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Case of the Month

Student failed to provide evidence to support her Title IX pre-assault and Section 504 and ADA keep safe claims, leaving her Section 504 and ADA failure-to-accommodate claims.

A.T., a student with Down Syndrome, enrolled in Texas A&M University's Aggie ACHIEVE program, a four-year certificate program for students with intellectual and developmental disabilities. Participants live on campus in dorms with mentors who provide support but not supervision. On several occasions, A.T.'s parents expressed concerns about the program students' safety and requested more supervision, but the requests were not addressed. The parents requested an accommodation plan under Section 504 of the Rehabilitation Act for A.T. that included someone to provide her more supervision to ensure her safety and lessen the potential she may be exploited, but the plan was never issued. A.T. was sexually assaulted on two occasions by other program participants her second year. A.T. and her parents (A.T.) sued Texas A&M for violations of [Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681](#), [Section 504 of the Rehabilitation Act, 29 U.S.C. § 794](#), and the [Americans with Disabilities Act \(ADA\), 42 U.S.C. chapter 126](#). The university filed a motion to dismiss.

A.T. alleged that the university was liable under Title IX because it created a heightened risk she would be assaulted that was known or obvious, referred to as a pre-assault claim. The district court disagreed, noting that the university had received no prior reports of sexual misconduct by Aggie ACHIEVE students, including the students who assaulted A.T., and therefore had no notice of such conduct prior to A.T.'s assaults. The parents also failed to provide facts to show the university had an official policy or custom that created a heightened risk, and the university had no history of ignoring or mishandling assault reports from program students. The court dismissed the Title IX claims.

A.T. claimed that the university failed to accommodate her and keep her safe in violation of Section 504 and the ADA. The court concluded A.T. alleged facts that established the university was aware of her disability and that her parents repeatedly asked for accommodations, but the university did not engage in the legally-required interactive process. Turning to her keep safe claims, the court acknowledged the Fifth Circuit Court of Appeals has not determined if individuals can bring a hostile environment claim under Section 504 or the ADA, though it has set out the necessary elements to plead such a claim. Even if such a claim was recognized, the parents did not allege facts showing the harassment experienced by A.T. prior to her assaults was sufficiently severe or pervasive to interfere with her education or that the university was deliberately indifferent to her sexual assaults. The court dismissed all but the failure-to-accommodate claims. [Doe v. Texas A&M Univ.](#), No. H-21-3728, 2022 WL 5250294 (S.D. Tex. Oct. 6, 2022) (mem.).

Why is This Case Significant?

This case provides clarity as to the application of the Title IX pre-assault and Section 504 and ADA keep safe theories of liability.

Highlights

Join us at the TACCA Conference at TASB on Jan. 26-27, 2023. Register [here!](#)

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

Business and Finance

Social media companies' U.S. Constitution [First Amendment](#) rights were not violated by restrictions imposed by the 87th Texas Legislature on content curation because censoring a user posts based on the user's viewpoints is not protected speech. [NetChoice v. Paxton](#), 49 F.4th 439 (5th Cir. Sept. 16, 2022).¹

Texas's restriction on a felon possessing a firearm does not violate the U.S. Constitution [Second Amendment](#), because individuals who commit crimes and violence may be excluded from the Second Amendment's protections. [United States v. Collette](#), No. MO:22-CR-00141-DC, 2022 WL 4476790 (W.D. Tex. Sept. 25, 2022) (mem.); [United States v. Charles](#), No. MO:22-CR-00154-DC, 2022 WL 4913900 (W.D. Tex. Oct. 3, 2022) (mem.).

Personnel

Jury's verdict in favor of a former community college president on her U.S. Constitution [Fourteenth Amendment](#) due process claim and state breach of contract claim was supported by the record. [Tercero v. Texas Southmost Coll. Dist.](#), No. 22-40004, 2022 WL 5101903 (5th Cir. Oct. 4, 2022) (per curiam).²

The U.S. Equal Employment Opportunity Commission's guidance [Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity](#) interpreting [Bostock v. Clayton Cnty.](#), 140 S. Ct. 1731 (2020) and a similar U.S. Department of Health and Human Services [Affordable Care Act guidance](#) are inconsistent with the case

because the case states employees are protected from discrimination in violation of [Title VII of the Civil Rights Act of 1964](#), 42 U.S.C. § 2000e-2, on the basis of their homosexual or transgender status but not their "correlated conduct." [Texas v. Equal Emp't Opportunity Comm.](#), No. 2:21-CV-194-Z, 2022 WL 4835346 (N.D. Tex. Oct. 1, 2022).

Former professor's claims that a community college's policies and directives constituted a prior restraint on his speech in violation of his [First Amendment](#) rights overcame dismissal because the college need not expressly forbid speech or require prior approval to speak for prior restraint to exist. [Phillips v. Collin Cmty. Coll. Dist.](#), No. 4:22-cv-184, 2022 WL 4477698 (E.D. Tex. Sept. 26, 2022) (mem.).

White instructor's claims a community college subjected her to racial discrimination and retaliation in violation of [Title VII](#) and the [Texas Commission on Human Rights Act](#) (TCHRA) survived dismissal because she provided evidence that she filed a complaint with the college addressing alleged pervasive practices involving racial preference and that her hours were subsequently reduced resulting in a loss of pay. [McClendon-Lemman v. Tarrant Cnty. Coll.](#), No. 4:21-cv-1338-P, 2022 WL 4396275 (N.D. Tex. Sept. 23, 2022).

Former professor did not provide sufficient evidence to overcome summary judgment on her claims a university violated the [TCHRA](#) by discriminating against her based on her disability, failing to remedy a hostile environment, failing to provide her reasonable accommodations, and retaliating against her for her discrimination complaints. [Lamar Univ. v.](#)

¹ This case was summarized in the [December 2021/January 2022](#) and [May 2022](#) editions of the Community College Services Legal Update.

² This case was summarized in the [December 2021/January 2022](#) and [March 2021](#) editions of the Community College Services Legal Update.

[Snook](#), No. 09-21-00143-CV 2022, 2022 WL 4546574 (Tex. App.—Beaumont Sept. 29, 2022, no pet. h.) (mem. op.).

Students and Instruction

The adoption in 2012 of the federal Deferred Action for Childhood Arrivals (DACA) program and its authorizing memorandum constituted substantive rulemaking, not the issuance of a policy statement, without notice and comment in violation of the [U.S. Administrative Procedure Act](#). [Texas v. U.S.](#), 50 F.4th 498 (5th Cir. Oct. 5, 2022).



Recent Regulations and Guidance

The Texas Behavioral Health Executive Council repealed and adopted regulations addressing the continuing education requirements applicable to [social workers](#) and [marriage and family therapists](#).

The Texas Board of Nursing amended [regulations](#) addressing the licensure of individuals with a criminal history, implementing statutory changes enacted by the 87th Texas Legislature.

The Texas Attorney General adopted [regulations](#) addressing the Address Confidentiality Program as part of a reorganization of the crime victim services provisions in response to statutory changes enacted by the 87th Texas Legislature.

The Texas Department of Family and Protective Services amended [regulations](#) addressing child abuse investigations, including investigations at child care centers.

The Texas Workforce Commission amended [regulations](#) addressing child care services, including provisions related to the Texas Rising

Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings³ based on requests from Texas community colleges related to:

- Information regarding a solicitation. Tex. Atty. Gen. Op. [2022-28488](#) (Sept. 16, 2022);
- A contract. Tex. Atty. Gen. Op. [2022-30784](#) (Oct. 6, 2022); and
- Specified security camera videos. Tex. Atty. Gen. Op. [2022-31392](#) (Oct. 12, 2022).

Star program, to implement statutory changes enacted by the 87th Texas Legislature.

The Texas Ethics Commission amended [regulations](#) addressing reporting thresholds applying to campaigns and lobbyists as part of the annual required adjustment tied to the Consumer Price Index.

The U.S. Congress amended [statutes](#) addressing Federal Direct Consolidation Loans to allow married individuals who received a joint consolidation loan to apply for separate consolidation loans.

The U.S. Department of Education updated [waivers and modifications of statutory and regulatory provisions](#) addressing federal financial aid that were issued in response to the COVID-19 pandemic.

The U.S. Environmental Protection Agency amended the [emission standards](#) for hazardous air pollutants from industrial, commercial, and institutional boilers and process heaters, including those used by institutions of higher education.

³ Open records letter rulings are limited to the particular records at issue and the facts as presented to the attorney general. These rulings must not be relied upon as a previous determination regarding any other records or any other circumstances.



In the News

The Texas Governor renewed the [disaster proclamation](#) issued for all counties in Texas due to the COVID-19 pandemic.

The Texas Higher Education Coordinating Board provided notice of the [opportunity to comment](#) on the proposed field of study curricula for political science, social work, and sociology.

The U.S. Department of Education (DOE) issued [guidance](#) reminding institutions of higher education that [Title IX](#) prohibits discrimination

on the basis of pregnancy and related conditions and stating prohibition applies to students who receive abortion services.

DOE issued grants to Coastal Bend College under the [Strengthening Institutions Program](#) to support services for low-income students and to Angelina College, College of the Mainland, San Jacinto College, Ranger College, Lone Star College, Northeast Texas Community College, and San Antonio College under the [Developing Hispanic-Serving Institutions Program](#).