



## Contents

[Case of the Month](#)  
[From the Courts and the Attorney General](#)  
[Recent Regulations and Guidance](#)  
[In the News](#)



## Case of the Month

### Fifth Circuit clarified standard for First Amendment unbridled discretion claims.

The Texas State Preservation Board, chaired by Governor Greg Abbott, approves applications by private citizens to display exhibits at the Texas State Capitol. Exhibits must serve a public purpose. In 2015, Freedom From Religion Foundation, Inc. (FFRF), a nonprofit advocacy group received approval to display a Bill of Rights nativity exhibit for six days. The exhibit featured the Founding Fathers and the Statue of Liberty around a manger holding the Bill of Rights. On the fifth day of the display, Governor Abbott ordered its immediate removal describing it as inappropriate and “tasteless sarcasm.” The following year, the board denied FFRF’s application to display the exhibit, explaining that it did not serve a public purpose and mocked Christianity.

FFRF sued Governor Abbott and the board’s executive director alleging, among other claims, that the board’s public purpose requirement constituted an unconstitutional grant of unbridled discretion under the [First Amendment](#). The district court found that the board violated FFRF’s First Amendment rights to free speech by engaging in viewpoint discrimination. However, the court dismissed FFRF’s unbridled discretion claim, reasoning that the board’s public purpose requirement provided a reasonable framework to accept or deny applications and did not grant the board overly broad approval discretion. FFRF appealed this dismissal and Governor Abbott appealed the First Amendment violation finding.

The Fifth Circuit Court of Appeals held that restraints on speech in limited public forums must be reasonable, viewpoint neutral, and contain definite standards to safeguard against viewpoint exclusion. The Fifth Circuit found that the district court erred by only considering the reasonableness of the board’s public purpose requirement. The Fifth Circuit then clarified the appropriate application of the unbridled discretion standard in limited public forums stating that, “prior restraints on speech in limited public forums must contain neutral criteria sufficient to prevent (1) censorship that is unreasonable in light of the purpose served by the forum and (2) viewpoint-based censorship.” The court remanded the case for the application of the clarified unbridled discretion standard. [Freedom from Religion Found. v. Abbott](#), 955 F.3d 417 (5th Cir. Apr. 3, 2020).

### Why is This Case Significant?

Community colleges should ensure that restrictions on expression contain criteria that are both reasonable and viewpoint neutral. Restrictions that are overly broad and lack definite standards may subject a college to First Amendment claims.

### Highlights

[Update 38](#) is now available.

New [Title IX Regulations and State Law Side-by-Side](#) available.

COVID-19 resources available on [TASB College eLaw](#) and the [TASB COVID-19 Website](#).

### Resources

[Texas Higher Education Coordinating Board](#)  
[Texas Legislature](#)  
[Texas Statutes](#)  
[Texas Attorney General](#)  
[U.S. Department of Education](#)



## From the Courts and the Attorney General

### Personnel

Former drilling company employee's initial unverified intake questionnaire filed with the Equal Employment Opportunity Commission constituted a charge of discrimination although his later corrected complaint was filed outside of the filing period. The court related the later complaint back to the date of the initial questionnaire. [Equal Emp't Opportunity Comm'n v. Vantage Energy Servs., Inc.](#), 954 F.3d 749 (5th Cir. Apr. 3, 2020).

Former university employee's allegation against her supervisor of an isolated incident of sexual harassment was not actionable under [Title VII of the Civil Rights Act of 1964](#) because it was neither severe nor pervasive. The court also dismissed the employee's associated Title VII race discrimination claim, finding that the sexual harassment incident was not racially motivated despite previous race discrimination complaints against her supervisor. [Johnson v. Bd. of Supvs. La. State Univ. & Agric. & Mech. Coll.](#), No. 2:19-CV-12823, 2020 WL 1903997 (E.D. La. Apr. 17, 2020).

Former employee, terminated by a university due to performance concerns, failed to establish a prima facie case of age discrimination under the [Age Discrimination in Employment Act](#). The court held that the concerns expressed regarding his cognitive decline, the reassignment of his duties after his termination, and the stray remarks made by colleagues regarding generational differences did not constitute age discrimination. [Morse v. Bd. of Supvs. La. State Univ. Agric. & Mech. Coll.](#), No. 2:19-CV-9240, 2020 WL 2037192 (E.D. La. Apr. 28, 2020).

Former coach provided sufficient evidence of retaliatory discharge, including the close temporal proximity between reporting athletic association violations and his termination and the proffered reasons for his termination, to reverse the summary judgment granted to a community college on appeal. [Benjamin v. Bd.](#)

[of Trs. of Barton County Cmty. Coll.](#), No. 19-3048, 2020 WL 1970512 (10th Cir. Apr. 24, 2020).

### Students and Instruction

Former student failed to sufficiently allege a valid due course of law claim when he was academically dismissed without receiving a hearing. The court gave deference to the university to make academic decisions and held that the university's failure to follow its own standards did not amount to a violation of the student's due process rights. [Doe v. Univ. of N. Tex. Health Sci. Ctr.](#), No. 02-19-00321-CV, 2020 WL 1646750 (Tex. App.—Fort Worth Apr. 2, 2020, no pet. h.) (mem. op.).

Disabled students' claims of a lack of meaningful access to a community college's programs and services under [Title II of the Americans with Disabilities Act](#) and [Section 504 of the Rehabilitation Act](#) following the termination of a campus shuttle were sufficient to reverse the judgment granted to the college on appeal. [Guerra v. W. Los Angeles Coll.](#), No. 18-56236, 2020 WL 2086547 (9th Cir. Apr. 30, 2020).

### Community and Governmental Relations

The Texas Attorney General concluded that purely economic, non-physical damage caused by the COVID-19 disaster is not eligible for the temporary tax exemption for property damaged by a disaster. Tex. Att'y Gen. Op. No. [KP-299](#) (Apr. 13, 2020).

### Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings based on requests from Texas community colleges related to:

- Meeting minutes for specified meetings, two specified reports, and the

- information used to produce the two specified reports. Tex. Att’y Gen. [OR2020-10253](#) (Apr. 3, 2020);
- Information related to the bookstore management or virtual online bookstore or course material services. Tex. Att’y Gen. [OR2020-10431](#) (Apr. 7, 2020);
  - Vendors’ responses to a specified request for proposals. Tex. Att’y Gen. [OR2020-10540](#) (Apr. 8, 2020);
  - Information pertaining to a specified request for proposals, including vendor responses and contracts. Tex. Att’y Gen. [OR2020-10560](#) (Apr. 8, 2020);
  - A request for proposals. Tex. Att’y Gen. [OR2020-10655](#) (Apr. 9, 2020);
  - A winning bidder of a specified request for proposals. Tex. Att’y Gen. [OR2020-10637](#) (Apr. 9, 2020);
  - Bids and the resulting contract for the operation of a bookstore. Tex. Att’y Gen. [OR2020-10689](#) (Apr. 13, 2020);
  - Bid proposals and the winning contract for a specified request for proposals. Tex. Att’y Gen. [OR2020-10715](#) (Apr. 13, 2020);
  - Complaints filed against a named employee. Tex. Att’y Gen. [OR2020-10801](#) (Apr. 13, 2020);
  - Contracts with a specified law firm. Tex. Att’y Gen. [OR2020-10851](#) (Apr. 14, 2020);
  - A specified contract and for the related proposals. Tex. Att’y Gen. [OR2020-10870](#) (Apr. 14, 2020);
  - A specified contract for educational services. Tex. Att’y Gen. [OR2020-10944](#) (Apr. 15, 2020);
  - A completed compliance investigation that concluded that the complaint was unsubstantiated. Tex. Att’y Gen. [OR2020-11226](#) (Apr. 17, 2020);
  - A contract, cost and technical proposals, and evaluation documents relevant to a specified request for proposals. Tex. Att’y Gen. [OR2020-11504](#) (Apr. 23, 2020);
  - A particular category of contracts. Tex. Att’y Gen. [OR2020-11952](#) (Apr. 28, 2020);
  - Contracts between a college and an educational platform company. Tex. Att’y Gen. [OR2020-12031](#) (Apr. 28, 2020);
  - Purchasing records created during a specified time period. Tex. Att’y Gen. [OR2020-12187](#) (Apr. 29, 2020); and
  - Categories of information related to invoices and agreements between the college and particular law firms pertaining to particular litigation. Tex. Att’y Gen. [OR2020-12235](#) (Apr. 30, 2020).



## Recent Regulations and Guidance

The U.S. Department of Education amended [regulations](#) concerning Title IX of the Education Amendments Act of 1972 to include new definitions and changes to the procedures community colleges must follow to process Title IX complaints. Among other requirements, the regulations require an institution’s grievance process to provide for a live hearing and allow cross-examination by advisors. Colleges must update their policies to address

the new regulations by August 14, 2020. TASB Community College Services will issue a special policy update in July incorporating the new regulations into the Community College Policy Reference Manual and local policies.

The Texas Comptroller of Public Accounts amended definitions in the [regulations](#) addressing the Higher Education Savings Plan.

*Legal Update* is a publication of TASB Community College Services

The Comptroller amended [regulations](#) concerning the Texas Tomorrow Fund.



## In the News

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In response to the economic impact of COVID-19, the Texas Governor [issued](#) a [letter](#) directing state agencies and institutions of higher education, excluding community colleges, to reduce their budgets for the 2020-2021 biennium by five percent.

The Department of Education [updated guidance](#) on the Coronavirus Aid, Relief, and Economic Security (CARES) Act Higher Education Emergency Relief Fund.

The Texas Higher Education Coordinating Board, Greater Texas Foundation, and the Trellis Foundation [awarded](#) student aid grants to 57 institutions of higher education, including 29 community colleges.