



Contents

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



Case of the Month

Fifth Circuit concluded that a board member could not speak as a member of the public during a public comment period.

David Stratta, a member of the Brazos Valley Groundwater Conservation District (BVGCD) board of directors and local landowner, expressed concerns regarding the unequal application of BVGCD rules related to production limitations on wells. Stratta requested that the agenda for an upcoming board meeting include a discussion of this issue, but the board refused his request stating it could affect pending litigation. Stratta attended the board meeting and registered as a member of the public to participate in the public comment portion of the meeting. Stratta sought to ask the board to include the topic at its next meeting. However, the board prohibited Stratta from speaking during the public comment period. Stratta joined a fellow landowner's lawsuit against BVGCD and its board and alleged that the board violated his [First Amendment](#) right to free speech by prohibiting him from speaking as a member of the public during public comment. The board argued that, because he is a board member, Stratta's right to speak was regulated by the [Texas Open Meetings Act \(OMA\)](#) and moved to dismiss his claims. The lower court granted the board's motion finding that Stratta failed to show that the board's actions were objectively unreasonable in light of clearly established law. Stratta appealed.

The Fifth Circuit Court of Appeals examined the OMA notice exception provision, relied on by Stratta, that permits a board to respond to an inquiry from a member of the public regarding a topic for which notice has not been given by placing the topic on the agenda of a subsequent meeting. The Fifth Circuit acknowledged that the OMA is a constitutional restriction on First Amendment rights and stated that, if the OMA prohibited Stratta from speaking during the public comment period as a member of the public, then his First Amendment rights were not violated. The court also considered whether Stratta had the right to address the board as a member of the public. Although *member of the public* is not defined in Texas law, because the term is used in the OMA in conjunction with an identified group, "governmental body," the court interpreted the term to mean someone who does not belong to a governmental body. Since Stratta is a BVGCD board member, the court determined that Stratta does not have the same rights as a member of the public and may not circumvent the OMA notice requirements by speaking during public comment. The court affirmed the lower courts judgment dismissing Stratta's First Amendment claim. [Stratta v. Roe](#), 961 F.3d 340 (5th Cir. May 29, 2020).

Why is This Case Significant?

A community college board member's speech during a board meeting is governed by the OMA. A board member is not considered a member of the public at meetings of a board of which they are a member.

Highlights

[Update 39](#) is now available.

New on eLaw:

[Incorporating the New Title IX Regulations into Policy](#)

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

COVID-19 resources are 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 professor, denied tenure for failing to adequately publish, alleged race and national origin discrimination under [Title VII of the Civil Rights Act of 1964](#) and [Family and Medical Leave Act \(FMLA\)](#) retaliation. The court dismissed her Title VII claims as time barred because she failed to timely file an Equal Employment Opportunity (EEOC) charge and her allegations failed to meet the pleading standard. The court also dismissed her FMLA retaliation claim because she was not eligible to receive FMLA leave at the time she claimed to be denied leave. [Banerjee v. Univ. of Tennessee](#), No. 19-6009, 2020 WL 3485818 (6th Cir. June 26, 2020).

Community and Governmental Relations

Community college was not considered a public school for purposes of the [Texas Public Information Act's](#) exception to disclosure applicable to a public school employee's academic transcript. [Del Mar Coll. Dist. v. Paxton](#), No. 03-19-00094-CV, 2020 WL 3582886 (Tex. App.—Austin July 1, 2020, no pet. h.).

Provision of a state's private school tuition assistance program that prohibited the use of the assistance at religious schools violated the Free Exercise Clause of the [First Amendment](#). [Espinoza v. Montana Dep't of Revenue](#), 140 S. Ct. 2246 (June 30, 2020).

Students and Instruction

The Texas Attorney General concluded that Rider 52 to the Texas Higher Education Coordinating Board's appropriation in the General Appropriations Act that provides tuition assistance to students who enroll in a Teacher Education Program in Bilingual Education or comparable programs does not permit institutions of higher education to use the passage of the exams comparable to the State Board for Educator Certification Bilingual Target Language Proficiency Test, or the passage of a practice exam of that test comparable programs to meet the grant award requirement for students to receive tuition assistance. Tex. Att'y Gen. Op. No. [KP-320](#) (July 14, 2020).

Open Records Letter Rulings

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

- Information pertaining to a specified request for proposals. Tex. Att'y Gen. [OR2020-16801](#) (July 1, 2020); and
- Information and documentation pertaining to an investigation into and the termination of an employee. Tex. Att'y Gen. [OR2020-16949](#) (July 6, 2020).



Recent Regulations and Guidance

The Texas Higher Education Coordinating Board repealed [regulations](#) concerning the Work-Study Student Mentorship Program and incorporated the regulations into rules addressing the Texas College Work-Study Program.

The Texas Workforce Commission amended [regulations](#) concerning age discrimination in job training programs in response to statutory changes made during the 86th Texas Legislative Session.

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The Texas Real Estate Commission amended [regulations](#) concerning requirements for non-elective continuing education courses.



In the News

The Texas Higher Education Coordinating Board updated its [Reopening of Campus Operations](#) guidance.

The Texas governor [announced](#) the State will allocate an additional \$118 million in [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) funding to institutions of higher education.

The Texas Comptroller released a [study](#) on the economic impact community college have on the state's economy.

The Department of Labor updated its [Families First Coronavirus Act: Questions and Answers](#) guidance.

The Texas Governor issued a [proclamation](#) suspending provisions of the Texas Election Code to expand the early voting period for the November 3, 2020 elections