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Case of the Month

University may require out-of-state students to pay higher tuition even though it charges in-state tuition to resident students without lawful status.

Young Conservatives of Texas Foundation, a student association, sued the University of North Texas in federal court arguing that a Texas statute governing university tuition rates, [Texas Education Code section 54.051\(d\)](#), violated a [1996 federal immigration statute](#), which prohibits a non-citizen who is not lawfully in the United States from receiving a postsecondary education benefit based on residence unless U.S. citizens have the same benefit, regardless of whether they are residents, by allowing Texas residents without lawful status to pay in-state tuition.

The district court analyzed the Texas statute and federal statute and determined the federal statute both expressly and impliedly preempted the Texas statute because non-U.S. citizens without legal status who establish residency in Texas receive the postsecondary education benefit of in-state tuition while denying that benefit to U.S. citizens who are not Texas residents. The district court declared the Texas statute invalid and permanently enjoined the university's administrators from applying the statute. The university appealed.

The Fifth Circuit Court of Appeals considered whether the Texas statute was preempted by federal law. The court reviewed the text and plain meaning of the statute and determined there was no conflict between the statutes. The court stated that federal law only prohibits states from granting certain postsecondary education benefits to non-U.S. citizens without legal status but does not prohibit them from denying those benefits to U.S. citizens. The Texas statute only sets tuition rates and imposed non-resident tuition for any person who did not qualify for Texas residency, and it did not offer a public benefit to non-U.S. citizens without legal status. Therefore, the court determined there was no conflict with the federal immigration statute. The court reversed the lower court's judgment and vacated the permanent injunction. [Young Conservatives of Tex. Found. v. Smatresk](#), No. 22-40225, 2023 WL 4419365 (5th Cir. July 10, 2023).¹

Why is This Case Significant?

The Fifth Circuit's ruling allows Texas universities to maintain the status quo regarding tuition policies.

¹ This case was previously featured in the [April 2022](#) Community College Services Legal Update.

Highlights

[2023-24 HR Services Community College Salary Survey](#) launches September 7th.

[The 2023 TASB/TACCA Legislative Summary for Community Colleges and Their Attorneys](#) book is now available in the TASB store

New on eLaw:
[Deadlines for November 2023 Elections](#)

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 employee who was not provided night shifts off in order to attend court-ordered meetings and counseling to address his alcohol addiction failed to provide sufficient evidence to overcome summary judgment in favor of employer on his claims the employer violated the [Americans with Disabilities Act](#) (ADA). [Mueck v. La Grange Acquisitions, L.P.](#), No. 22-50064, 75 F.4th 469 (5th Cir. Aug. 4, 2023).

Former employee failed to provide sufficient evidence to overcome dismissal of his claims a university discriminated against him on the basis of race in violation of [Title VII of the Civil Rights Act of 1964](#) and retaliated against him in violation of the [Family and Medical Leave Act](#) (FMLA) by dismissing him before the end of his approved FMLA leave. [Thornton v. Univ. of Tex. Southwestern Med. Ctr.](#), No. 3:22-CV-2079-N, 2023 WL 4826208 (N.D. Tex. July 26, 2023) (mem.).

Former professor granted intermittent FMLA leave failed to provide sufficient evidence to overcome summary judgment on her claim the university violated the FMLA by requiring she provide a doctor's note each time she took leave consistent with the university's sick leave policy. [Turner v. Board of Supervisors of Univ. of La. Sys.](#), No. 22-30615, 2023 WL 5092758 (5th Cir. Aug. 9, 2023) (per curiam).

Former employee failed to provide sufficient evidence to overcome a university's motion for summary judgment on her claim that a colleague's secret recording of women in the restroom created a hostile work environment in violation of the [Title VII of the Civil Rights Act of 1964](#). [Kraft v. Tex. A&M](#), No. 4:20-cv-04015, 2023 WL 4566249 (S.D. Tex. July 17, 2023) (no pet. h.)

Former employee who suffers from cataracts, a condition which necessitates he work a modified work schedule to avoid driving in the dark, alleged sufficient facts to overcome summary judgment on his claim his employer violated the federal [ADA](#) by not accommodating his disability because an employer may be required to provide an accommodation relating to an employee's commute if the employee's disability substantially interferes with his ability to attend work. [EEOC v. Charter Commc'ns, LLC](#), No. 22-1231 (7th Cir. July 28, 2023).

Students and Instruction

Student alleged sufficient facts to overcome dismissal of his claim a university breached a contract related to tuition the student paid prior to move to remote learning during COVID-19 pandemic, including that the university promised to provide students with on-campus services but then shifted from in-person instruction to online instruction. [Hogan v. Southern Methodist Univ.](#), No. 22-10433, 74 F.4th 371 (5th Cir. July 20, 2023).²

Former student who was dismissed by a college following a sexual assault investigation failed to provide sufficient evidence to overcome summary judgment on his claims that the college violated [Title IX of the Education Amendments of 1972](#) based on theories of selective enforcement and erroneous outcome. [Doe v. Rollins Coll.](#), No. 21-11081, 2023 WL 5199469 (11th Cir. Aug. 14, 2023).

Open Records Letter Rulings

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

² This case was summarized in the [April 2022](#) Community College Services 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.

- Two requests for information pertaining to a RFP for delinquent tax collection services. Tex. Atty. Gen. [OR2023-23866](#) (July 18, 2023);
- A product. Tex. Atty. Gen. [OR2023-24140](#) (July 20, 2023);
- Submitted proposals for a solicitation. Tex. Atty. Gen. [OR2023-24801](#) (July 25, 2023);
- A request for proposals. Tex. Atty. Gen. [OR2023-24872](#) (July 25, 2023);
- The proposals submitted by the awarded contractors in response to a request for qualifications. Tex. Atty. Gen. [OR2023-25027](#) (July 27, 2023);
- A group of college employees. Tex. Atty. Gen. [OR2023-25125](#) (July 27, 2023);
- Information pertaining to an instructional course involving a named individual. Tex. Atty. Gen. [OR2023-25597](#) (July 31, 2023);
- Several categories of information pertaining to a solicitation. Tex. Atty. Gen. [OR2023-25765](#) (Aug. 1, 2023);
- The winning proposal, contract, and scoring information associated with a request for qualifications. Tex. Atty. Gen. [OR2023-25900](#) (Aug. 1, 2023);
- Information pertaining to a contract. Tex. Atty. Gen. [OR2023-25959](#) (Aug. 2, 2023); and
- A request for award documents and the winning proposal associated with a request for proposals. Tex. Atty. Gen. [OR2023-25983](#) (Aug. 2, 2023).



Recent Regulations and Guidance

The Teacher Retirement System of Texas (TRS) amended [regulations](#) incorporating updated actuarial tables which affect the distribution of retirement benefits to certain TRS members and payees.

The DOE issued a [final interpretation](#) entitled Federal Preemption and Joint Federal-State Regulation and Oversight of the DOE's Federal Student Loan Programs and Federal Student Loan Servicers, which clarifies the DOE's position that state laws which govern various aspects of the servicing of federal loans are preempted by the [Higher Education Act of 1965](#).

The U.S. Department of Justice, Civil Rights Division, and the DOE, Office for Civil Rights, issued a [Dear Colleague letter](#) providing guidance on student admissions following the

U.S. Supreme Court's decision in [Students for Fair Admissions, Inc. vs. Pres. & Fellows of Harvard Coll.](#), 143 S. Ct. 2141 (June 29, 2023)⁴.

The U.S. Equal Employment Opportunity Commission issued [guidance](#) addressing the application of the federal [Americans with Disabilities Act](#) to job applicants and employees with visual disabilities, including permissible pre-employment questions, reasonable accommodations, concerns over whether a visual disability may impact the safety of the applicant/employee or other staff, and preventing harassment.

The U.S. Architectural and Transportation Barriers Compliance Board issued its [final rule](#) regarding accessibility guidelines for sidewalks and other pedestrian facilities in the public right-of-way.

⁴ This case was summarized in the [July 2023](#) Community College Services Legal Update.



Policy Spotlight

TASB Community College Services is preparing Update 46, the post-legislative update. As in previous legislative years, we require adequate preparation time to develop appropriate policy recommendations and process this large update. As a result, Update 46 will be issued after the effective date of many of the relevant bills. For example, HB 8 (dropped course limit) and SB 1565 (research security) are effective on or before September 1st and will be addressed in the local policy update.

In October, we will send an email to localized colleges that includes all of the local policy codes that will be affected by Update 46. The email will also include questions regarding two bills, HB 1486 and HB 471, the answers to which will help us in our preparation of policy DEC(LOCAL). HB 1486 requires that full-time telecommunicators be provided mental health leave similar to that required for peace officers. HB 471 requires that a college extend paid leave to police officers or EMS personnel for an injury or illness related to those employees' line of duty. The bill may also apply to the college's firefighters. After the required leave ends, the board may extend the leave at full or reduced pay. After any extension expires, the employee may use accumulated leave.

The Community College Policy Reference Manual (CCPRM) update reflecting the legal policy changes is currently scheduled to be released in early November, while updates to the local policies will be sent to each localized community college in December. To address the time between the effective date of the bills and the adoption of new local policies, most colleges have adopted Community College Services' recommended language at policy BE(LOCAL) pertaining to "Harmony with Law," which provides that a newly enacted law takes precedence over any conflicting policy or regulation.

The bills described here and other bills that impact community college policy, regulations, and operations are summarized in the book distributed at the 2023 TASB/TACCA Post-Legislative Seminar for Community Colleges and Their Attorneys. If you were not able to attend, or if you need additional copies, the book is now available in the [TASB store](#).

If you have questions about the policy update or the recent legislative changes, please contact Community College Services by phone at 800-580-1488 or by email at colleges@tasb.org.



In the News

The Texas Governor announced the Texas Workforce Commission (TWC) awarded a [Skills Development Fund grant](#) to Texas Southmost College to provide training to upskill employees of the Rich Products Corporation.

The governor announced TWC awarded Jobs and Education for Texans (JET) [grants](#) to several school districts to partner with Paris

Junior College and Texarkana College, who also received grants to purchase and install equipment for training students.

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