

CAUSE NO. D-1-GN-11-003130

TEXAS TAXPAYER & STUDENT  
FAIRNESS COALITION, *et al.*,

Plaintiffs,

VS.

MICHAEL WILLIAMS, TEXAS  
COMMISSIONER OF EDUCATION, *et al.*,

Defendants

IN THE DISTRICT COURT OF

*Consolidated Case:*

FORT BEND INDEPENDENT SCHOOL  
DISTRICT, *et al.*,

Plaintiffs,

VS.

MICHAEL WILLIAMS, TEXAS  
COMMISSIONER OF EDUCATION, *et al.*,

Defendants.

TRAVIS COUNTY, TEXAS

200<sup>TH</sup> JUDICIAL DISTRICT

**FORT BEND ISD PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO  
STRIKE SUPERINTENDENT OF SPRING BRANCH FROM WITNESS LIST**

TO THE HONORABLE JUDGE JOHN K. DIETZ

The Defendants' seek to strike a witness from Plaintiffs Fort Bend ISD, *et. al.*'s (the "FBISD Plaintiffs") witness list. Defendants' motion is based on a false premise that the designation of Dr. Duncan Klussmann, the superintendent of Spring Branch ISD, as a witness is the equivalent of designating a new focus district and ignores the limitation in the witness designation itself, which states that Dr. Klussmann will "testify regarding the impact of recent legislative changes to the finance system and high school assessment and curriculum

requirements on Spring Branch ISD.”<sup>1</sup> Because the subject of Dr. Klussmann’s testimony goes to the very heart of the issues that caused the Court to re-open the evidence and because this evidence regarding the impact of legislation passed in May 2013 was unavailable at the time of the original trial (conducted October 22, 2012 through February 4, 2013), the Defendants’ motion to strike should be denied.

### I.

#### **Spring Branch ISD is Not Being Designated as a Focus District**

The Defendants’ motion rests on the mistaken premise that the designation of Dr. Klussmann to testify regarding the limited issue of the impact of the 2013 Legislative Session is the equivalent of designating Spring Branch ISD as a focus district. This is simply not the case. In his position as superintendent of Spring Branch ISD, Dr. Klussmann followed the 2013 legislative session closely, including Senate Bill 1’s changes to the school finance system and House Bill 5’s changes to the accountability system. Therefore, as noted in the FBISD Plaintiffs’ fact witness list, the FBISD Plaintiffs intend to take a limited direct examination of Dr. Klussmann for the purpose of eliciting evidence regarding the impact of the 2013 legislative changes. If the Defendants believe that, in response to this limited direct examination, they must conduct a full cross-examination of Dr. Klussmann regarding all issues in the case, it is their choice to open up his testimony further. As noted in the Defendants’ motion to strike, the FBISD Plaintiffs’ designated Dr. Klussmann as a fact witness on August 26, 2013—almost two months before Defendants filed their motion to strike, on the appointed deadline for designating fact witnesses under the current scheduling order, and more than three months before the discovery deadline for the hearing on re-opening. The Defendants, therefore, had ample time to request discovery from Spring Branch ISD, to “compile and review all of the potentially relevant

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<sup>1</sup> FBISD Plaintiffs’ Preliminary Fact Witness List, served August 26, 2013, and attached hereto as Exhibit A.

financial and accountability information about the district,” and to prepare for a full cross-examination of Dr. Klussmann at his deposition or at the evidentiary hearing.<sup>2</sup> More importantly, the Defendants had ample time to request discovery and prepare for a cross-examination that is focused on the subject matter of the re-opening and his testimony: the impact of the 2013 legislative changes.<sup>3</sup>

## II.

### **Dr. Klussmann’s Testimony Goes to the Heart of the Issues that Led the Court to Re-Open the Evidence and Necessarily was Unavailable at the Time of the Original Trial**

On June 19, 2013, the Court granted the motion by Calhoun County ISD to re-open the evidence “to consider the effect of changes to the public school finance and accountability systems made by the Texas Legislature in the 83rd Regular Session.”<sup>4</sup> The FBISD Plaintiffs agree with the State Defendants’ that the resulting hearing is not a new trial and should only include evidence that was unavailable at the time of the original trial.<sup>5</sup> In determining what evidence to admit after re-opening, the Court should look first to the motion to re-open the evidence itself, which identified the following topics as subjects requiring additional evidence:

- Changes to the statutory funding formulas and the resulting impact on the amount and distribution of public education funding;
- Changes to the STAAR end-of-course testing regime and graduation requirements, along with 2013 student performance data relating to these tests;
- Changes to the accountability system; and
- The raising of the statutory cap on open-enrollment charters.<sup>6</sup>

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<sup>2</sup> The same scheduling order for the original trial that the Defendants’ cite notes that “The designation of districts may not serve as the basis for an objection to any parties’ request for documents or information from any other party to this suit on the grounds that the request is outside the scope of discovery in this case.”

<sup>3</sup> Instead of doing so, Defendants waited eight weeks after his designation as a fact witness to express their concern regarding his designation to the FBISD Plaintiffs.

<sup>4</sup> Order on Motion to Re-open Evidence, dated June 19, 2013.

<sup>5</sup> Defendants’ Motion to Strike at 2-3.

<sup>6</sup> Calhoun County ISD Plaintiffs’ Motion to Reopen at 2-3, 5, filed June 18, 2013; *see also* Fort Bend ISD Plaintiffs’ Response in Support of Calhoun County ISD Plaintiffs’ Motion to Reopen the Evidence.

*See Cox v. Wilkins*, No. 03-05-00110-CV, 2006 WL 821202, at \*2, \*3 (Tex. App.—Austin 2006, no pet.) (plaintiff moved to reopen evidence on issue of attorneys’ fees and trial court granted motion for “the limited purposes of offering the attorneys’ fees”); *Musick v. Musick*, 590 S.W.2d 582, 584-85 (Civ. App.—Tyler 1979, no writ) (court abused discretion by refusing to reopen, after letter announcement of decision, for presentation of evidence of changed conditions that developed after parties rested). Dr. Klussmann’s testimony will address the specific issues laid out in the motion to re-open, and in the Court’s order granting that motion. Because his testimony will focus on legislative changes from May of 2013 it is necessarily evidence that was unavailable at the time of the original trial.

In the June 19 order, the Court required the parties to negotiate and enter into a scheduling order governing the hearing upon re-opening. This new scheduling order was necessary precisely because the evidentiary hearing is focused on evidence that was not available at the time of the original trial. Therefore, it is illogical to suggest that the scheduling order for the original trial, which governed the discovery of evidence that was available at the time of the original trial, would govern the hearing on re-opening. There is a reason that the new scheduling order had a date for designating fact witnesses well in advance of the new hearing: the fact witnesses with the most knowledge of the legislative changes are not necessarily the same as those with the most knowledge of the issues in the original trial and the parties needed time, and were allowed more than three months, to develop evidence and prepare for depositions of those witnesses.

It is true that Dr. Klussmann’s connection to the case is through his position as Superintendent of Spring Branch ISD. It is through that position that Dr. Klussmann followed the 2013 legislative session and gained knowledge of the 2013 legislative changes and their

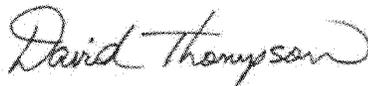
impact on his district. Allowing the parties to fully develop the record regarding the 2013 changes means allowing them to call the witnesses with the most knowledge of these changes. *See In re A.F.*, 895 S.W.2d 481, 484 (Tex. App.—Austin 1995, no writ) (the trial court’s discretion to reopen the evidence under Rule 270 “should be liberally exercised in the interest of permitting both sides to fully develop the case in the interest of justice”). Not all superintendents are equally involved in the legislative process. It would be unjust to limit the plaintiffs to superintendent fact witnesses based on the focus district designations from June of 2012, as neither the FBISD Plaintiffs nor any other party could have anticipated in June of 2012 that the current hearing on re-opening would even be happening, much less which superintendents or other fact witnesses would have the most knowledge of the 2013 legislative changes.

**III.**  
**Prayer**

For the reasons state above, the FBISD Plaintiffs’ respectfully request that the Court deny Defendants’ Motion to Strike Superintendent of Spring Branch ISD from Fort Bend Plaintiffs’ Witness List.

Respectfully submitted,

THOMPSON & HORTON LLP



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document has been forwarded on this 5th day of November, 2013 to counsel of record in accordance with Rule 21a of the Texas Rules of Civil Procedure and the Parties' Rule 11 Agreement, as follows:



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