

Decision

DOCKET NO. 004-R10-09-2019

PARENTS A/N/F STUDENT,

v.

EL PASO INDEPENDENT
SCHOOL DISTRICT

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BEFORE THE

COMMISSIONER OF EDUCATION

THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

STATEMENT OF THE CASE

Petitioners, Parents a/n/f Student, complain of actions and decisions of Respondent, El Paso Independent School District. Merle Dover is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioners appear *pro se*. Respondent is represented by S. Anthony Safi, Attorney at Law, El Paso, Texas.

The primary issue in this case concerns jurisdiction. The Petition for Review alleged violation of Texas Education Code §§ 26.008 and 38.053 and various sections of the Texas Penal Code, Texas Family Code, and the Texas Educators' Code of Ethics. By Order on Respondent's Plea to the Jurisdiction, Petitioners' claims under the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics were dismissed for lack of jurisdiction. Petitioners' brief on the merits included allegations of Texas Penal Code violations and added allegations of violation of Texas Education Code §§ 21.006, 21.0061, 22.093, 26.0081, 37.0012, 37.0023, 37.054, 37.081, and 38.010. The Commissioner may not consider any issue not raised by the Petition for Review. 19 Tex. Admin. Code § 157.1051(b). Accordingly, all of Petitioners' allegations of Texas Education Code violations not raised in the Petition for Review should be dismissed for failure to state a claim for which relief can be granted and lack of jurisdiction. Petitioners' allegation that Texas Education Code § 28.006(a) was violated by the Respondent's staff withholding full information about their child is meritorious. However, since Petitioners have now received all the information that they sought, there is no relief that can be granted. Petitioners' allegation that Texas Education Code § 28.006(b) was violated by the Respondent's staff fails because the evidence shows that while the staff facilitated the child's withholding of information from her

parents, they did not encourage or coerce her to do so. Finally, Petitioners' claim that Respondent violated Texas Education Code § 38.053 by facilitating the provision of services to their child at the Center Against Family Sexual and Domestic Violence ("CAFSDV") without their written consent must fail because CAFSDV is not a school-based health center. Although the facts of this case are very troubling, the Commissioner lacks jurisdiction to provide the relief requested, and thus, Petitioners' appeal is dismissed. Exceptions and reply were timely filed and considered.

FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by substantial evidence according to the standards set forth in Texas Administrative Code section 157.1073(h):

1. On May 7, 2019, a fifteen-year-old student at one of Respondent's high schools, made an outcry of child abuse substantiated by marks she claimed she received during a physical altercation with her mother to a staff member at the school.
2. Respondent's staff filed a CPS report and contacted law enforcement.
3. El Paso County Sheriff's Deputies conducted a preliminary investigation and determined that it appeared to be a child discipline issue and the mother had the right to take the child home.
4. The child informed the high school's At-Risk Coordinator that she was afraid to go home.
5. After contacting the Director of Counseling, one of the high school's counselors advised the At-Risk Coordinator that the parents had every right to take their child home, if they desired.
6. The At-Risk Coordinator contacted the Center Against Family Sexual and Domestic violence to take the child since she did not want to go home.
7. When Petitioner/mother arrived at the school to take her son and daughter home, she could not locate her daughter.
8. Her daughter was in the school at the time waiting for transport to the shelter.

9. The At-Risk Coordinator and an EPISD Police Services Officer knew that the child was in the school and that her mother and brother were looking for her to take her home but did not inform them of her whereabouts.

10. Petitioners did not know their daughter's whereabouts until May 9, 2019, when an Assistant Principal informed them that she was taken to a secured shelter.

11. School staff pulled the child from her classes and allowed her to spend the school day in the counseling center so that her brother would not see her. She was transported to and from school by the shelter.

12. On May 10, 2019, a CPS investigator interviewed the child and told one of the school counselors that she recommended the child not go home at that time, but her parents had a right to take her home if they chose to.

13. The child stayed at the shelter from May 7 to May 13, 2019.

14. Petitioner/stepfather met with the child on May 13, 2019 and convinced her to return home.

15. On May 23, 2019, Petitioners filed a complaint/grievance with Respondent.

16. The Level I decisionmaker concluded that proper protocols were followed but protocols would be reviewed with the staff.

17. The Superintendent's designee issued a Level II decision that the campus should have informed Petitioners that a shelter was contacted and that their daughter was taken there and that the high school staff would receive additional staff development on CPS reporting protocols and protocols for working with students.

18. At the Level III hearing before the Board, Petitioners complained about the decision to release their daughter to a shelter and not to her parents, failure to inform the parents of their daughter's whereabouts, interference with child custody, facilitating a child to not go home, harboring a runaway, denying a parent's rights to full information and transferring custody to an outside organization without permission of CPS or the parents.

19. The Board voted to uphold the Level II decision.

20. Parents timely appealed to the Commissioner.

DISCUSSION

Jurisdiction

Unlike district courts, the Commissioner does not have general jurisdiction. A person may appeal to the Commissioner if he is aggrieved by:

- (1) the school laws of the state; or
- (2) actions or decisions of any school district board of trustees that violate:
 - (A) the school laws of the state; or
 - (B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee.

Tex. Educ. Code § 7.057(a). The school laws of the state are defined as Titles 1 and 2 of the Texas Education Code and the rules thereunder. Tex. Educ. Code § 7.057(f)(2).

It is undisputed that Petitioners did not have a written employment contract. Thus, in order to establish jurisdiction, Petitioners must allege an action or decision of a school board that violates a school law of this State.

Texas Administrative Code Section 157.1051

Respondent asserts that most of the violations raised in Petitioners' brief are barred based on Texas Administrative Code section 157.1051, which provides that "all issues relied upon by the petitioner must be raised in the petition for review, and the commissioner will not consider any issues not raised in the petition for review." Respondent asserts that only violations of Texas Education Code sections 26.008 and 38.053 were properly raised in the Petition for Review. Respondent is correct.

Texas Education Code Section 26.008(a)

Petitioners allege that the high school staff violated Texas Education Code section 26.008(a) by withholding information regarding the whereabouts of their child for 72 hours. Respondent contends that Petitioners did not sufficiently brief this allegation and that Petitioners mention Texas Education Code section 26.008 only in the portion of their brief entitled Questions Presented. Respondent cites to *Parents v. United Indep. Sch. Dist.*, No. 035-R10-03-2018

(Comm'r Educ. 2018) in support of its position. However, Petitioners in the *United* case failed to articulate *any* facts in support of their claim in their Petition for Review or in their Brief on the Merits. In contrast, here Petitioners' Brief contains a four and one-half page Statement of the Case that goes into explicit detail with citations to the record regarding the events at issue in the case, including the Petitioners' extensive efforts to obtain information about their daughter's whereabouts from approximately 4:15 p.m. on May 7 when the mother arrived at the high school to take her daughter home through May 10 when the stepfather finally obtained information regarding his stepdaughter's whereabouts for the previous three nights from the CPS worker investigating the case. Respondent's staff knew the child's location but failed to provide this information to the parents. Connecting these facts to the allegation of violation of Texas Education Code section 26.008 is sufficiently clear to satisfy the requirements of 19 Texas Administrative Code section 157.1058(a)(4). Additionally, Petitioners specifically connect their allegation of violation of section 26.008 to the withholding of information about their daughter's location in their Reply Brief at page 9.

Texas Education Code Section 26.008(a) states:

A parent is entitled to full information regarding the school activities of a parent's child except as provided by Section 38.004.

Respondent asserts that in addition to Petitioners failing to properly brief their claim, this statute was not violated because the whereabouts of a child is not a "school activity." "School activity" is not a defined term in the Education Code. Respondent cites to *Texas Appleseed v. Spring Branch Indep. Sch. Dist.*, 388 S.W.3d 775 (Tex. App. – Houston [1st Dist.] 2012, pet. denied) for its position that the right to full information regarding the school activities of a parent's child is not absolute. In *Texas Appleseed*, a public interest law center sought information related to school discipline and juvenile justice from several Texas school districts. The information requested included the police department's use of force handbook. The court concluded that Texas Education Code section 26.008's provision that a parent is entitled to full information regarding the school activities of a parent's child does not concern the disclosure of a school district's police

force's handbook. *Id.* at 779. Unfortunately, the court did not provide any guidance on what information would be considered "regarding the school activities of a parent's child."

The Education Code states that a parent is entitled to all written records of a school district concerning the parent's child, including: attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and counselor evaluations, reports of behavioral patterns, and records relating to assistance provided for learning difficulties, including information collected regarding any intervention strategies used with the child. Tex. Educ. Code § 26.005(b). Because participation in a school activity requires the child to be present either physically or virtually, it follows that the location of the child is relevant to the child's school activities. The information is so basic that it is difficult to comprehend how a child's physical location during the time the child is under the school's supervision would not be included in information regarding the child's school activities.

Further indication that information about a child's location is information parents are entitled to is the fact that parents are responsible for their child's presence in school under truancy laws. *See e.g.* Tex. Educ. Code § 25.093. When parents release their child to the custody of the school at school drop-off, they are entitled to expect that the child will remain at the school until the child is returned to parental custody at the conclusion of the school day. If the child leaves the school campus during the day for a field trip, athletic event or other authorized school activity, parents must give written permission. It is reasonable to conclude that a child's whereabouts during the school day would be information about the parent's child to which a parent is entitled.

The record is clear that several school officials knew that Petitioner/mother had come to pick up her daughter from school on May 7, 2019 and she was not told that her daughter was in the counselor's office waiting to be transported to a shelter. In fact, the Executive Director of Student and Parent Services, the Level II grievance decisionmaker, found that "the campus staff should have informed [the parents] that the Center for Family and Sexual Violence was contacted, involved in the situation, and that [their daughter] was taken to the shelter if known by the staff."

The record contains the statements of approximately eight (8) staff members involved, several of whom knew the child's location when the mother was searching for her initially and in the following days. No one on the staff informed the parents about the child's absence on May 8, about her being allowed to spend the school day in the counselor's office on May 9, or about her being transported to the shelter at the end of the school day until May 10, when the Petitioner/stepfather came to the school accompanied by an El Paso police officer. Petitioners never gave permission for their daughter to be transported from the high school through transportation provided by the CAFSDV, for their daughter to be housed at CAFSDV from May 7 through May 10, 2019, nor for their daughter to be absent from school on May 8, 2019.

Texas Education Code Section 38.004

Texas Education Code section 26.008(a) gives the parent the right to full information concerning their child's school activities *except* as provided in Section 38.004. Respondent contends that Petitioners' claim under Section 26.008(a) fails because the incident at issue falls squarely into the statute's exception. Respondent misreads the exception created by Section 38.004. Section 38.004 requires that TEA develop a policy governing the reporting of child abuse and neglect, as required by Chapter 261, Family Code, for school districts, open-enrollment charter schools and their employees. "The policy must provide for cooperation with law enforcement child abuse investigations without the consent of the child's parents if necessary, including investigations by the Department of Family and Protective Services ("DFPS")." Tex. Educ. Code § 38.004. The Texas Family Code requires reporting of suspected child abuse and schools allows schools to release to DFPS all information needed without the need of an authorization required by the Health Insurance Portability and Accountability Act ("HIPPA") or the Family Educational Rights and Privacy Act ("FERPA"). While Texas Education Code section 38.004 allows for school district employees to report and cooperate with child abuse investigations without the parent's consent, it does not allow the district to withhold information regarding the child's school activities or whereabouts. Section 38.004 does not limit a parent's right to information just because a child abuse report has been made, but rather, allows a school district to share information about

the student with investigating agencies without the parental consent normally required to release information about a student. For example, school district employees could be cooperating with a DFPS investigation into an allegation that a child was sexually assaulted by a teacher without the parents' consent and that would not authorize the school district to withhold from the parents information about the child's STAAR test results. Here, the school staff's cooperation with the sheriff's or CPS's investigation did not require withholding information about the child's whereabouts. A report of suspected child abuse to CPS and law enforcement does not take away a parent's right to basic information about their child's school activities. Petitioners were inquiring about the location of their child, not interfering with any investigation.

Thus, Section 38.004 allows the school district to *share* information with an investigation of child abuse, even if the parent does not consent, not *withhold* information from the parent because there is an investigation. Even the Superintendent's designee concluded in the Level II grievance decision adopted by the Board that the parents were entitled to information about their child's whereabouts and the Board voted to uphold the Level II decision. Respondent violated Texas Education Code section 28.008(a) by withholding full information from Petitioners concerning the whereabouts of their child.

Texas Education Code Section 26.008(b)

Texas Education Code Section 26.008(b) states:

An attempt by any school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline under Section 21.104, 21.156, or 21.211, as applicable.

Although the school staff did not encourage or coerce the child to conceal her whereabouts from her parents, they certainly facilitated it. Respondent admits the idea to seek shelter at the CAFSDV was not the child's idea, but staff's. Staff facilitated the child avoiding contact with her mother when the At-Risk Coordinator allowed her to wait in the hallway outside the counselling center where she could look out the window to see when her transportation arrived instead of waiting where her mother could see her. The At-Risk Coordinator further facilitated withholding

information about the child's whereabouts as evidenced in her own statement where she admits that while the child was waiting for transportation to the CAFSDV, she was in the office when her brother came in the office looking for his sister. Moreover, the staff allowed the child to spend the school day on May 9, 2019 in the counselor's suite and/or the nurse's office so that she could avoid seeing her brother. The At-Risk Coordinator admits in her statement that the Sheriff's Deputy had advised the child earlier that she needed to go home. Thus, while it could be argued that the school staff encouraged the child to withhold information from her parents, the staff certainly facilitated the withholding of information.

However, even if it were determined that Texas Education Code section 26.008(b) was violated, discipline is not mandatory, and the Commissioner is not empowered to order a school district to discipline its employees. The power to discipline a school district employee is a duty within the discretion of the school board. Tex. Educ. Code § 21.211; *Child b/n/f Parents v. Rockwell Indep. Sch. Dist.*, Docket No. 090-R10-0612 (Comm'r Educ. 2013).

Texas Education Code Section 38.053

Texas Education Code Section 38.053 requires written parental or guardian consent for a school-based health center to provide services to a student. Petitioners allege that this statute was violated when the school staff allowed their daughter to be transported to CAFSDV and housed there from May 7 through May 13, 2019. A school-based health center is based on a school campus and provides conventional health care services. Tex. Educ. Code § 38.051. CAFSDV does not meet the definition of a school-based health center. Accordingly, this claim must fail.

Order on Plea to the Jurisdiction

In addition to the violation of Texas Education Code §§ 26.008 and 38.053, the Petition for Review alleges violations of the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics. By Order on Respondent's Plea to the Jurisdiction, Petitioners' claims under the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics were dismissed for lack of jurisdiction. Petitioners' brief contains allegations of Texas Penal Code violations. Those allegations are again dismissed for lack of jurisdiction.

New Allegations of Texas Education Code Violations

In their brief on the merits, Petitioners added claims that Respondent violated Texas Education Code §§ 21.006, 21.0061, 22.093, 26.0081, 37.0012, 37.0023, 37.054, 37.081, and 38.010. The Commissioner may not consider any issue not raised by the Petition for Review. 19 Tex. Admin. Code § 157.1051(b). Accordingly, all of Petitioners' allegations of Texas Education Code violations not raised in the Petition for Review are dismissed for failure to state a claim for which relief can be granted and lack of jurisdiction.

Relief Requested

In their pleadings, Petitioners request that the Commissioner invoke Chapter 39 of the Texas Education Code and conduct a special accreditation investigation of the high school faculty, EPISD Police Services, and EPISD District Staff's handling of the removal, withholding and subsequent investigation of the child's removal from their custody. Additionally, Petitioners request that if any laws were broken, that EPISD be held accountable to the fullest extent of the law.

Even if Petitioners successfully proved their alleged violations of law, the initiation of a special accreditation investigation is not available through the Texas Education Code section 7.057 grievance appeal process. Special accreditation investigations are initiated in response to complaints filed directly with the Complaints Division of TEA. The Petition for Review indicates that Petitioners have already filed such complaint.

In addition to discipline of educators imposed at the discretion of the local district, discipline of school employees for violation of state or federal law may be sought by filing a complaint with the State Board of Educator Certification ("SBEC"). SBEC is a separate state agency from TEA over which the Commissioner has no jurisdiction.

Response to Exceptions

Respondent excepts to extensive portions of the Proposal for Decision as an improper advisory opinion. The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d

440, 444 (Tex. 1993). The issue analyzed herein is specific and concrete, not a hypothetical, and is a necessary element in a full analysis of Petitioner's allegations.

Petitioners assert in their Reply to Exceptions that their claim to entitlement to full information regarding their children under Texas Education Code section 26.008 is not moot because they have still not received all the information requested from Respondent. Petitioners attached to their Reply a January 7, 2020 records request and a series of emails between Petitioners and Respondent related to that request and their contention that they have yet to receive a complete response. The Commissioner may not accept new evidence at this stage of the proceeding. The Commissioner's Decision is based on a substantial evidence review of the evidence in the Local Record. The Local Record was timely filed on October 24, 2019. The record is considered complete and accurate, unless within 30 days of the date of filing the petitioner objects and sets forth the items missing that are relevant and material. 19 Tex. Admin. Code § 157.1073(e). Petitioners' January 7, 2020 request for documents was not part of their grievance and was never a subject of an action or decision by the Board subject to appeal to the Commissioner. Petitioners must exhaust administrative remedies regarding any complaint related to the January 7, 2020 request for information by filing a new grievance in order to invoke the Commissioner's jurisdiction over that matter.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as the Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner's jurisdiction under Texas Education Code 7.057(a)(2)(A) is limited to claims that actions or decisions of a school district board of trustees violate the school laws of this state, defined as Titles 1 and 2 of the Texas Education Code and the rules thereunder.
2. The Commissioner does not have jurisdiction over allegations of violation of the Texas Penal Code, the Texas Family Code or the Texas Educators' Code of Ethics.
3. All issues relied upon by the Petitioner must be raised in the Petition for Review.

4. The only allegations of violation of laws in Titles 1 and 2 of the Texas Education Code raised in the Petition for Review are Texas Education Code sections 26.008 and 38.053.

5. Under Texas Education Code section 26.008, full information regarding the school activities of a child to which a parent is entitled includes information regarding the location of the child during the school day and the party that assumed custody of the child at the end of the school day, if known by the staff.

6. Respondent's staff violated Texas Education Code section 26.008(a) by withholding information from Petitioners about the location of their child.

7. The exception to a parent's right to full information concerning their child's school activities under Texas Education Code section 26.008(a) found in Texas Education Code section 38.004 allows a school district to cooperate with child abuse investigations without the parent's consent; it does not authorize the district to withhold information regarding the child's school activities.

8. A school district employee violates Texas Education Code section 26.008(b) by encouraging or coercing a child to withhold information from the child's parent.

9. Respondent's staff did not encourage or coerce Petitioners' child to withhold information from her parents.

10. The power to discipline a school employee by suspending or terminating a contract is within the discretion of the school board not the Commissioner.

11. Texas Education Code section 38.053 requires written parental or guardian consent for a school-based health center to provide services to a student.

12. The Center Against Family Sexual and Domestic Violence is not a school-based health center.

13. Special accreditation investigations are initiated in response to complaints filed directly with the complaints division of TEA.

14. Discipline of educators for violation of state or federal law may be sought by filing a complaint with the State Board of Educator Certification.

15. The Commissioner has no jurisdiction over the State Board of Educator Certification.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby ORDERED that Petitioners' appeal be, and is hereby, DISMISSED.

SIGNED AND ISSUED this ____18th____ day of ____May____ 2020.

Michael Morath

MIKE MORATH
COMMISSIONER OF EDUCATION

Proposal for Decision

DOCKET NO. 004-R10-09-2019

PARENTS A/N/F STUDENT,

v.

EL PASO INDEPENDENT
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BEFORE THE

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THE STATE OF TEXAS

PROPOSAL FOR DECISION

STATEMENT OF THE CASE

Petitioners, Parents a/n/f Student, complain of actions and decisions of Respondent, El Paso Independent School District. Merle Dover is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioners appear *pro se*. Respondent is represented by S. Anthony Safi, Attorney at Law, El Paso, Texas.

The primary issue in this case concerns jurisdiction. The Petition for Review alleged violation of Texas Education Code §§ 26.008 and 38.053 and various sections of the Texas Penal Code, Texas Family Code, and the Texas Educators' Code of Ethics. By Order on Respondent's Plea to the Jurisdiction, Petitioners' claims under the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics were dismissed for lack of jurisdiction. Petitioners' brief on the merits included allegations of Texas Penal Code violations and added allegations of violation of Texas Education Code §§ 21.006, 21.0061, 22.093, 26.0081, 37.0012, 37.0023, 37.054, 37.081, and 38.010. The Commissioner may not consider any issue not raised by the Petition for Review. 19 Tex. Admin. Code § 157.1051(b). Accordingly, all of Petitioners' allegations of Texas Education Code violations not raised in the Petition for Review should be dismissed for failure to state a claim for which relief can be granted and lack of jurisdiction. Petitioners' allegation that Texas Education Code § 28.006(a) was violated by the Respondent's staff withholding full information about their child is meritorious. However, since Petitioners have now received all the information that they sought, there is no relief that can be granted. Petitioners' allegation that Texas Education Code § 28.006(b) was violated by the Respondent's staff fails because the evidence shows that while the staff facilitated the child's withholding of information from her

parents, they did not encourage or coerce her to do so. Finally, Petitioners' claim that Respondent violated Texas Education Code § 38.053 by facilitating the provision of services to their child at the Center Against Family Sexual and Domestic Violence ("CAFSDV") without their written consent must fail because CAFSDV is not a school-based health center. Although the facts of this case are very troubling, the Commissioner lacks jurisdiction to provide the relief requested.

FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by substantial evidence according to the standards set forth in Texas Administrative Code section 157.1073(h):

1. On May 7, 2019, a fifteen-year-old student at one of Respondent's high schools, made an outcry of child abuse substantiated by marks she claimed she received during a physical altercation with her mother to a staff member at the school.
2. Respondent's staff filed a CPS report and contacted law enforcement.
3. El Paso County Sheriff's Deputies conducted a preliminary investigation and determined that it appeared to be a child discipline issue and the mother had the right to take the child home.
4. The child informed the high school's At-Risk Coordinator that she was afraid to go home.
5. After contacting the Director of Counseling, one of the high school's counselors advised the At-Risk Coordinator that the parents had every right to take their child home, if they desired.
6. The At-Risk Coordinator contacted the Center Against Family Sexual and Domestic violence to take the child since she did not want to go home.
7. When Petitioner/mother arrived at the school to take her children home, she could not locate her daughter.
8. Her daughter was in the school at the time waiting for transport to the shelter.

9. The At-Risk Coordinator and an EPISD Police Services Officer knew that the child was in the school and that her mother and brother were looking for her to take her home but did not inform them of her whereabouts.

10. Petitioners did not know their daughter's whereabouts until May 9, 2019, when an Assistant Principal informed them that she was taken to a secured shelter.

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18. At the Level III hearing before the Board, Petitioners complained about the decision to release their daughter to a shelter and not to her parents, failure to inform the parents of their daughter's whereabouts, interference with child custody, facilitating a child to not go home, harboring a runaway, denying a parent's rights to full information and transferring custody to an outside organization without permission of CPS or the parents.

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DISCUSSION

Jurisdiction

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It is undisputed that Petitioners did not have a written employment contract. Thus, in order to establish jurisdiction, Petitioners must allege an action or decision of a school board that violates a school law of this State.

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(Comm'r Educ. 2018) in support of its position. However, Petitioners in the *United* case failed to articulate *any* facts in support of their claim in their Petition for Review or in their Brief on the Merits. In contrast, here Petitioner's Brief contains a four and one-half page Statement of the Case that goes into explicit detail with citations to the record regarding the events at issue in the case, including the Petitioners' extensive efforts to obtain information about their daughter's whereabouts from approximately 4:15 p.m. on May 7 when the mother arrived at the high school to take her daughter home through May 10 when the stepfather finally obtained information regarding his stepdaughter's whereabouts for the previous three nights from the CPS worker investigating the case. Respondent's staff knew the child's location but failed to provide this information to the parents. Connecting these facts to the allegation of violation of Texas Education Code section 26.008 is sufficiently clear to satisfy the requirements of 19 Texas Administrative Code section 157.1058(a)(4). Additionally, Petitioners specifically connect their allegation of violation of section 26.008 to the withholding of information about their daughter's location in their Reply Brief at page 9.

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force's handbook. *Id.* at 779. Unfortunately, the court did not provide any guidance on what information would be considered to be "regarding the school activities of a parent's child."

The Education Code states that a parent is entitled to all written records of a school district concerning the parent's child, including: attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and counselor evaluations, reports of behavioral patterns, and records relating to assistance provided for learning difficulties, including information collected regarding any intervention strategies used with the child. Tex. Educ. Code § 26.005(b). Because participation in a school activity requires the child to be present either physically or virtually, it follows that the location of the child is relevant to the child's school activities. The information is so basic that it is difficult to comprehend how a child's physical location during the time the child is under the school's supervision would not be included in information regarding the child's school activities.

Further indication that information about a child's location is information parents are entitled to is the fact that parents are responsible for their child's presence in school under truancy laws. *See e.g.* Tex. Educ. Code § 25.093. When parents release their child to the custody of the school at school drop-off, they are entitled to expect that the child will remain at the school until the child is returned to parental custody at the conclusion of the school day. If the child leaves the school campus during the day for a field trip, athletic event or other authorized school activity, parents must give written permission. It is reasonable to conclude that a child's whereabouts during the school day would be information about the parent's child to which a parent is entitled.

The record is clear that several school officials knew that Petitioner/mother had come to pick up her daughter from school on May 7, 2019 and she was not told that her daughter was in the counselor's office waiting to be transported to a shelter. In fact, the Executive Director of Student and Parent Services, the Level II grievance decisionmaker, found that "the campus staff should have informed [the parents] that the Center for Family and Sexual Violence was contacted, involved in the situation, and that [their daughter] was taken to the shelter if known by the staff."

The record contains the statements of approximately eight (8) staff members involved, several of whom knew the child's location when the mother was searching for her initially and in the following days. No one on the staff informed the parents about the child's absence on May 8, about her being allowed to spend the school day in the counselor's office on May 9, or about her being transported to the shelter at the end of the school day until May 10, when the Petitioner/stepfather came to the school accompanied by an El Paso police officer. Petitioners never gave permission for their daughter to be transported from the high school through transportation provided by the CAFSDV, for their daughter to be housed at CAFSDV from May 7 through May 13, 2019, nor for their daughter to be absent from school on May 8, 2019.

Texas Education Code Section 38.004

Texas Education Code section 26.008(a) gives the parent the right to full information concerning their child's school activities *except* as provided in Section 38.004. Respondent contends that Petitioners' claim under Section 26.008(a) fails because the incident at issue falls squarely into the statute's exception. Respondent reads too much into the exception created by Section 38.004. Section 38.004 requires that each school district and open-enrollment charter school adopt the TEA policy governing the reporting of child abuse or neglect that provides for cooperation with law enforcement and Department of Family and Protective Services ("DFPS") child abuse investigations without the consent of the parent, if necessary. While this section allows for the school district employees to report and cooperate with child abuse investigations without the parent's consent, it does not allow the district to withhold information regarding the child's school activities. Section 38.004 does not limit a parent's right to information just because a child abuse report has been made, but rather, allows a school district to share information about the student with investigating agencies without the parental consent normally required to release information about a student. *See, e.g.,* The Family Educational Rights and Privacy Act, FERPA, 20 U.S.C. § 1232g (preventing disclosure of minor child's educational records without parental consent). For example, school district employees could be cooperating with a DFPS investigation into an allegation that a child was sexually assaulted by a teacher without the parent's consent and

that would not allow the school district to withhold from the parents information about the child's STAAR test results just because the test was taken in that teacher's classroom. Here, the school staff's cooperation with the sheriff's or CPS's investigation did not require withholding information about the child's whereabouts. A report of suspected child abuse to CPS and law enforcement does not take away a parent's right to basic information about their child's school activities. Petitioners were inquiring about the location of their child, not interfering with any investigation.

Thus, Section 38.004 allows the school district to *share* information with an investigation of child abuse, even if the parent does not consent, not *withhold* information from the parent because there is an investigation. Even the Superintendent's designee concluded in the Level II grievance decision adopted by the Board that the parents were entitled to information about their child's whereabouts and the Board voted to uphold the Level II decision. Respondent violated Texas Education Code section 28.008(a) by withholding full information from Petitioners concerning the whereabouts of their child.

Texas Education Code Section 26.008(b)

Texas Education Code Section 26.008(b) states:

An attempt by any school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline under Section 21.104, 21.156, or 21.211, as applicable.

Although the school staff did not encourage or coerce the child to conceal her whereabouts from her parents, they certainly facilitated it. Respondent admits the idea to seek shelter at the CAFSDV was not the child's idea, but staff's. Staff facilitated the child avoiding contact with her mother when the At-Risk Coordinator allowed her to wait in the hallway outside the counselling center where she could look out the window to see when her transportation arrived instead of waiting where her mother could see her. The At-Risk Coordinator further facilitated withholding information about the child's whereabouts as evidenced in her own statement where she admits that while the child was waiting for transportation to the CAFSDV, she was in the office when her

brother came in the office looking for his sister. Moreover, the staff allowed the child to spend the school day on May 9, 2019 in the counselor's suite and/or the nurse's office so that she could avoid seeing her brother. The At-Risk Coordinator admits in her statement that the Sheriff's Deputy had advised the child earlier that she needed to go home. Thus, while it could be argued that the school staff encouraged the child to withhold information from her parents, the staff certainly facilitated the withholding of information.

However, even if it were determined that Texas Education Code section 26.008(b) was violated, discipline is not mandatory, and the Commissioner is not empowered to order a school district to discipline its employees. The power to discipline a school district employee is a duty within the discretion of the school board. Tex. Educ. Code § 21.211; *Child b/n/f Parents v. Rockwell Indep. Sch. Dist.*, Docket No. 090-R10-0612 (Comm'r Educ. 2013).

Texas Education Code Section 38.053

Texas Education Code Section 38.053 requires written parental or guardian consent for a school-based health center to provide services to a student. Petitioners allege that this statute was violated when the school staff allowed their daughter to be transported to CAFSDV and housed there from May 7 through May 13, 2019. A school-based health center is based on a school campus and provides conventional health care services. Tex. Educ. Code § 38.051. CAFSDV does not meet the definition of a school-based health center. Accordingly, this claim must fail.

Order on Plea to the Jurisdiction

In addition to the violation of Texas Education Code §§ 26.008 and 38.053, the Petition for Review alleges violations of the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics. By Order on Respondent's Plea to the Jurisdiction, Petitioners' claims under the Texas Penal Code, Texas Family Code and the Texas Educators' Code of Ethics were dismissed for lack of jurisdiction. Petitioners' brief contains allegations of Texas Penal Code violations. Those allegations are again dismissed for lack of jurisdiction.

New Allegations of Texas Education Code Violations

In their brief on the merits, Petitioners added claims that Respondent violated Texas Education Code §§ 21.006, 21.0061, 22.093, 26.0081, 37.0012, 37.0023, 37.054, 37.081, and 38.010. The Commissioner may not consider any issue not raised by the petition for review. 19 Tex. Admin. Code § 157.1051(b). Accordingly, all of Petitioners' allegations of Texas Education Code violations not raised in the Petition for Review are dismissed for failure to state a claim for which relief can be granted and lack of jurisdiction.

Relief Requested

In their pleadings, Petitioners request that the Commissioner invoke Chapter 39 of the Texas Education Code and conduct a special accreditation investigation of the high school faculty, EPISD Police Services, and EPISD District Staff's handling of the removal, withholding and subsequent investigation of the child's removal from their custody. Additionally, Petitioners request that if any laws were broken that EPISD be held accountable to the fullest extent of the law.

Even if Petitioners successfully proved their alleged violations of law, the initiation of a special accreditation investigation is not available through the Texas Education Code section 7.057 grievance appeal process. Special accreditation investigations are initiated in response to complaints filed directly with the Complaints Division of TEA. The Petition for Review indicates that Petitioners have already filed such complaint.

In addition to discipline of educators imposed at the discretion of the local district, discipline of school employees for violation of state or federal law may be sought by filing a complaint with the State Board of Educator Certification ("SBEC"). SBEC is a separate state agency from TEA over which the Commissioner has no jurisdiction.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as the Administrative Law Judge, I make the following Conclusions of Law:

1. The Commissioner's jurisdiction under Texas Education Code 7.057(a)(2)(A) is limited to claims against a school district board of trustees that violates the school laws of this state, defined as Titles 1 and 2 of the Texas Education Code and the rules thereunder.
2. The Commissioner does not have jurisdiction over allegations of violation of the Texas Penal Code, the Texas Family Code or the Texas Educators' Code of Ethics.
3. All issues relied upon by the petitioner must be raised in the petition for review.
4. The only allegations of violation of laws in Titles 1 and 2 of the Texas Education Code raised in the Petition for Review are Texas Education Code sections 26.008 and 38.053.
5. Under Texas Education Code section 26.008, full information regarding the school activities of a child to which a parent is entitled includes information regarding the location of the child during the school day and the party that assumed custody of the child at the end of the school day, if known by the staff.
6. Respondent's staff violated Texas Education Code section 26.008(a) by withholding information from Petitioners about the location of their child.
7. The exception to a parent's right to full information concerning their child's school activities under Texas Education Code section 26.008(a) found in Texas Education Code section 38.004 allows a school district to cooperate with child abuse investigations without the parent's consent; it does not allow the district to withhold information regarding the child's school activities.
8. A school district employee violates Texas Education Code section 26.008(b) by encouraging or coercing a child to withhold information from the child's parent.
9. Respondent's staff did not encourage or coerce Petitioners' child to withhold information from her parents.

10. The power to discipline a school employee by suspending or terminating a contract is within the discretion of the school board, not the Commissioner.

11. Texas Education Code section 38.053 requires written parental or guardian consent for a school-based health center to provide services to a student.

12. The Center Against Family Sexual and Domestic Violence is not a school-based health center.

13. Special accreditation investigations are initiated in response to complaints filed directly with the complaints division of TEA.

14. Discipline of educators for violation of state or federal law may be sought by filing a complaint with the State Board of Educator Certification.

15. The Commissioner has no jurisdiction over the State Board of Educator Certification.

RECOMMENDATION

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Administrative Law Judge, it is hereby RECOMMENDED that the Commissioner of Education adopt the foregoing Findings of Fact and Conclusions of Law and enter an order consistent therewith.

SIGNED AND ISSUED this 4th day of March 2020.



MERLE DOVER
ADMINISTRATIVE LAW JUDGE