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Case of the Month

A university can be liable under Title IX for student-on-student harassment that occurs off-campus.

Mackenzie Brown, a student at the University of Arizona, alleged she was repeatedly and violently assaulted by her classmate, Orlando Bradford, in an off-campus house where he lived with other football players. Brown sued the university, alleging the university knew of Bradford's previous assaults on two other female students and that the university's failed response deprived her of the full benefits of her education and an appropriate response would have prevented Bradford's assaults towards her, in violation of [Title IX of the Education Amendments of 1972](#), 20 U.S.C. § 1681.

Brown argued that because the university knew about Bradford's previous assaults, the university had substantial control over the previous assaults and thus had control over Bradford's subsequent assaults against her. The district court granted summary judgment to the university, finding no facts to support it had substantial control over the context in which Brown was assaulted because there were no facts to support the abuse occurred on campus or in any setting under its control. Brown appealed, arguing that because the university had extensive authority over Bradford, including control over whether he could live off campus, the university had substantial control over the context in which Brown was assaulted.

The Ninth Circuit Court of Appeals determined that harassment in a setting off-campus where the university has substantial control, the university may be held liable for deliberate indifference even if the harassment takes place off the physical property of the university. The court noted the university had disciplinary control over Bradford and the university had control over the off-campus housing where Bradford lived because athletes could only live off-campus with permission from the coaches. The court also determined that Bradford's coaches knew about his previous assaults and failed to properly investigate or enforce university policy regarding student-on-student assaults, which the court concluded was clearly unreasonable and demonstrated a deliberate indifference to the danger Bradford posed to female students. The court reversed summary judgment in favor of the university and remanded to the lower court for further proceedings. [Brown v. Ariz.](#), No. 20-15568, 82 F. 4th 863 (Sept. 25, 2023) (en banc).

Why is This Case Significant?

While this case addresses a Ninth Circuit case, it expands the scope of liability under Title IX. Universities may be held liable for student-on-student sexual harassment that occurs off-campus, even if the university did not directly cause the harassment. This expansion of liability may be addressed in upcoming amendments to Title IX regulations issued by the U.S. Department of Education.

Highlights

[Texas Open Meetings Act for Community Colleges](#) online course available in the TASB store

New on eLaw:
[Implementing Senate Bill 17](#)

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

Governance

The Texas Attorney General concluded that executive orders issued by the governor, such as those issued during the COVID-19 pandemic, have the force and effect of law, which would likely lead a court to conclude that these executive orders issued pursuant to the governor's emergency powers constitute are "laws" for purposes of [Texas Penal Code section 1.07\(a\)\(30\)](#). Tex. Att'y Gen. Op. No. [AC-0005](#) (Sept. 14, 2023).

Personnel

Professor who alleged sufficient facts to overcome summary judgment on his claim his department chair retaliated against him in violation of [Title VII of the Civil Rights Act of 1964](#) for publishing a report describing pay disparities between minority professors and other professors by filing complaints against the claimant, failing to renew his research scholarship, and giving a teaching award to a colleague instead of him, among other allegations. [Martinez v. Univ. of Tex.](#), No. 23-50036, 2023 WL 6518165 (5th Cir. Oct. 5, 2023).

Restaurant employer alleged sufficient facts to overcome judgment in favor of former employee's claim the employer violated the Fair Labor Standards Act because employers generally do not have to countersign an arbitration agreement to be enforceable. [Flores v. BJ's Restaurant Ops. Co.](#), No. 23-50038 (5th Cir. Oct. 6, 2023) (per curiam).

Former employee failed to provide sufficient evidence to overcome dismissal on his claim his employer violated the [Americans with Disabilities Act](#) by enforcing a COVID-19 policy which required preventative measures including

masking, social distancing, and temperature checks that he refused to comply with. [Chancey v. BASE](#), No. 3:22-CV-34 (5th Cir. Oct. 10, 2023).

Former professor alleged sufficient facts to overcome summary judgment on his claim a university discriminated against his race, color, and national origin and retaliated against him in violation of [Title VII](#). [Narayanan v. Midwestern State Univ.](#), No. 22-11140, 2023 WL 6621676 (5th Cir. Oct. 11, 2023).¹

Students and Instruction

Student organization failed to allege sufficient facts to overcome dismissal of their claim a university president cancelled a drag show fundraiser in violation of the U.S. Constitution [First Amendment](#). [Spectrum WT v. Wendler](#), No. 2:23-CV-048-Z, 2023 WL 6166779 (N.D. Tex. Sept. 21, 2023) (mem. op.).

Student failed to provide sufficient evidence to overcome dismissal on claims a university violated the [Americans with Disabilities Act](#) and [Rehabilitation Act Section 504](#) when it disciplined her for failing to follow procedures when cutting into a cadaver.. [Hodges v. Univ. of Tex. Southwestern Med. Sch.](#), No. 3:22-CV-2583-K, 2023 WL 6389426, (N.D. Tex. Sept. 29, 2023) (mem. op.).

Student did not provide sufficient evidence to overcome dismissal on claims the college was negligent and waived its immunity under the [Texas Tort Claims Act](#) when the student was injured from a college employee spraying water from a fire department truck during a college activity. [Rezac v. Navarro Coll.](#), No. 10-21-00070-CV, 2023 WL 6151710 (Tex. App.—Waco Sept. 21, 2023, no pet. h.).

¹ This case was previously summarized in the [November 2022](#) TASB Community College Services Legal Update.

Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings² based on requests from Texas community colleges related to:

- The planning and construction of a target range. Tex. Att’y Gen. [OR2023-32482](#) (Sept. 21, 2023);
- Statements made during a specified investigation. Tex. Att’y Gen. [OR2023-32983](#) (Sept. 27, 2023);
- Information pertaining to a request for proposals. Tex. Att’y Gen. [OR2023-33530](#) (Sept. 29, 2023); and
- A request for a specified police report. Tex. Att’y Gen. [OR2023-34157](#) (Oct. 4, 2023).



Recent Regulations and Guidance

The U.S. Department of Education, Office of Postsecondary Education, released [final regulations](#) for gainful employment and financial value transparency, which aim to provide more information to students regarding postgraduate employment and financial risks under federal financial aid programs. These rules go into effect July 1, 2024.

The U.S. DOE released [final regulations](#) which enhance higher education institution oversight and accountability, including financial aid programs and agreements. These rules go into effect July 1, 2024.

The Texas Higher Education Coordinating Board (THECB) announced its intention to engage in [negotiated rulemaking](#) to update rules defining *dual credit* and *dual enrollment* in response to legislation enacted by the 88th Texas legislature,

proposing that representatives from Alamo Colleges, Central Texas College, Del Mar College, El Paso Community College, Grayson College, North Central Texas College, San Jacinto College, and South Plains College serve on the committee.

The Texas State Board of Public Accountancy [amended](#) regulations reducing the semester hours a college must offer to satisfy the TSBPA’s educational requirements for academic accounting courses from 30 semester hours to 27 semester hours.

The Texas Health and Human Services Commission [amended](#) regulations regarding the provisional licensing of child-care administrators.



Policy Spotlight

During the 88th Texas Legislative Session, several bills were passed that have resulted in TASB Community College Services recommending changes to local policies. In this month’s Policy Spotlight, we are going to highlight a few of those.

Leaves and Absences

During the previous legislative session, SB 1359 provided mental health leave for college police officers. In this session, HB 1486 provides those same mental health leave benefits to telecommunicators. For those

² Open record 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.

colleges who are localized with TASB, we will adjust the Mental Health Leave section to account for telecommunicators in DEC(LOCAL) as part of Update 46.

HB 471 requires a community college to provide paid leave to police officers and emergency medical services (EMS) personnel who experience an illness or injury related to their line of duty. The bill defines EMS personnel as an emergency care attendant, emergency medical technician (EMT), advanced EMT, EMT - paramedic, or a licensed paramedic, who is a paid employee of a community college.

Following the required leave of absence with full pay for a period commensurate with the nature of the illness or injury, as required by law, the college has a couple of options regarding additional leave for line of duty illness or injury. We sent an email to each policy

contact at localized colleges to answer a few questions related to those options so that we can provide accurate language at DEC(LOCAL) as part of Update 46.

Research Security

SB 1565 requires a community college board to establish a local policy promoting research security while mitigating foreign espionage and interference risks. A new local policy on this subject will be recommended in this update. The bill also requires the board to designate a research security officer. As part of Update 46 for localized colleges, we will provide a new recommended policy covering this subject. We also sent an email to each localized college's policy contact asking for the person who will be serving as the research officer.



In the News

The U.S. House of Representatives [elected](#) a new Speaker, Representative Mike Johnson of Louisiana.

The U.S. Equal Employment Opportunity Commission invited public comment on or before November 1, 2023, regarding its [proposed enforcement guidance](#) on harassment in the workplace under statutes enforced by the EEOC.

The Texas Governor announced a [third special session](#) of the 88th Texas Legislature beginning October 9, identifying educational freedom, border security, public safety, and COVID-19 restrictions as agenda items.