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Case of the Month

The U.S. Constitution First Amendment protects academic speech, but a university may balance that protection with its interest in making hiring decisions.

John Heim, an adjunct professor of economics at the State University of New York at Albany, was a proponent of Keynesian economics, an approach that his colleagues considered outdated. Heim alleged he was denied three full-time opportunities due to his views, two of which were tenure track. Heim filed a lawsuit alleging various claims which were eventually reduced to a U.S. Constitution [First Amendment](#) retaliation claim against two department professors with hiring authority. The professors filed a motion for summary judgment alleging Heim had not produced enough evidence of his claim.

The district court granted the professors' motion, holding that the First Amendment did not protect Heim's academic speech from adverse action by the university because his academic research and writing were a part of a public university professor's duties. The court applied the U.S. Supreme Court's ruling in [Garcetti v. Ceballos](#), 126 S. Ct. 1951 (2006), that public employees have no First Amendment protections when speaking pursuant to their official duties. The district court alternatively applied the U.S. Supreme Court's ruling in [Pickering v. Board of Education](#), 88 S. Ct. 1731 (1968), which balanced the interest of the employee in speaking on matters of public concern against the interests of the government as an employer. The district court found Heim's research and writing did not involve a matter of public concern because his works were intended for a narrow academic audience, therefore his speech was unprotected and could not form the basis of a retaliation claim. Heim appealed.

The Second Circuit Court of Appeals found that Heim's colleagues terminated him because of his views but declined to apply [Garcetti](#) to a professor's scholarship and research. Professors are expected to speak freely using their professional expertise on their academic disciplines. Applying the [Pickering](#) framework, the Second Circuit determined Heim's speech was a matter of public concern because his research served the public purpose of contributing to academic debate. However, Heim's claim failed because the university's interest in deciding what academic perspectives to prioritize outweighed Heim's speech as a matter of public concern and his rights to free speech. The lower court's judgment was affirmed. [Heim v. Daniel](#), No. 22-1135-cv, 2023 WL 5597837 (9th Cir. Aug. 30, 2023).

Why is This Case Significant?

The Second Circuit, in a decision which is not binding in Texas but is instructive, extended First Amendment protections to faculty, preserving academic freedom for faculty but also provided for public universities to have broad discretion to consider that speech in hiring and tenure decisions.

Highlights

[2023-24 HR Services Community College Salary Survey](#) continues through October 5th.

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

Professor who alleged sufficient facts to overcome summary judgment on his claim a university board of regents retaliated against him in violation of the U.S. Constitution [First Amendment](#) by removing him from a journal following student and faculty complaints about an article he published. [Jackson v. Wright](#), No. 22-40059, 2023 WL 5992750 (5th Cir. Sept. 15, 2023).¹

Former professor failed to provide sufficient evidence to overcome summary judgment on her claims that a university violated her due process rights under the [Texas Constitution](#) and [U.S. Constitution](#) by depriving her of teaching assignments following an investigation into a student complaint against her. [Casper v. Tex. Women's Univ.](#), No. 02-22-00345-CV, 2023 WL 5617129 (Tex. App.—Ft. Worth Aug. 31, 2023) (mem. op.).

Former professor failed to provide sufficient evidence to overcome dismissal of her claim that a university retaliated against her in violation of the [Texas Commission on Human Rights Act](#) by terminating her following a [Family Medical Leave](#) absence and the filing of an Equal Employment Opportunity Commission complaint. [Univ. of Houston v. Sheppard](#), No. 14-22-00453, 2023 WL 5623316 (Tex. App.—Houston [14th. Dist.] Aug. 31, 2023) (mem. op.).

Students and Instruction

Idaho's categorical ban on the participation of transgender women and girls in women's student athletics likely violates the Equal Protection Clause of the U.S. Constitution [Fourteenth Amendment](#) and the statute was

preliminarily enjoined. [Hecox v. Little](#), No. 20-35815, 2023 WL 5283127 (9th Cir. Aug. 17, 2023).

Student who was dismissed by a university following a sexual assault investigation failed to provide sufficient evidence to overcome dismissal of his claims that the university's process? violated [Title IX of the Education Amendments of 1972](#) and the Due Process Clause of the [Fourteenth Amendment](#). [Doe v. Univ. of Iowa](#), No. 21-3340, 2023 WL 5967344 (8th Cir. Sept. 14, 2023).

The Final Rule on the federal [Deferred Action for Childhood Arrivals \(DACA\)](#) program was unconstitutional because it incorporated a memorandum which had previously been deemed rulemaking in violation of the [U.S. Administrative Procedure Act](#). [Tex. v. U.S.](#), No. 1:18-CV-00068, 2023 WL 5951196 (S.D. Tex. Sept. 13, 2023).²

Open Records Letter Rulings

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

- A specified request for proposals. Tex. Att'y Gen. [OR2023-28013](#);
- A request for communications involving a named individual and twelve specified e-mail addresses. Tex. Att'y Gen. [OR2023-28439](#);
- Categories of information pertaining to a stated request for proposals. Tex. Att'y Gen. [OR2023-28440](#); and

¹ This case was summarized in the [February 2022 Legal Update](#).

² This case was summarized in the [October 2022 Legal Update](#).

³ 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.

- Certain letters sent to a college by a specified organization. Tex. Att'y Gen [OR2023-28534](#).



Recent Regulations and Guidance

The Texas Higher Education Coordinating Board (THECB) adopted [emergency rules](#) in response to statutory changes made by House Bill 8 during the 88th Legislative Session repealing provisions relating to the Community and Technical Colleges Formula Advisory Committee and replacing them with new language establishing the Standing Advisory Committee for Public Junior Colleges to reflect functions moving to a different committee.

THECB adopted [emergency rules](#) repealing rules concerning the certification of community colleges as eligible to receive state appropriations, in response to statutory changes made by House Bill 8 during the 88th Legislative Session, and will replace those rules with a new certification process.

THECB adopted [emergency rules](#) regarding funding of baccalaureate degree programs at community colleges which will be incorporated in future new rules in response to statutory changes made by House Bill 8 during the 88th Legislative Session.

THECB adopted [emergency rules](#) in response to statutory changes made by House Bill 8 during the 88th Legislative Session repealing certain provisions relating to community college financial reporting which will be replaced with more specific and clarifying language.

THECB adopted [regulations](#) regarding a framework to offer College Connect Courses through optional dual credit or dual enrollment programs.

The Texas Commission on Fire Protection amended [regulations](#) regarding approval for new or revised curricula by the curriculum and testing committee.

The Texas Real Estate Commission adopted [emergency regulations](#) on an emergency basis regarding the seller's disclosure notice, in response to statutory changes made during the 88th Legislative Session.

The Texas Ethics Commission amended [regulations](#) to require candidates, officeholders, or political committees to report certain virtual currency contributions.



Policy Spotlight

November Election and Local Policy BBB

We recently posted [Deadlines for November 2023 Community College Elections](#), a memo that provides important dates and deadlines applicable to community colleges preparing for the November 7, 2023, trustee election.

During Update 44, we made recommended revisions to local policy BBB, which covers board elections. We suggested more information be added to this local policy,

including a more precise election day for the college as well as the term years and election schedules for each board member election. In addition, the policy includes the position, place, or district number that is tied to each board member. If you have not yet brought this updated version of BBB(LOCAL) to your board for adoption, we encourage you to do so ASAP.

For additional information regarding elections, visit TASB College eLaw, [Elections and Tax](#), or contact the college's local counsel, the [Texas Secretary of State Elections Division \(Elections](#)

Legal Update is a publication of TASB Community College Services

[Division](#)), or TASB Community College Services.



In the News

The U.S. Department of Labor invited public comment on or before November 5, 2023, regarding its [proposed amendments](#) to regulations under the [Fair Labor Standards Act](#) for exemptions from minimum wage and overtime pay requirements for certain employees.

The Texas Workforce Commission awarded [Jobs and Education for Texans \(JET\) grants](#) to Alamo Colleges, Amarillo College, Brazosport College, Houston Community College, Kilgore College, Lee College, Paris Junior College, Ranger College, Vernon College, and Western Texas College to purchase and install equipment for career and technical education programs.

Dallas College was awarded a 2023 [International Economic Development Council \(IEDC\) Excellence in Economic Development Gold Award](#) for supporting economic opportunity and growth in the local community.