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Robert Scott
Commissioner

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March 15, 2011

OPINION COMMITTEE

FILE # ML-4493-11
I.D. # 46693

The Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion

Dear General Abbott:

Please find enclosed a letter from legal counsel for a Texas independent school district that presents a question as to whether a school district board of trustee may authorize the expenditure of funds to defray legal expenses by a school district administrator. I am requesting your opinion on the issue presented in the enclosed letter.

If you have any questions regarding this request, you may contact David Anderson, General Counsel at (512) 463-9720.

Sincerely,

Robert Scott
Commissioner of Education

Enclosure

RS/da/ds

cc: S.Anthony Safi, Attorney

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January 24, 2011

Mr. Robert Scott
Commissioner of Education
c/o David A. Anderson, General Counsel
Texas Education Agency
1701 N. Congress Avenue
Austin, Texas 78701-1494

Re: Request for Attorney General Opinion

Dear Commissioner Scott:

I am writing on behalf of my client, a Texas independent school district, to request that you request of Attorney General Greg Abbott his opinion concerning whether a school district board of trustees may authorize the expenditure of funds to defray legal expenses by a school district administrator to file a defamation/libel/slander lawsuit, under circumstances where the board believes that statements made about the administrator are false and defamatory, and concern the administrator's performance of official duties.

Background

One or more of the District's administrators have been subject to stories in local media, alleging improprieties in connection with student testing, student admissions and attendance, etc. The stories have been ongoing for a matter of months. We ask you to assume, for purposes of the opinion request, that the Board of Trustees of the District believes that the stories contain false and defamatory allegations concerning the administrators' performance of their official duties as such. The stories have had the tendency to injure the reputation not only of the administrators, but of the District itself, have had a negative impact on the morale of the students and employees in the District, and have raised questions in the minds of students, employees and parents in the District concerning whether the District is complying

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with legal requirements concerning such issues as student testing and student admissions and attendance. We would also note that the District held a tax ratification election in mid-2010, which failed, in the midst of the dissemination of the allegations about the district and some of its administrators mentioned above.

Applicable Law

The Board of Trustees believes that the District itself has been defamed, but understands that under current law the District itself does not have standing to file a defamation case on its own behalf. *Port Arthur Independent School District v. Klein & Associates*, 70 S.W.3d 349 (Tex. App. – Beaumont 2002, no pet.). Prior court cases and Attorney General Opinions have addressed the situation where a governmental entity such as a school district board of trustees funds the defense of a public officer or employee in litigation, both in the civil and criminal contexts. Tex. Att'y Gen. Op. Nos. GA-0104 (2003) (civil) and JC-0294 (2000) (criminal). Attorney General Abbott has previously written to you along the following lines:

In certain circumstances, a school district or other political subdivision may pay the costs of defending an officer or employee in a suit brought against the person in an individual capacity for actions taken within the scope of his or her official duties. . . .

This office has determined that school districts have authority, based on their power to govern and oversee the management of the district, to employ an attorney to represent an officer or employee when sued in an individual capacity for actions taken in the scope of his or her employment [citations omitted]. The school board's authority to employ an attorney for a trustee sued in an individual capacity is limited to situations where the district's interests, and not merely the trustee's personal interests, require assertion or defense in court. [citations omitted]. The school board must also determine that the officer's or employee's actions forming the basis of the law suit were undertaken in good faith within the scope of an official duty. . . .

A school district may reimburse an officer or employee for the expense of defending a lawsuit only if it determines that (1) the expenditure was for the district's interests and not merely the officer's or employee's personal interests, and (2) the lawsuit arose out of actions by the officer or employee that were undertaken in good faith within the scope of an official duty.

Need for Opinion

We have been unable to find a court case or Attorney General's Opinion dealing with the situation where the employee receiving financial assistance with litigation expenses is involved in a lawsuit in the capacity as a plaintiff, rather than a defendant. We submit, however, that the same principles should apply and that providing funding for the employee plaintiff's suit should be permissible, provided that the Board of Trustees makes a good-faith determination that (1) the expenditure is in the District's interest, and not merely the employee's personal interest; and (2) the lawsuit involves actions by the employee that were undertaken in good faith and within the scope of an official duty.

With respect to the first element, please assume that the Board believes that the expenditure in funding the plaintiff's lawsuit would be in the District's interest, and not merely in the employee's personal interest. This is true for several reasons. The employee's defamation lawsuit would be the only way to obtain a conclusive finding in the judicial system that the defamatory statements made about the employee, and by extension about the District itself, were false. Obtaining such a ruling would restore the confidence of the District's students, employees, patrons and taxpayers, not only in the employee in question, but also in the District administration and the District as a whole. Such a ruling would also demonstrate that members of the media and other persons may not make repeated damaging, defamatory statements about District personnel with impunity, and thereby improve employee morale. Obtaining a definitive ruling clearing the names of key District administrators is believed by the Board to be critical to regaining the confidence of the public in regard to its finances, to include future bond elections and possibly a future tax ratification election. Because the District itself does not have standing to bring a defamation case in its own name, these benefits, which are in the public interest and will provide a public benefit, can be obtained only through the employee's lawsuit. Also, please assume that the employee would agree to reimburse the District for the legal fees and expenses advanced by it, to the extent of any monetary recovery by the employee in the lawsuit. This would serve to prevent any windfall recovery by the employee at District expense.

With respect to the second element, we ask that you assume, and that the Attorney General assume, that the Board of Trustees is satisfied that the lawsuit would be based on defamatory statements mischaracterizing actions taken by the employee, where the actions actually taken by the employee were undertaken in good faith and within the scope of the employee's official duties.

We hope that you will be able to submit a request to the Attorney General for a conforming opinion as soon as feasible.

Please do not hesitate to contact me if any further information is needed.

Respectfully submitted,

MOUNCE, GREEN, MYERS, SAFI,
PAXSON & GALATZAN
A Professional Corporation

By:



S. Anthony Safi

SAS/mh