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## Case of the Month

### Faculty may assert First Amendment claims when administrators take action to quell academic controversies.

Administrators at the University of North Texas removed a music theory professor from his position as editor of a scholarly journal after a symposium was published responding to assertions that music theory, as an academic discipline, was based on a “white racial framework.” The symposium included a paper by the professor that raised concerns of anti-Semitism in the racism critique, and further expressed sentiments that his colleagues and students viewed as racist. A firestorm of public opinion ensued in the form of student protests and music faculty expressions of disapproval. The professor defended the symposium as showcasing diverse viewpoints. After conducting an internal review, a provost required the professor to propose changes to the journal’s management to his academic dean and department chair. Ultimately, the administrators suspended the journal, disregarding options that continued the professor as an editor of the journal in a lesser role.

The professor sued members of the board in their official capacity for violation of his [U.S. Constitution First Amendment](#) rights and other defendants for defamation. The regents claimed they could not be sued, as they were not involved in the administrative decision-making process, but their role in governance provides the basis for suit. Administrators’ actions were authorized by “policies” of Board members, “who maintain and delegate the power to govern the university.”

The professor’s claims were properly characterized as a violation of the First Amendment by either direct suppression of speech or retaliation by in the form of adverse employment action following protected speech. The professor’s removal from the journal qualifies as an adverse employment action forming a basis for retaliation and was causally connected to the publication of the symposium. For the alternative suppression of speech claim, the test balancing the professor’s and the university’s interest weighed in favor of the professor; therefore, the motion to dismiss was denied. [Jackson v. Wright](#), No. 4:21-CV-00033, 2022 WL 179277 (E.D. Tex. Jan. 18, 2022) (mem.).

### Why is This Case Significant?

First Amendment concerns are embedded in academic debates and controversies, and administrators’ decisions when resolving conflicts may give rise to these claims. A college may want to seek guidance from local counsel when changing terms of faculty employment in this context.

### Highlights

Welcome new staff attorney  
[Amy Wright](#)

### 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

#### [Texas Government Code chapter 2271](#)

requirement that government contracts include a verification that the contractor will not boycott Israel violated the contractor's [First Amendment](#) free speech rights, so the court enjoined the city and state from including the clause in the contract. [A & R Eng'g & Testing v. City of Houston](#), No. 4:21-CV-03577, 2022 WL 267880 (S.D. Tex. Jan. 28, 2022).

Poll watcher who challenged the legality of votes and other procedural matters in a community college bond election failed to timely provide notice of appeal of the trial court's ruling in favor of the chair of the college's board of trustees. [Texas Election Code section 231.009](#) requires all appeals challenging elections on a measure, including bond elections, to be expedited. [Launius v. Flores](#), No. 05-21-00210-CV, 2022 WL 292265 (Tex. App.—Dallas Feb. 1, 2022, no pet. h.).

### Personnel

University may breach its fiduciary duty under the [Employee Retirement Income Security Act](#) (ERISA) by offering funds in an ERISA plan that are imprudent, even if plan participants have a choice among a multitude of funds for their investments. [Hughes v. Northwestern Univ.](#), 142 S. Ct. 737 (Jan. 24, 2022).

Former medical resident provided sufficient evidence to overcome summary judgment on her [Texas Commission on Human Rights Act](#) (TCHRA) disability discrimination claim because her morbid obesity may be "regarded as" a disability under the TCHRA. [Tex. Tech Univ. Health Sci. Ctr. v. Niehay](#), No. 08-19-

00201-CV, 2022 WL 289505 (Tex. App.—El Paso Jan. 31, 2022, no pet. h.) (per curiam) (mem. op.).

### Students and Instruction

U.S. Supreme Court granted *certiorari* in companion cases that challenge use of diversity in college admissions decisions. [Students for Fair Admissions v. Univ. of N.C.](#), 142 S. Ct. 896 (Jan. 24, 2022); [Students for Fair Admissions v. Harvard Coll.](#), 142 S. Ct. 895 (Jan. 24, 2022).<sup>1</sup>

University's award of summary judgment on a [Title IX](#) claim was upheld because the student-on-student physical assault at issue occurred in the male student's private off-campus residence, a context in which the university lacked substantial control. [Brown v. Univ. of Ariz.](#), 23 F.4th 1173 (9th Cir. Jan. 25, 2022).

Non-party individual's motion to prevent a university from disclosing protected student information under the [Family Educational Rights and Privacy Act](#) (FERPA) in discovery proceedings was refused because the disclosure was made to comply with a judicial order and the information was subject to a protective order. [Doe 1 v. Baylor Univ.](#), No. 6:16-CV-173-RP, 2022 WL 180154 (W.D. Tex. Jan. 20, 2022).

### Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings<sup>2</sup> based on requests from Texas community colleges related to:

- Information regarding a specified request for proposals. Tex. Att'y Gen. [OR2022-01339](#) (Jan. 14, 2022), [OR2022-01569](#) (Jan. 20, 2022), [OR2022-04024](#) (Feb. 10, 2022);

<sup>1</sup> This case was summarized in the [November 2020](#) Community College Services *Legal Update*.

<sup>2</sup> 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.

- Correspondence involving a trustee's insurance coverage, insurance policies for trustees, and specified payment records. Tex. Att'y Gen. [OR2022-02586](#) (Jan. 28, 2022);
- A specified grievance. Tex. Att'y Gen. [OR2022-02611](#) (Jan. 28, 2022);
- Information about funds the college paid a specified consulting agency. Tex. Att'y Gen. [OR2022-03298](#) (Feb. 8, 2022);
- Information pertaining to a specified entity, including all proposals responsive to a bid solicitation. Tex. Att'y Gen. [OR2022-03595](#) (Feb. 8, 2022);
- A specified incident report. Tex. Att'y Gen. [OR2022-03566](#) (Feb. 8, 2022);
- Information regarding a specified competitive bid process. Tex. Att'y Gen. [OR2022-03861](#) (Feb. 10, 2022);
- Information regarding a specified motor vehicle accident involving the requestor. Tex. Att'y Gen. [OR2022-04292](#) (Feb. 11, 2022);



## Recent Regulations and Guidance

The Texas Higher Education Coordinating Board amended a [regulation](#) addressing regional council approval of off-campus courses and programs in response to statutory changes made during the 87th Legislative Session.

The Texas State Board of Public Accountancy amended [regulations](#) addressing the contents and provision of accounting courses required to qualify for the Uniform Certified Public Accountant Examination.

The Texas Department of Information Resources (DIR) amended [regulations](#) addressing information security control standards.

DIR amended [regulations](#) addressing the commodity items purchasing program.

The U.S. Department of Labor adjusted the [monetary penalties](#) it assesses or enforces under the Fair Labor Standards Act and other laws consistent with the federal Inflation Adjustment Act.



## In the News

The U.S. Department of Education's Office of Civil Rights circulated drafts of [proposed Title IX regulations](#) to the Office of Management and Budget and Department of Justice for internal review on February 17, 2022. The agency [announced](#) previously that the proposed regulations will be published for public comment in April 2022.

The Texas Comptroller's office recently released [A Field Guide to the Taxes of Tex.](#), a periodic report providing an overview of Texas' major state taxes.

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