 2013 WL 3270862 (Tex. App. – Tyler 2013) (unpublished).

Summary: Kathy Carnes worked for the Cross Roads Independent School District (CRISD) under a two-year contract as a teacher, when Tyler Independent School District approached her to gauge her interest in a teaching position there. Carnes was interested in changing jobs, and she requested CRISD allow her out of her contract. CRISD initially indicated a willingness to allow her to change jobs, and Carnes delivered a letter of resignation. CRISD waited to act on Carnes's letter of resignation until it could find a teacher to replace Carnes.

Because the superintendent did not accept her letter of resignation, Carnes requested that the matter be considered by the CRISD board of trustees. Before her letter of resignation was placed on the board's agenda, Carnes changed her mind and attempted to rescind her resignation. About the same time, the CRISD superintendent accepted Carnes's resignation. There is no indication in the record that the matter was ever considered by the CRISD board.

Carnes did not file an appeal of the CRISD superintendent's decision to accept Carnes's resignation and end her employment with the district. Instead, more than a year after her resignation was accepted, Carnes filed suit against CRISD for breach of contract. Carnes sought past and future damages related to her loss of employment in the district and attorney's fees. CRISD filed a plea to the jurisdiction claiming immunity to suit, arguing that the trial court lacked subject matter jurisdiction over Carnes's claims against CRISD because Carnes did not exhaust her administrative remedies prior to filing suit. The trial court denied the district's plea to the jurisdiction and the district took an immediate, pretrial appealed.

Ruling: The court reversed the trial court decision and dismissed the case for lack of jurisdiction. On appeal, Carnes argued that the plea to the jurisdiction was properly denied because (1) it was not ripe for consideration since she had not had time to conduct discovery and (2) CRISD failed to comply with Texas Education Code § 21.210 and § 21.211. The court observed, however, that sovereign immunity protects a state entity from suit. Absent a waiver of sovereign immunity, Carnes cannot sue the school district.

CRISD argued that under Texas Education Code § 7.057(a), Carnes should have appealed through an administrative procedure, rather than file suit. Pursuant to that statute, a party may appeal to the Commissioner of Education if the party is aggrieved by any action by a school district board of trustees that violates the school laws of Texas or a provision of a written employment contract if a violation causes or would cause monetary harm to the party. The Commissioner's jurisdiction over those claims is exclusive, and a party must exhaust this administrative remedy prior to filing suit. Thus, when a teacher of a school district seeks breach of contract damages based on an employment contract, the teacher

Practice & Procedure, continued

must first exhaust the school district's grievance procedure and then appeal the decision to the Commissioner of Education before she may bring a breach of contract action in court.

Here, there was nothing in the record indicating what action, if any, the CRISD board of trustees took with regard to the superintendent's acceptance of Carnes's resignation. Carnes also never appealed the district's actions to the Commissioner of Education. Because it is undisputed that Carnes failed to exhaust her administrative remedies, the trial court lacked subject matter jurisdiction. Accordingly, the trial court erred by denying CRISD's plea to the jurisdiction. The appeals court reversed the trial court's order and rendered judgment in favor of the district.

Commissioner Jurisdiction

DID THE COMMISSIONER HAVE JURISDICTION OVER THE PROBATIONARY TEACHER'S TERMINATION?

Case citation: Jones v. Houston ISD, Dkt. No. 082-R1-0611 (Comm'r Educ. June 5, 2013).

Summary: Donald Jones worked for the Houston Independent School District under a probationary contract for the 2009-10 school year. However, in the spring of 2010, the administration informed Jones that his probationary contract would be recommended for termination at the end of the contract period. The district informed Jones that he had the option to resign and that if he wished to do so he should submit a letter of resignation by April 6, 2010. Jones submitted a resignation, in lieu of nonrenewal, on or after April 7, 2010. The board of trustees on April 8, 2010, voted to terminate his contract at the end of the contract period.

After the district terminated the contract, Jones filed unsuccessful grievances challenging the district's decision. The district denied the grievances and Jones appealed to the Commissioner of Education. On appeal, Jones argued that the district improperly terminated his contract because he did not receive timely notice of the termination and because the decision was discriminatory. In response, the district argued that the Commissioner did not have jurisdiction over the matter because (1) the case was moot because Jones chose to resign, (2) he did not challenge the notice issue at the local level, and (3) the Commissioner lacked jurisdiction over federal discrimination claims.

Ruling: The Commissioner lacked jurisdiction over Jones's appeal. While the case was not moot, the Commissioner did not have jurisdiction because Smith failed to exhaust administrative remedies on his claims regarding the notice of termination and did not use the statutory enforcement mechanism for violations of 42 U.S.C. § 2000d, related to discrimination claims.

The Commissioner explained that under Texas Education Code § 21.105(a) an unconditional written resignation at the end of the school year is final when it is properly filed with a school board. In this case, Jones's resignation was not unconditional because it was made in lieu of termination. The district rejected the offer by voting to terminate the contract. Thus, the parties did not agree to end the contract by way of resignation. Because there was no resignation, the case was not moot.

According to the Commissioner, jurisdiction did not exist over the claim that the notice of termination was untimely. Jones did not present that issue at the local level. Thus, he failed to exhaust administrative remedies as to that claim. Even if Jones had properly exhausted administrative remedies, the Commissioner concluded that the superintendent properly provided notice of termination.

Jones also claimed that his termination was discriminatory in violation of 42 U.S.C. 2000d. [*Editor's Note:* 42 U.S.C. § 2000d is also known as Title VI of the Civil Rights Act of 1964, and prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.] The Commissioner observed that jurisdiction does not exist over claims brought under the United States Code. Moreover, Texas Education Code § 7.057(a)(2)(a) does not give the Commissioner jurisdiction over federal claims. According to the Commissioner, laws that subsist when a contract is entered into are incorporated into the contract. If a statutory enforcement mechanism exists in the law, that too is incorporated into the contract. In this case, because Jones had failed to pursue and complete the statutory enforcement mechanisms under 42 U.S.C. § 2000d, the Commissioner did not have jurisdiction over the claim. The Commissioner dismissed the appeal for lack of jurisdiction.

RELIGION

Distribution of Religious Material

THE RELIGIOUS FREEDOM LAW REQUIRES SPECIFIC NOTICE OF CLAIMS

Editor's Note: *This is the latest ruling in longstanding litigation over this issue in Plano ISD. The decision summarized below is limited to a discussion of whether the plaintiffs had complied with notice requirements set out in the Texas Religious Freedom Restoration Act. Still pending are claims that school district student speech policies were unconstitutional as they were applied to the plaintiffs.*

Case citation: Morgan v. Plano ISD, __ F.3d __, 2013 WL 3866814 (5th Cir. 2013).

Summary: The parents of Plano Independent School District elementary school students sued the school district and Lynn Swanson and Jackie Bomchill, the principals at two separate elementary schools. The parents alleged that Swanson and Bomchill violated the First Amendment and the Texas Religious Freedom Restoration Act (TRFRA) when they placed restrictions on the distribution of religious items at school. Specifically, the suit alleged that at a winter break party, Swanson prohibited the distribution of candy cane-shaped pens with an attached message regarding the religious origin of the candy cane. According to the lawsuit, other children were allowed to bring non-religious items to the party, while those with religious messages were excluded.

Ruling: The Fifth Circuit held that because the plaintiffs did not comply with strict notice requirements in the TRFRA, those claims should have been dismissed. The law provides that a "government agency may not substantially burden a person's free exercise of religion" unless the burden is in "furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that interest."

Under Tex. Civ. Prac. & Rem. Code § 110.006 of the TRFRA, however, a person may not bring suit unless, "60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested: (1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;

Religion, continued

(2) of the particular act or refusal to act that is burdened; and (3) of the manner in which the exercise of governmental authority burdens the act or refusal to act."

The Fifth Circuit observed that, as a public school district, Plano ISD enjoyed governmental immunity from suit, absent a waiver effected by clear and unambiguous language. Section 110.006 of the TRFRA requires pre-suit notice in the form of certified mail, return receipt requested, 60 days prior to filing suit. Texas Government Code § 311.034 further provides that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." Although that language in § 311.034 was not added to the statute until after the Morgans filed suit, the Texas Supreme Court held in 2010 that § 311.034 applies to cases pending at the time of its enactment.

In this case, it was undisputed that the Morgans had not provided notice of their claims by certified mail, return receipt requested. The record showed that the Morgans had exchanged emails with an assistant superintendent and met personally with the school principal to express their concerns. The Morgans' attorney also sent a demand letter to the school principal via fax and U.S. mail that outlined their specific complaints. The attorney emailed that same letter to the superintendent, deputy superintendent, and all members of the district's board of trustees. According to the Fifth Circuit, because it was undisputed that the Morgans' delivery of the demand letter did not strictly comply with the TRFRA jurisdictional pre-suit notice requirements, the district was entitled to governmental immunity. The appeals court, therefore, dismissed the Morgans' TRFRA claims for lack of jurisdiction.

Things to Remember: ***Sometimes when the law says "certified mail, return receipt requested" it actually means "certified mail, return receipt requested." Score this round for Plano ISD in the interminable candy cane case.***

SPECIAL EDUCATION & DISABILITY DISCRIMINATION

Disability Discrimination

DID THE TEACHER STATE SUFFICIENT FACTS TO SUPPORT HER DISABILITY CLAIMS?

Case citation: Prew v. Llano ISD, 2013 WL 3994188 (W.D. Tex. 2013) (unpublished).

Summary: Karena Prew was an elementary school teacher for the Llano Independent School District when she filed suit alleging discrimination and retaliation due to her disability, a condition which causes uncontrollable facial spasms. She also alleged age discrimination and a hostile work environment. In her suit, Prew claimed that she was passed over for a transfer to a high school teaching job in favor of a younger, non-disabled candidate. After Prew raised this issue with school district officials, she contends she, her husband (also a teacher at the elementary school), and her son (a student at the elementary school) were harassed in retaliation.

Specifically, the suit alleged (1) the failure to accommodate under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973; (2) unlawful retaliation under the ADA and Rehabilitation Act; (3) hostile work environment under the Rehabilitation Act; (4) discrimination under the Rehabilitation Act; (5) discrimination under the Age Discrimination in Employment Act (ADEA); and (6) a violation of her First Amendment right to petition, brought via § 1983. Llano ISD filed a motion to dismiss for failure to state a claim upon which relief could be granted.

Ruling: The trial court dismissed all but the hostile work environment claim. Both the ADA and Rehabilitation Act require employers to make "reasonable accommodations" for disabled employees. In this case, according to the trial court, Prew failed to plead facts in support of her failure to accommodate claims. She did not identify any particular accommodation she needed, requested, or was denied. The only accommodation even referenced in the suit was a testing accommodation the school had offered to her son. Prew's complaint failed to give the district even basic notice of what accommodations it is alleged to have failed to provide, and thus failed to state a claim.

With respect to her retaliation claims under the ADA and Rehabilitation Act, Prew had to show that (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected act and the adverse action. Prew claimed the district retaliated against her for filing a grievance. However, Prew's lawsuit failed to allege any retaliatory conduct or adverse employment action, and failed to demonstrate any causal connection between her alleged protected activity and the district's actions. According to the trial court, the alleged retaliation amounted only to "petty slights or minor annoyances that often take place at work and that all employees experience," and are not actionable under Title VII. Although Prew complained that she was denied a transfer to a high school teaching position, even assuming that decision was an adverse employment action, it occurred in May 2011, five months before Prew filed her grievance. The Court, therefore, concluded that Prew failed to state a viable retaliation claim under either the ADA or the Rehabilitation Act.

The trial court, likewise, dismissed her discrimination claim under the Rehabilitation Act. Prew had alleged that she was denied leave under the Family and Medical Leave Act (FMLA) based on her disability. However, the lawsuit failed to state facts that the denial of leave was improper. Rather, the suit stated that the district gave her extended leave and told her to discuss temporary disability leave with the superintendent. The allegations failed to allege any adverse employment action or that she was denied leave based on her disability. Prew also failed to demonstrate any adverse action to support a discrimination claim under the ADA.

Prew also alleged retaliation for exercising her First Amendment rights, stemming from complaints about student programming issues. The trial court concluded, however, that her complaints were not on a matter of public concern, a necessary element of her First Amendment claim. Instead, her speech involved a matter of personal interest made as a public employee. The First Amendment claim, therefore, failed.

The trial court, however, ruled that Prew had alleged sufficient facts to pursue a claim for hostile work environment under the Rehabilitation Act. Assuming the Fifth Circuit recognizes a hostile work environment claim under the Rehabilitation Act, the court observed that Prew had to show that (1) she belonged to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based solely on her disability; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt, remedial action.

Here, Prew alleged that she had numerous abusive encounters with Llano ISD administrators. For example, the superintendent allegedly gave Prew a list of goals to work on, including controlling her facial twitches and controlling how she viewed her disability. After the grievance was filed, the school principal allegedly treated Prew differently than other teachers by requiring a third-party witness be present for any interactions between them, and by allegedly telling other teachers not to associate with Prew. The trial court stated: "To be sure, many—perhaps even the majority—of the incidents catalogued by Prew are innocuous, representing either common workplace slights or personal misinterpretations of legitimate activities. But some events are more serious, and make a hostile work environment claim at least plausible." The trial court denied the district's motion to dismiss the hostile work environment claim.

Things to Remember: ***Note to high school staff: the court was not willing to infer that a transfer to a high school teaching position would be a promotion. Thus, the denial of a transfer to the high school, as alleged, did not amount to an "adverse employment action."***

FAPE

DID THE SCHOOL DISTRICT DENY THE STUDENT FAPE?

Case citation: R. C. v. Keller ISD, __ F.Supp.2d __, 2013 WL 3963985 (N.D. Tex. 2013).

Summary: R.C. moved from California to Texas in 2005. In California, R.C. had been diagnosed with ADHD and bipolar disorder and had been found eligible for special education as a student with an emotional disturbance. R.C.'s cognitive abilities were in the high-average range and expressive/receptive language skills were relatively strong. During the 2006-07 school year, R.C. attended school in the Keller Independent School District. At the parents' request, the district conducted an autism assessment but found that R.C.'s educational and behavioral profiles were more consistent with an emotional disturbance rather than autism or pervasive developmental disorder. The parents disagreed with the district's eligibility determination. R.C. attended school in the general education setting, except for one class, and received content mastery support and counseling.

The parents later requested an independent educational evaluation (IEE) and requested a self-contained special education class. The district agreed to change R.C.'s placement. The parents withdrew their request for an IEE but claimed that the special education director improperly convinced them to. The following school year the parents obtained an IEE, but it concluded that R.C. did not meet eligibility criteria as a student with autism. The ARD Committee agreed with the IEE, but the parents continued to disagree. The ARD Committee also recommended R.C.'s return to the general education setting for the 2008-09 school year. R.C. made progress, but the parents withdrew R.C. from the district in March of 2009.

R.C. returned to the district at the beginning of the 2009-10 school year. The parents continued to dispute the district's eligibility determination concerning autism. The parents eventually secured a homebound placement for R.C. The district believed that R.C. could be served at school and discontinued homebound instruction. The parents disagreed and withdrew R.C. from the district. Except for some instruction in the summer of 2010, R.C. did not return to the district. The parents later requested a due process hearing, challenging the district's eligibility determinations and proposed programs, and claiming that the district committed procedural and substantive violations of the IDEA. The parents requested reimbursement for the costs of R.C.'s private placement, as well as the costs of R.C.'s IEEs.

The hearing officer ruled in favor of the district. Many of their claims were barred by the IDEA's one-year statute of limitations. The main issues were whether the district improperly classified R.C. and whether R.C.'s programs and services denied R.C. FAPE. The hearing officer ultimately determined that the district's classification of R.C. under emotional disturbance, rather than autism, was appropriate. [*See,* Student v. Keller ISD, Dkt. No. 147-SE-0211 (Hearing Officer Deborah Heaton McElvaney, July 8, 2012); *Texas School Administrators' Legal Digest,* Nov/Dec 2012]. The parents then filed suit in federal court to challenge the hearing officer's ruling.

Ruling: The trial court upheld the hearing officer's decisions, and entered judgment in favor of the district. The trial court held that the district provided R.C. FAPE. The district developed individualized educational programs and behavioral intervention plans for the student. The district conducted multiple evaluations for the student, some at the parents' request. The results of those evaluations were promptly reviewed and incorporated in the student's educational program. The district effectively communicated with the parents regarding the student's needs and programs. According to the trial court, the district's educational recommendations complied with the IDEA. While some disagreements arose between the district and the parents, the IEPs developed for R.C. were adequate and the district provided the student with a FAPE.

In addition, the parents were not entitled to funding of R.C.'s private school. The parents at times did not fully cooperate with the school district's efforts to help R.C. Further, the trial court observed that a district is not required to pay for the costs of a student's private education if the school district made a FAPE available, but the parents decided to place the student in private school anyway. Thus, they were not entitled to the relief they requested and the trial court upheld the decision of the hearing officer in favor of the district on each of the issues raised by the parents.

Things to Remember: ***This case makes three important points. First, it is yet another case holding that the disability label the student carries is less important than the services the school provides. Second, the case highlights the importance of parental cooperation. The court noted that the parents refused some of the homebound services offered, blocked the school's requests to collaborate and to help plaintiff succeed, consistently refused to allow the school to consult with the student's physicians regarding homebound services and various diagnoses, refused to provide consent for the school to perform an autism assessment, placed the student in a private school without providing notice, and refused to attend the December 16, 2010 ARDC meeting. Third, the case confirms that homebound placement is restrictive and should not be agreed to without investigation. Key Quote: "…[the school] was not required to consent to such restrictive services, particularly when considering the parents' refusal to allow communication between the recommending physician and school officials, and the school district's obligation to deliver the FAPE in the least restrictive environment."***

Special Education & Disability Discrimination, continued

DID THE STUDENT REQUIRE A MORE STRUCTURED SETTING?

Case citation: A.P. v. Leander ISD, Dkt. No. A-12-CA-1068-SS (W.D. Tex. 2013).

Summary: A.P. attended school in the Leander Independent School District and was eligible for special education services as a student with an intellectual disability, Down Syndrome, and a speech impairment. A.P.'s cognitive abilities were low and verbal communication was minimal. A.P. had a history of noncompliance, task avoidance, and elopement.

The parents and the district had a history of disagreements regarding A.P.'s educational program. The district agreed to transfer A.P. to another school. The district opened a new classroom there and assigned a certified special education teacher. Shortly into the new school year, the district held an ARD Committee meeting, during which the parent complained about A.P.'s IEPs. The IEP included positive behavior interventions and supports, provided a communication device to A.P., and called for speech services, occupational therapy, psychological services, and adaptive PE.

Throughout the first half of the school year, A.P. made progress in some areas, but not in others. A.P. started the year in the general education classroom with numerous supports for core subjects and received individual instruction in the special education classroom, Individual Community Academic Program (ICAP). As the curriculum became more advanced, A.P. had difficulty comprehending the material and began to develop behavioral problems, as well. A.P.'s ARD Committee recommended A.P.'s placement in a more restrictive setting. The district proposed limited placement in the general education classroom for science and language arts, as well as lunch, recess, and specials. The district proposed a more restrictive classroom setting for the remaining classes. The parent disagreed and ultimately filed a request for a due process hearing. The hearing officer ruled in favor of the district on each of the parent's claims, finding that the program proposed by the district provided A.P. FAPE in the least restrictive environment. [*See,* Student v. Leander ISD, Dkt. No. 192-SE-0312 (Hearing Officer Brenda Rudd, August 20, 2012); *Texas School Administrators' Legal Digest,* Feb. 2013]. The parents then filed suit in federal court, challenging the hearing officer's decision.

Ruling: The trial court upheld the hearing officer's determination that the district's proposed program provided A.P. an appropriate placement in the least restrictive environment. After A.P.'s behavior could not be managed in the general education setting, the district recommended placement in a more restrictive setting.

The record showed that, over the years, the district provided A.P. a number of modifications and accommodations, including a one-on-one instructional aide, visual schedule, visual/picture cues, and sensory breaks, among others. The modifications were designed in collaboration with the district's behavior specialist and lead licensed specialist in school psychology. The district's team of professionals met frequently with A.P.'s parents, the family's own behavior consultant, A.P.'s teachers, A.P.'s assistants, and other staff members. The team observed A.P. at home, with her parents, and with a private tutor. In addition, the team met on a weekly basis and continued to find ways to improve the strategies to help A.P. succeed. The hearing officer properly concluded that the district had offered adequate accommodations to A.P.

The record also showed that A.P. received academic and nonacademic benefits from her educational program. The trial court stated: "In light of the undisputed success A.P. has in special education settings, and the absence of any compelling case for leaving her in the general education classroom in subject areas where she will admittedly underperform and disrupt her peers, this Court agrees with the [hearing officer] and finds LISD has complied with IDEA's mandate to provide A.P. with a free appropriate public education in the least restrictive environment." Although the district prevailed, the trial court denied its request for attorney's fees.

Things to Remember: ***While the district prevailed here, the case also demonstrates how difficult it is for the district to recover attorneys' fees. The court noted that if it "could award fees simply to punish ridiculous behavior, it would gladly do so in this case and in many others." The judge noted that the parent had filed over 30 grievances against school staff over the last few years, along with numerous complaints to TEA and the Department of Education. In fact, the judge characterized the parent as having "a hobby of filing grievances and complaints against LISD employees and teachers." But none of that was sufficient to justify an award of fees. The court observed that the parent "may well be harassing LISD in a number of ways, some of which may be legally sanctionable, but filing a viable (though unsuccessful) due process complaint and following up with a viable (though unsuccessful) appeal are not among them."***

STUDENTS

Peer Harassment

DID THE LAWSUIT PROPERLY STATE CLAIMS AGAINST THE DISTRICT BASED ON PEER HARASSMENT?

Case citation: Turner v. Houston ISD, 2013 WL 3353956 (S.D. Tex. 2013) (unpublished).

Summary: Ebonie King was a five-year-old with cerebral palsy who attended the Houston Independent School District. On September 11, 2012, she was on an HISD school bus when she was allegedly assaulted by another student. Janice Turner, Ebonie's guardian, filed this lawsuit in Texas state court, asserting claims on her own behalf and on behalf of Ebonie. She raised state law claims of negligence, negligent hiring, and negligent misrepresentation. Turner also asserted federal claims under 42 U.S.C. § 1983, the Americans with Disabilities Act (ADA), and the Rehabilitation Act. In response, the district filed a motion to dismiss, arguing that the state law claims were barred by sovereign immunity, and that Turner failed to allege facts supporting the federal claims.

Ruling: The trial court granted the district's request for dismissal. The school district is a governmental unit immune from liability unless that immunity has been waived by the Texas Tort Claims Act. The Texas Tort Claims Act provides that the governmental unit is liable for property damage, personal injury, and death proximately caused by the wrongful act or omission or the

Students, continued

negligence of an employee acting within his scope of employment if: (1) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and (2) the employee would be personally liable to the claimant according to Texas law.

The Texas Supreme Court has held that sovereign immunity is not waived for an injury occurring on a school bus where the injury does not arise out of the use or operation of the bus, and the bus is only the setting for the injury. The plaintiff must allege that the bus driver's operation of the bus actually caused the injury. Further, allegations regarding the duty to supervise the bus passengers does not concern the actual operation or use of the bus. Here, Ebonie's injury did not "arise out of" the operation of the school bus. Instead, the school bus was "only the setting for the injury." As a result, the Texas Tort Claims Act did not waive the district's immunity, and the trial court granted the district's request for dismissal of the state law claims.

Turner also alleged that the district violated Ebonie's constitutional rights to Equal Protection and Due Process. She also raised claims under the Americans with Disabilities Act and the Rehabilitation Act. The suit alleged that the district violated Ebonie's Due Process rights by failing "to properly supervise and monitor the conduct of students traveling on the bus with Ebonie King knowing that Plaintiff Ebonie King was incapable of protecting herself." The trial court observed that, as a general matter, a state's failure to protect an individual against private violence does not constitute a violation of due process.

Turner argued that a special relationship existed in this case because of Ebonie's disability. However, the Fifth Circuit has not extended the special relationship exception to public school students, even where the student is disabled. She also argued that a special relationship existed in this case because Texas has compulsory school attendance laws that require students to attend school, but that argument has also been rejected by the Fifth Circuit. Thus, Turner failed to allege a constitutional due process violation.

The trial court, likewise, dismissed the equal protection claims. In general, the Equal Protection Clause of the Fourteenth Amendment "requires that similarly-situated persons be treated alike." The lawsuit, however, failed to state any allegations to support an equal protection claim.

Turner also alleged disability discrimination under the ADA and the Rehabilitation Act, which prohibit public entities from discriminating against an individual based on his disability. To support her claims, Turner had to allege and prove that he was excluded from or denied benefits or services based on his disability. According to the trial court, the lawsuit did not allege discrimination on the basis of her disability. Turner did not identify any non-disabled student who was treated differently. Similarly, the suit did not allege that Ebonie was excluded from or denied benefits because of her disability. She admitted that the district assigned an aide to accompany Ebonie on the school bus, but alleged that the aide failed to ensure Ebonie's safety. The trial court held that Turner failed to state a claim for relief based on discrimination under the Equal Protection Clause, the ADA and/or Rehabilitation Act, and these discrimination claims were dismissed. The trial court, therefore, entered judgment in favor of the district.

NAVIGATING continued from page 4

with a historically underutilized business; dealing with ordinances or resolutions passed by municipally-owned electric utilities; and selected provisions of the Texas Water Code applicable to river authorities or to conservation and reclamation districts.

Because there is no other exception stated in Government Code Section 2269.003, it is reasonable to accept that Government Code Chapter 2269 preempts and controls over any other law dealing with the procurement of a public work contract. If Chapter 2269 prevails over any other law relating to public work contracts, as it expressly provides, then the only methods of procurement available for construction projects are those contained in Chapter 2269. Those procurement and delivery methods include the following: competitive bidding method; competitive sealed proposal method; construction manager-agent method; construction manager-at-risk method; building using design-build method; and job order contracts method.

This means that certain additional procurement and delivery methods which previously may have been used for construction services may no longer be available for use by a school district. No statute or court decision has addressed this issue since the enactment of Chapter 2267, now numbered Chapter 2269.

Some attorneys have expressed the opinion that construction services may still be acquired using an interlocal contract. This opinion is based upon provisions contained in the Interlocal Government Cooperation Act, found at Chapter 791 of the Texas Government Code and in § 271.102 of the Texas Local Government Code. The provision of the Interlocal Government Cooperation Act relied upon by these attorneys is contained in § 791.025 of the Texas Government Code, a section entitled "Contracts for Purchases." Section 791.025(c) provides that a local government that purchases goods and services under this section satisfies the requirements to seek competitive bids for the purchase of the goods or services. Thus, the argument is that once a school district has determined that a local cooperative purchasing program will afford the best value, the district need not follow any other specific competitive procurement process. Section 271.102(c) of the Texas Local Government Code declares that a local government that purchases items through a cooperative purchasing program "satisfies any state law requiring the local government to seek competitive bids for the purchase of goods or services." As usual when competent attorneys reach different conclusions on an issue, we will look to the legislature or the courts to resolve this issue in the future. This is discussed in more detail in the section of this article dealing with cooperative purchasing of construction services.

In any event, all of the statutes referenced provide that the professional services of an engineer or architect who is not a regular employee of the district must be procured under the provisions of Chapter 2254 of the Texas Government Code, the Professional Services Procurement Act. The procurement of professional services is addressed later in this article.

Texas Government Code, Chapter 2269, Subchapter B sets

out the general powers and duties of a governmental entity in construction projects. This statute provides that a governmental entity may adopt rules as necessary to implement this chapter. This statute also provides that a governmental entity must advertise or publish notice of requests for bids, proposals, or qualifications in a manner prescribed by law. This implicates the technical provisions of both Chapter 44 of the Texas Education Code and Chapter 271 of the Texas Local Government Code, where these operational provisions are found.

Texas Government Code § 2269.055 provides that in determining the award of a contract, the governmental entity may consider eight (8) categories of criteria, which include:

1. The price;
2. The offeror's experience and reputation;
3. The quality of the offeror's goods or services;
4. The impact on the ability of governmental entity to comply with rules relating to historically underutilized businesses;
5. The offeror's safety record;
6. The offeror's proposed personnel;
7. Whether the offeror's financial capability is appropriate for the size and scope of the project;
8. Any other relevant factors specifically listed in the request for bids, proposals, or qualifications.

Please note that the relevant factors, if they are to be validly considered as criteria in determining the award of a contract for construction services, must be adopted by the board prior to making any request for bids, proposal, or qualifications. Then, the same "other relevant factors" must be specifically listed in the request for bids, proposals, or qualifications published by the governmental entity.

The statute further provides that in making the award of a contract under Chapter 2269, a governmental entity must consider and apply any existing law, including any criteria relating to historically underutilized businesses. It must also apply any existing laws, rules, or other applicable municipal charters, including laws applicable to local governments, relating to the use of women, minority, small or disadvantaged businesses.

The statute then goes on to provide additional requirements for governmental entities that select a method of procurement other than competitive bidding for construction services. Texas Government Code § 2269.056 provides that the governing body of a governmental entity that considers using a method other than competitive bidding must, before advertising for such services, determine which method provides the "best value." The governmental entity must then base its selection among the various offerors on criteria listed for the particular method determined to provide the best value. The governmental entity is required to publish in the request for proposal or qualifications the exact criteria that will be used to evaluate the offerors and the applicable weighted value for each such criterion. The governmental entity is also required to document the basis for its selection and to make the evaluation of each offeror public not later than the 7th day after the date the contract is awarded.

Section 2269.058 of the Texas Government Code provides that independently of the selection of a contractor, construction manager-at-risk, or design-build firm, the governmental entity shall provide or contract for construction materials engineering, testing, and inspection services and the verification testing services necessary for the acceptance of the facility by the governmental entity. These services must be procured under the method established by the Professional Services Procurement Act, Chapter 2254 of the Texas Government Code.

B. ALTERNATIVE CONSTRUCTION SERVICES DELIVERY METHODS

Each of the construction delivery methods occupies a subchapter of Government Code Chapter 2269 and contains its own separate and specific statutory requirements. Consultation with and the advice of an experienced school district construction lawyer is essential if the school district is to avoid statutory violations, contract disputes, bidder and contract disputes and expenses, delays, and litigation in the construction process.

C. STATUTORY RULES FOR THE BID PROCESS

Under Section 2269.051 of the Texas Government Code, a governmental entity may adopt rules as necessary to implement this chapter. Legal counsel for the district should be consulted when undertaking the preparation of such rules. Section 2269.052 requires that a governmental entity advertise and publish notice of requests for bids, proposals, or qualifications in a manner prescribed by law. This requirement includes publication of notice of the time and place at which the bid, proposal, or request for qualifications will be received and opened.

In addition to Education Code Chapter 44 and Government Code Chapter 2269, a parallel set of requirements for procurement exists in Chapter 271 of the Texas Local Government Code. Section 271.021 through Section 271.029 from Local Government Code, subchapter B, provide requirements for competitive bidding on certain public works contracts. In Section 271.021, "government entity" is defined as: "…. a common or independent school district."

Section 271.026 of the Texas Local Government Code sets out the guidelines for the opening of bids and confirms the common law right of the bidder to withdraw a bid due to a material mistake contained in the bid. Local Government Code § 271.027 confirms the authority of a governmental entity to reject any and all bids. Further, under Section 271.027(b), the governmental entity must award the contract to the lowest responsible bidder. The contract, however, may not be awarded to a bidder who is not the lowest bidder unless before the award, each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body or the designated representative of the governing body to present evidence concerning the bidder's responsibility.

Governmental entities are authorized by Section 271.0275 to take into account the safety record of the bidder, of the firm, corporation, partnership, or institution represented by the bidder or of anyone acting for such firm, corporation, partnership, or institution provided the governing body has previously adopted a written definition and criteria accurately determining the safety record of the bidder. In addition, the governing body must have given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder.

D. INTERLOCAL CONTRACTS

Section 44.031(a)(4) of the Texas Education Code provides that an interlocal contract is one of the methods that may be used, provided the governmental entity determines that this method provides the best value for the district. The best value determination is critical and must be made before any contract is authorized.

Once a school district has determined that a local cooperative purchasing program will afford the district the best value, it need not follow any other specific competitive procurement process. Section 271.102(c) of the Texas Local Government Code provides that a local government that purchases goods or services under this subchapter satisfies any state law requiring the local government to seek competitive bids for purchase of the goods or services. Section 271.101 defines "local government" as including a school district and a junior college district, among other types of governmental entities.

Further, § 791.025 of the Texas Local Government Code, entitled "Contracts for Purchases," provides that a local government may agree with another local government or with the state or a state agency to purchase goods and services. Section 791.025(c) provides that a local government that purchases goods and services under this section satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services. Further, § 791.003 of the Texas Local Government Code defines "local government" as including a school district.

The upshot of all of this seems to be that if the school district is a member of a purchasing cooperative by interlocal contract, and has determined that an interlocal contract provides the best value to the school district under Education Code § 44.031(a)(4), then the law does not require that the interlocal contract provider have undertaken any type of competitive procurement whatsoever. Further, the Attorney General of Texas has determined that any purchases made to a cooperative purchasing program "necessarily are deemed to be the result of competitive procurement." Tex. Att'y Gen. Op. No. JC-0037 (April 28, 1999). This statutory interpretation enables governmental entities to essentially do an "end run" around direct competitive procurement. By statute, an interlocal contract may not be used to purchase engineering or architectural services. Texas Government Code § 791.011(h).

E. WHAT IS THE DIFFERENCE BETWEEN "CONSTRUCTION," "MAINTENANCE," AND "INSTALLATION"?

There are no clear statutory definitions or guidelines for the distinction between construction, maintenance, or installation. Generally, maintenance is defined as the routine upkeep of existing property, facilities, or building components to keep them in good operational condition. Construction/Renovation includes new building construction or a major repair, reconstruction, remodel, rehabilitation, restoration or alteration of an existing facility. This area of the law remains a trap for the unwary, as there are no clear statutory definitions or guidelines for any distinction between construction, maintenance, or installation. In practice, the lines can and do become quite blurred.

For instance, when a school procures new HVAC equipment for an existing building, is that construction or maintenance? When those HVAC units are installed, is that construction, maintenance, or installation? Do different rules and statutory requirements apply? When are the services of an architect or an engineer required for maintenance or installation? It is the author's belief that these are questions that must be answered on a case-by-case basis and require the advice of experienced construction counsel.

F. COOPERATIVE PURCHASING OF CONSTRUCTION SERVICES

The fact that the legislature did not qualify § 44.031(a)(4) of the Texas Education Code "an interlocal contract" with the same qualifier "for services other than construction services," has led to differing views as to whether or not an interlocal contract can be used as a method for procurement of construction services. Included in the term "interlocal contract" are purchases and contracts procured through cooperative purchasing agreements.

However, practical issues arise with regard to the use of an interlocal contract for construction services. Because construction services are inherently site specific, a procurement of construction services through an interlocal contract cannot, at the outset, take into consideration factors such as surface drainage, soil conditions, elevations, local ordinances, restrictions, set back lines, adjacent property uses; zoning; easements; availability of utility services; and connection to utility services. The problems with procuring construction services by interlocal contract would seem even more significant in a project that involves remodeling or adding on to an existing facility.

Examples of scenarios in which co-op purchasing of construction-related services have created problems are HVAC replacement and installation on existing buildings; roof replacements on existing buildings; and the construction of entire new school buildings/campuses by the purchase of modular buildings. At times, schools have been told by providers of these services that they do not need to engage an architect or engineer. As discussed later, nothing could be further from the truth!

Because the statute requires the school district to make a determination of which delivery method provides the best value for the district before selecting a construction delivery method, the use of an interlocal contract to procure such services seems even more problematic because so many site-specific factors cannot be adequately addressed in an interlocal contract procurement process. For example, catalog prices are generally used which are not, at least at that stage, capable of being site specific. At the stage when the "best value" determination must be made, the co-op provider cannot have known or considered the factors affecting construction at a particular district. There are myriad hidden costs that will ultimately be borne by the district that may result in the interlocal contract cooperative purchase not providing the "best value."

Districts should also be aware that, under Education Code § 44.0331, a district that enters into a purchasing contract valued at $25,000 or more under § 44.031(a), or under Subchapter F of Local Government Code, Chapter 271, or under any other cooperative purchasing program, is required to document any contract-related fee. The documentation may include any management fee and the purpose of each such fee under the contract. Thereafter, the statute requires that the amount, purpose and disposition of any such fee must be presented in a written report and be submitted annually in an open meeting of the school board. The written report must appear as a specific agenda item. Further, this report is subject to audit by the Commissioner of Education.

School districts should be very cautious in signing vendor agreements for co-op purchases of construction-related services or the installation of equipment that involves electrical, mechanical, structural, or other engineering or architectural components. The only reference to an interlocal contract as a construction delivery method in Chapter 2269 is in the job order contract section.

Co-op purchases customarily are done by catalog selection then by a purchase order through the interlocal agreement. Without an additional written agreement, stating the general terms and conditions specific and necessary to protect the interests of the school district, the school district will find itself at a clear disadvantage in the event of unsatisfactory materials or work, disputes with the provider, or claims. In addition, the co-op

purchase may limit the specific products and services covered, resulting in unanticipated costs in the completion of the project. These unanticipated costs should be, but frequently are not even considered in the determination of "best value." If additional products or services are required to complete the project, and if these products or services are outside the co-op purchase, the district must then separately procure the additional products and services at considerable delay and expense to the district.

Co-op purchases do not relieve the district of its obligation to separately procure the professional services of an architect or engineer for beginning a construction-related project. State law prohibits acquiring architectural or engineering services through a purchasing cooperative.

Where construction-related services are involved, it is difficult to see how installation costs can be calculated before the vendor visits the site, because the actual conditions and circumstances at each location will vary widely. It would be very difficult to set a price for complete construction-related services when construction costs are necessarily site-specific. Due to these uncertainties, the school district should rely upon the advice of its legal counsel before it considers procuring any type of construction-related services through an interlocal contract.

The most well- known cooperative purchasing arrangement among school districts in Texas is the Texas Association of School Board's BuyBoard program. The BuyBoard website now includes an "advisory" for Texas members concerning the use of the program for the purchase of construction related goods and services. That advisory reinforces many of the points made here. It specifies that architectural or engineering services cannot be procured through BuyBoard. It says: "If…you are procuring construction related services through a BuyBoard Job Order Contract (JOC) or contract for the installation of equipment or materials (e.g., athletic fields and surfaces, kitchen equipment, HVAC, playground equipment or modular buildings), you may need to procure certain aspects of these services using a separate procurement process outside of the BuyBoard." Citing a "high risk of legal exposure," the advisory recommends consultation with legal counsel "before procuring construction-related products and services under any procurement method, including a purchasing cooperative."

G. LEGISLATIVE UPDATE – HOUSE BILL 1050 - 83RD TEXAS LEGISLATURE (2013)

House Bill 1050 amends current law relating to purchasing p[ur]chasing and other contracts by governmental entities. It It does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

This bill defines "purchasing cooperative," and changes the ability of government entities to purchase construction items within a purchasing cooperative that exceeds $50,000 by requiring certifications. F, for a description of these certifications, see the section entitled Purchasing Cooperatives. The legislation also changes design-build requirements and prohibits bid shopping after a government entity has made a selection.

House Bill 1050 is effective September 1, 2013, but only for contracts or construction projects for which a governmental entity first advertises or otherwise requests bids or makes a similar solicitation on or after the effective date.

Design Build Projects

The bill makes changes to the "design-build" requirements, currently found under Chapter 2267 of the Texas Government Code (will bewhich will be re-codified in Chapter 2269 of Texas Government Code). The law, by now requiresring that firms who respond to a request for detailed proposal, identify the companies that will fill key project roles and serve as key task leaders for particular activities. Those cCompanies identified for these roles cannot be changed unless certain criteria are met.

Purchasing Cooperatives

The bill also amends §Section 791.011 of the Texas Government Code that relates to purchasing cooperatives. Current law states that, to be able to use a purchasing cooperative, a certification must be provided that the project does not require plans or specifications to be prepared by a licensed engineer or architect. The bill defines "purchasing cooperative" as a "group purchasing organization that governmental entities join as members and the managing entity of which receives fees from members or vendors." The new statute provides that a local government may not enter in a contract to purchase construction- related goods or services through a cooperative in an amount greater than $50,000.00, unless that person designated by the local governmental entity can provide the certifications described above regarding plans or specifications prepared by a licensed engineer or architect.

VII. PROCUREMENT OF PROFESSIONAL SERVICES

A. WHAT CONSTITUTES PROFESSIONAL SERVICES?

There are three sources for determining if a service constitutes a professional service: (1) Chapter 44, Subchapter B of the Texas Education Code; (2) state common law (as described in court decisions or Texas Attorney General opinions); and (3) Chapter 2254 of the Texas Government Code (the "Professional Services Procurement Act"). Services that qualify as professional services under any one of these three sources are outside the procurement requirements of Texas Education Code Chapter 44 and Government Code Chapter 2269. Although the law specifically defines some services as professional services, when not specifically identified in either Chapter 44 or the Professional Services Procurement Act, government entities regularly must determine whether other services constitute professional services. Moreover, it is important to know which of the three bases qualifies a particular service as a professional service, because different requirements or restrictions may apply to the procurement of a particular kind of professional service.

1. Professional Services Explicitly Excepted from Chapter 44 Procurement

Section 44.031(f) of the Texas Education Code provides a non-exclusive list of the types of professional services excepted from the chapter on procurement. These include the services of architects, attorneys, certified public accountants, engineers, and fiscal agents. Section 44.031(f) merely states that these services are "included" in the definition of professional services. Because attorney and fiscal agent services are exempt from the Chapter 44 procurement requirements and because they are not addressed by the Professional Services Procurement Act (discussed more fully below), school districts enjoy considerable discretion in determining how best to procure these services and which service providers to use for these services. A school district may use any of the procurement methods in the Texas Education Code, and often it may be good business practice to do so. However, the district may obtain and contract for legal and fiscal agent services through any other means. For example, if a district selects a vendor based on criteria important to the district, such

as the recognized expertise of an attorney or fiscal agent or the past relationship between the district and a contractor, this would be acceptable under the statutes.

Further, under § 44.031(f), a school district *may* contract for the services of a financial consultant or a technology consultant as professional services in the manner provided by the Professional Services Procurement Act as an alternative to the Texas Education Code procurement methods. Thus, unlike the selection of attorney or fiscal agent services, where there is no prescribed process, a district must use either the methods outlined in Chapter 44 or those described in the Professional Services Procurement Act (described more fully below) in procuring the services of a financial consultant or technology consultant.

2. Professional Services Under the Common Law

In addition to the types of professional services listed in Texas Education Code Chapter 44 and Texas Government Code Chapter 2254, case law and Attorney General Opinions provide guidance on the other types of services that a school district governing board may determine to be "professional services" excepted from competitive procurement. The Texas Attorney General generally has declined to make factual determinations about whether particular services are properly classified as professional services. Instead, the Attorney General generally has stated that such factual determinations should be made by the governing body of a government entity. *See, e.g.*, Tex. Att'y Gen. Op. No. DM-418 (1996). The Attorney General, however, over the years has held that professional services are those that (1) require predominantly mental or intellectual, rather than physical or manual skills; (2) require years of education and service for one to attain competence and call for a high order of intelligence, skill and learning; and (3) have widely accepted standards of required study or specified attainments in a special knowledge as distinguished from mere skill.

In applying the various factors and relying on guidance from case law in Texas and other jurisdictions, the Attorney General has indicated that the following are not professional services: bathhouse operator, a company that sells newspaper advertising, an interior decorator, a renderer who prepares pictorial representations of buildings, a container terminal operator, a broker of record for the procurement of insurance products, and microfilm services. On the other hand, the Attorney General has held that the services of a law enforcement consultant could be obtained as professional services.

3. Professional Services Identified in the Professional Services Procurement Act

Texas Government Code § 2254.002(2)(a) lists the professional practices that fall under the Professional Services Procurement Act. Those professional practices include: accounting; architecture; landscape architecture; land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing. The statute requires that the professional engaged in these areas be licensed or registered under the applicable statutes and regulations of Texas.

Section 2254.004 of the Texas Government Code applies to the procurement of architectural, engineering or land surveying services and requires procurement of such services in a two-step process. The first step involves the selection of the most highly qualified provider of the professional service on the basis of demonstrated competence and qualifications. There can be no discussion of the contract or price in the first stage. The second stage allows the school district to attempt to negotiate a contract for a fair and reasonable price with the provider. If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering or land surveying services, the district must formally end negotiations with that provider and select the next most highly qualified provider and then attempt to negotiate a contract with the second provider at a fair and reasonable price. The school district must continue this process until a provider enters into an appropriate contract with the school district. The statute further provides that a contract entered into or an arrangement made with a professional provider in violation of this statute is void as against public policy.

Except for requiring contracts for those professional services defined in the Act to be awarded on the basis of competence and qualifications, the law does not prescribe a specific process for making the determination or selecting a provider. For example, the law does not require a school district to prepare a request for qualifications, publicize its interest in contracting, or implement any particular procedure. However, some governmental entities have adopted policies that mandate certain procedures to be followed. In the absence of such policies, it is a good practice to document the steps taken by the district in determining that the selected service provider is the most competent and qualified for the project.

B. WHEN IS AN ARCHITECT AND/OR ENGINEER REQUIRED ON A CONSTRUCTION PROJECT?

A question that often arises is whether the services of an architect or engineer are required on a project, particularly those involving minor construction, re-roofing, renovations, and repairs. State statutes require a governmental entity to obtain the architectural and engineering services independent of any similar services that may be provided by the contractor, construction manager-at-risk, construction manager-agent, job order contractor, or design-build firm. Whether such services are necessary depends on the nature of the project and the cost, as well as whether the services are considered architectural or engineering services under the Texas Occupations Code and implementing regulations and other authorities.

The provisions of the Texas Occupations Code and rules in the Texas Administrative Code provide guidance on when an architect or an engineer is required for a school construction project. There is some overlap between the practices of architecture and of engineering. Because there are relatively few professionals who are licensed or registered in both professions, a school construction project may require both an architect and multiple engineers, depending upon the nature and aspects of the project.

The Texas Engineering Practices Act, found at chapter 1001 of the Texas Occupations Code, requires that a professional engineer be engaged in any project in which the public health, welfare, or safety is involved. This will include virtually every school district construction project. The statute would require that the engineering plans, specifications, and estimates be prepared by a licensed engineer, and that that portion of the construction involving engineering be done under the supervision of a registered engineer. The Engineering Practices Act excuses from these requirements any project involving mechanical or electrical engineering when the total cost is eight thousand dollars ($8,000) or less, or a project that will cost twenty thousand dollars ($20,000) or less that does not involve mechanical or electrical engineering. Tex. Occ. Code §1001.053.

The practice of architecture is governed by Chapter 1051 of the Texas Occupations Code. The law requires that school districts engage a licensed architect for a facility that will be

used for instructional purposes, office occupancy, or the gathering of groups of people such as an auditorium, gymnasium, and stadium. An architect is required for design and construction observation if the cost at the commencement of the project for new construction exceeds $100,000. For remodeling or an alteration to an existing building, an architect must be hired if the project requires removal, relocation, or addition of walls, partitions or exits (doors) and the construction costs exceed $50,000. Tex. Occ. Code §1051.703; 22 Tex. Admin. Code § 1212.

However, § 1051.703 does not necessarily preclude engineers from designing a new building or preparing plans and specifications for a renovation if the work meets the definition of engineering under the Texas Engineering Practice Act, Texas Occupations Code, Chapter 1001. "[W]hether a particular work or service is the practice of engineering, the practice of architecture, or both requires a determination of the education, training, and experience necessary to adequately and properly perform the work or service." Tex. Att'y Gen. Op. No. GA -0391 (2006). Further, the statutory rules and regulations for requiring an architect or engineer and for the procurement of such professional services apply regardless of what constructive delivery method is chosen by the school district for its project.

Chapter 469 of the Texas Government Code deals with the elimination of architectural barriers in buildings or facilities used by the public. It applies to buildings or facilities constructed, renovated, or modified, in whole or in part, after January 1, 1970, using public funds of this state or of any political subdivision of the state. It also applies to the building of a facility that is leased for use or occupied, in whole or in part by the state under a lease or rental agreement entered into on or after January 1, 1972. This chapter requires that all plans and specifications for the construction of or for the substantial renovation or modification of a building or facility must be submitted to the Texas Department of Licensing and Regulation for review and approval if the estimated construction cost is at least fifty thousand dollars $50,000.

C. SERVICES THAT MUST BE PROVIDED BY AN ARCHITECT OR ENGINEER

The Architects' Registration Law, Texas Occupations Code Chapter 1051, defines "architectural plans and specifications" fairly broadly and provides that some tasks may be performed by either an architect or engineer. The tasks include "programming for construction projects, including identification of economic, legal, and natural constraints; and determination of the scope of functional elements; recommending and overseeing appropriate construction project delivery systems; consulting with regard to, investigating, and analyzing the design, form, materials, and construction technology used for the construction, enlargement, or alteration of a building or its environment; and providing expert opinion and testimony with respect to issues within the responsibility of the engineer or architect." Tex. Occ. Code § 1051.103.

The Texas Board of Professional Engineers issues advisory opinions on questions related to the practice of engineering, whether particular work or services constitutes the practice of engineering, and whether an engineer is required for particular types of projects. These can be found at http://engineers.texas.gov/policy.htm. For example, a policy advisory opinion has been issued regarding roof replacement and repairs. An engineer is required for a roofing project exceeding the cost of $20,000, if any of the following apply or are part of the work: (1) evaluation of the structural framing members prior to the addition of roof-mounted equipment or the installation of roofing material heavier than the original roofing material; (2) the modification of roof pitch by the addition of rafters, trusses or other structural framing elements; (3) damage to the building's structural framing elements; or (4) the modification of the roof internal drainage system.

In addition, if either of the following applies and the cost is over $8,000, an engineer is required: (1) the roof replacement involves any structural or mechanical systems of the building; or (2) if any other electrical or mechanical systems are involved. If the re-roofing involves simply going back with the same materials and same design, then no engineering is necessary. If the reroof involves a change in design such as new penetrations or structures attached or if additional loading is put on the roof structure, then some engineering calculations should be done to confirm adequacy of design.

IX. BONDS AND INSURANCE

The statutes require that school districts obtain separate payment bond and performance bonds from the provider of any construction services. The failure of a district to require and obtain such bonds results in the school district becoming the guarantor of payment for all materials, supplies, classman, and laborers who provide services for the project. A district that does not require an adequate performance bond may find the cost of its project to be twice the original contract amount with no recourse against an insolvent contractor. The district should also require adequate and appropriate types of insurance coverage from any provider and ask its legal counsel to review the bonds and insurance policies to advise the district on how to protect its interests.

X. COMPETITIVE BIDDING ON CERTAIN PUBLIC WORKS CONTRACTS: THE PROVISIONS OF LOCAL GOVERNMENT CODE CHAPTER 271 XI

Local Government Code Chapter 271, subchapter B, provides certain procedures for competitive bidding for public works contracts. The school district shall provide all bidders with the opportunity to bid on the same items on equal terms and have each bid judged according to the same standards as are set forth in the specifications. The statute also requires the district to receive bids in a fair and confidential matter. Further, districts are authorized to receive bids in hard-copy format or through electronic transmission.

Subchapter B of Chapter 271 of the Local Government Code also contains guidelines for advertisement for bids. The statute requires districts to advertise for bids. The advertisements must include a notice that:

1. describes the work;
2. states the location at which the bidding documents, plans, specifications or other data may be examined by all bidders;
3. states the time and place for submitting bids and the time and place that bids will be open.

The statute provides further that the advertisement must be published as required by law. Local Government Code § 271.025 and Texas Education Code § 44.031(g). The notice and advertisement must be published once a week for at least two weeks before the deadline for receiving bids, proposals or responses to a request for clarification. The notice must be published in a newspaper of general circulation in the county where the school district's administrative offices are located or in the newspaper in the county nearest the county seat of the

county in which the district's central administrative office is located. The second publication must be on or before the tenth (10th) day before the first date when bids may be submitted. Local Government Code § 271.025(b).

In addition, the statute provides that the school district may mail a notice containing the information required under the statute to any organization that requests in advance that notices for bids be sent to it, agrees in writing to pay the actual costs of mailing the notice, and certifies that it circulates notices for bids to the construction trade in general.

State law requires that bids be opened by the school district at a public meeting or by an officer or employee of the district at or in an office of the district. The statute further provides that a bid that has been opened may not be changed for the purpose of correcting an error in the bid price. Common law would allow a bidder to withdraw a bid due to a material mistake in the bid.

A contract awarded in violation of Subchapter C of the Texas Local Government Code is void. In addition, there are criminal penalties for an officer or employee of the school district who intentionally or knowingly makes or authorizes separate, sequential, or component purchases to avoid the competitive bidding requirements of the statute for a contract that is to be awarded on the basis of competitive bids. This offense is a class B misdemeanor. If an officer or an employee of the school district intentionally or knowingly violates the statute in any other way, other than by intentionally or knowingly making or authorizing separate, sequential or component purchases, the criminal offense is a Class C misdemeanor.

Section 2269.106 of the Texas Government Code provides that, except as otherwise specifically provided, Subchapter B, Chapter 271 of the Texas Local Government Code does not apply to a competitive bidding process conducted under Chapter 2269 of the Texas Government Code. However, sections 271.026, 271.027(a) and 271.0275 of the Texas Local Government Code do apply to a competitive bidding process conducted under Chapter 2269 of the Texas Government Code. Section 271.026 of the Texas Local Government Code has to do with opening of bids, § 271.027(a) preserves the authority of the school district to reject any and all bids, and § 271.0275 provides for the consideration of the safety record of the bidder.

XII. CONTRACT CHANGE ORDERS

Education Code § 44.0411 governs contract change orders. The statute limits the authority of school districts to increase the contract price unless additional money for increased cost is approved for that purpose from available money or is provided for by the authorization of the issuance of time warrants. The authority to approve change orders may be delegated by the board to an administrative official.

The statute further provides that a contract with an original contract price of one million dollars or more may not be increased by more than twenty-five (25) percent. If a change order for a contract with an original contract price of less than one million dollars increases the contract amount to one million dollars or more, the total of the subsequent change orders may not increase the revised contract amount by more than twenty-five (25) percent of the original contract price.

XII. ENERGY SAVING PERFORMANCE CONTRACTS

Section 44.901 of the Texas Education Code authorizes school districts to enter into "energy savings performance contracts." This is a contract for energy or water conservation measures to reduce energy or water consumption or operating costs of new or existing school facilities in which the estimated savings in utility cost resulting from the measures is guaranteed to offset the cost of the measures over a specified period of time. The statute contains a laundry list of the types of improvements that qualify under the category of an energy saving performance contract. The school district should require the inclusion of an enforceable energy performance provision in its bid specifications and its contract in every project that qualifies under the statute in order to obtain the guarantee of energy cost savings. The district is authorized by statute to require a separate bond from the provider to ensure that the district receives the anticipated energy savings.

XII. SCHOOL DISTRICT CONSTRUCTION CONTRACTS

For at least nine years, the Texas Association of School Boards Construction Contracts Committee has worked to create Texas public school and community colleges specific contract modifications. I was pleased to serve on this Committee along with several other experienced school district attorneys. The Committee developed school-specific modifications to the Standard American Institute of Architect construction contracts. The forms and modifications we developed are readily available to you, and to your school attorney. You should encourage your school district attorney to review and consider these contract modifications when advising your district on a construction project. These contract modifications contain hundreds and hundreds of provisions, which protect the interests of Texas public schools and community colleges. No school district or community college should ever sign a construction contract without legal advice from an attorney who is familiar with the unique issues and concerns of public school districts in entering into such contracts. The forms and contract modifications developed by the TASB Construction Contracts Committee provide an excellent resource.

XV. QUESTIONS THAT REMAIN UNANSWERED

Does Chapter 2267 of the Texas Government Code provide the exclusive methods for procuring construction-related services and contracts?

Does current Texas law permit interlocal contracts and Co-op purchasing to be used to acquire construction-related services, and if so under what circumstances?

What factors should be considered in making the "best value" determination and when should the "best value" determination be made?

There are surely other questions. Please send them to the author of this article.

XVI. GUIDANCE AND INSIGHT FROM THE COURT

In a school district case, a state district judge found that the legislature's codification of purchasing methods for school districts was meant to provide guidelines for those purchases and methods and to provide public accountability. The court went on to find that Chapter 44 of the Texas Education Code (then the applicable law regarding procurement of construction services) is designed to protect all of the citizens of Texas, to provide the public with an open window into the purchasing of goods and services by a school district, and to provide accountability to each citizen and to each taxpayer of each dollar spent on a particular project. These standards should guide the district in every procurement and contract.

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XVII. CONCLUSION AND PRACTICAL ADVICE

Laws related to procurement and contracting are complex, sometimes appear to be in conflict, and can be confusing even for those who deal with the issues every day. When a school district is considering procurement and construction contracting, it must consider the best value for the district, and also ensure compliance with all requirements of federal and state laws and district policy. A school district should always contact its attorney and request guidance throughout the procurement and contracting phases. Construction-related contracts often involve large amounts of money and carry with it a potential for expensive litigation. Contacting the district's attorney prior to entering into a construction-related contract can save the district valuable time and resources.

Practical advice to school districts in procurement matters is as follows:

1. Involve the district's lawyer before the procurement process begins so that the district complies with all requirements of federal and state law and district policy and so that the district obtains the most favorable terms.
2. In contracts involving complex issues or substantial amounts of money and other resources, require that the contracts prepared by the district's legal counsel be attached as an exhibit to the procurement documents or be included in the packet of documents provided to interested bidders.
3. Before any contract is considered, have the board of trustees adopt as the official contract document prepared by the legal counsel for the district, so that any changes in the material provisions of the contract would have to come back before the board for approval. This significantly enhances the district's bargaining position in contract negotiations as suppliers and bidders do not desire to come before the board, in open session, before the public and the media, to quibble about contract terms and money.
4. The district should formally adopt the basic contract form for the construction-related services before advertising, so that prospective providers are on notice of the contract terms and the expectations of the district.
5. The school board should adopt a specific set of criteria to be used in determining the award of a contract prior to making and publishing a request for bids, proposals or qualifications.
6. The board should establish and adopt the relative weight to be given to each category of criteria considered in determining the award of a contract prior to making a request for bids, proposals, or qualifications. In selecting a delivery method for a construction project, the board or its designee should carefully document the criteria and factors considered in arriving at the method that provides the "best value" to the district.
7. In consultation with its legal counsel, the district should draft and adopt written rules and procedures to implement the construction project.
8. The district should document in detail and in writing all steps in the decision-making process in awarding a contract.
9. If the board of trustees considers awarding a construction contract using a method authorized by Chapter 2269 of the Texas Government Code other than competitive bidding, the school district must, before advertising, determine which method provides the best value for the district.
10. The district must publish in the request for proposals or qualifications the criteria that will be used to evaluate the offerors and the applicable weighted value for each criterion.
11. The district must base its selection among offerors on applicable criteria listed for the particular delivery method used (which criteria may vary depending on the delivery method chosen).
12. The district must document the basis of its selection and shall make the evaluations public not later than the seventh (7^{th}) day after the date the contract is awarded.
13. Never approve or sign a contract for construction services without review and revision by an experienced school construction lawyer.
14. Make sure your attorney is familiar with the contract modifications developed by the TASB Construction Contracts Committee.