Legal Update

TASA/TASB Convention
September 30 – October 2, 2020

Presented by Legal Services
Texas Association of School Boards

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I. Governance

A. Open Meetings Act

- **The Texas governor suspended certain provisions of the Texas Open Meetings Act due to coronavirus.** On March 16, 2020, Governor Greg Abbott granted a request from Attorney General Ken Paxton to temporarily suspend a limited number of open meetings laws to the extent necessary to allow telephonic or videoconference meetings and to avoid congregate settings in physical locations in response to Abbott’s coronavirus disaster declaration on March 13, 2020. Several of the suspended laws offer flexibility for telephone or videoconference meetings conducted by Texas school boards. The order was effective immediately and will remain in effect until terminated by the governor or until the March 13, 2020, disaster declaration is lifted or expires.

- **Former county employee raised legal issue as to sufficiency of meeting notice.** At a meeting for which the notice indicated, “discussion and possible action to adopt the county budget [; . . . and that the County] may make any modifications to the proposed budget it considers warranted by law and required by the interest of the taxpayers . . .”, the Webb County Commissioners Court took action to split a department in half and to reduce the department director’s salary by $30,000. The director was later terminated and sued the County under various claims, including inadequate notice of the salary reduction under the Texas Open Meetings Act (OMA). The district court agreed that the County’s notice was not sufficiently specific to apprise the public of its actions. The trial court considered a long history of more detailed notices as evidence that the County was able to provide adequate notice; its retreat from that custom undermined the adequacy of the notice at issue. The trial court denied the County’s motion for summary judgment as to the OMA claim but granted summary judgment in favor of the County on the former director’s age discrimination, First Amendment retaliation, and Whistleblower Act claims. *Mares v. Texas Webb Cnty.*, Civil Action No. 5:18-CV-121, 2020 WL 619902 (S.D. Tex. Feb. 10, 2020) (mem.).

- **Prohibiting board member from speaking in public comment did not violate First Amendment.** David Stratta, a member of the Board of Directors of the Brazos Valley Groundwater Conservation District (BVGCD), requested that the agenda for the board’s March 8, 2018 meeting include discussion of a topic central to a landowner’s pending dispute against the BVGCD. The board
president declined Stratta’s request because discussing the issue at a meeting might affect the pending litigation. However, Stratta signed in as a member of the public at the March 8 meeting and submitted a form stating that he wished to make a public comment on an agenda item. Specifically, Stratta intended to ask the board to include the subject he had requested for the agenda at its next meeting. He was prohibited from voicing this request, however, on the rationale that board members may not discuss subjects that are not on the agenda. Stratta then joined the landowner’s lawsuit against the BVGCD, alleging a violation of his First Amendment right to free speech. The district court ruled that Stratta failed to show that BVGCD’s conduct in prohibiting him from speaking was objectively unreasonable in light of clearly established law, and the Fifth Circuit affirmed the district court’s judgment. The court concluded that, given Stratta’s status as a board member, he was governed by the OMA and did not have the same rights as a member of the public when attending a BVGCD meeting. The court dismissed Stratta’s First Amendment claim against the BVGCD. *Stratta v. Roe*, 961 F.3d 340 (5th Cir. May 29, 2020).

- **Attorney general issued opinion regarding compliance with OMA’s public comment provision.** In 2019, the Texas Legislature added Texas Government Code section 551.007 to the OMA, requiring governmental bodies, including school districts, to “allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body’s consideration of the item.” In 2020, the attorney general was asked whether the statute requires holding a separate public comment period prior to each item on a meeting agenda, or whether a single public comment period at the beginning of a meeting would comply with the law. Interpreting the plain language of the law, the attorney general opined that a governmental body complies with the OMA by holding a single public comment period at the beginning of a meeting to address all items on the agenda. The attorney general was also asked about the ability to regulate public comments under Section 551.007(c), which allows a governmental body to adopt “reasonable rules” for public comment, “including rules that limit the total amount of time that a member of the public may address the body on a given item.” Looking again at the plain language of the law, the attorney general opined that a governmental body may adopt a rule limiting the total amount of time for a person to address all items on the agenda, as long as the time limit is reasonable. The attorney general responded further that whether an amount of time is considered “reasonable to address all desired agenda items at a meeting” depends on many factors, such as the amount of agenda items for a meeting and their complexity. Tex. Att’y Gen. No. *KP-0300* (Apr. 22, 2020).
B. Trustees

- **Fifth Circuit holds that former trustee’s censure harmed his First Amendment rights.** While serving as a member of the board of trustees of the Houston Community College System (HCCS), David Wilson took several actions that his fellow trustees found objectionable, including hiring a private investigator to investigate a fellow trustee’s residence and suing HCCS for allegedly allowing a vote by videoconference in violation of the board’s bylaws and excluding him from a closed session meeting. On January 18, 2018, the board voted to adopt a resolution publicly censuring Wilson for actions “not consistent with the best interests of the College or the Board, and in violation of the Board Bylaws Code of Conduct.” The censure directed Wilson to immediately cease all inappropriate conduct and warned that failure to do so would result in further disciplinary action. Upon being censured, Wilson amended his pending lawsuit against HCCS to include a Section 1983 claim that the censure violated his First Amendment right to free speech and Fourteenth Amendment right to equal protection. Wilson’s lawsuit sought an injunction preventing the board from enforcing the censure, $10,000 in damages for mental anguish, $10,000 in punitive damages, and reasonable attorney fees. In August 2019, Wilson resigned from the board of trustees. The district court dismissed the lawsuit, finding that the censure did not harm Wilson, as it did not prevent him from carrying out his official duties or speaking publicly. The Fifth Circuit Court of Appeals, however, found that a public official’s allegation of censure in retaliation for speaking out about a matter of public concern was sufficient to establish an injury under Fifth Circuit precedent. In addition, the court noted that the U.S. Supreme Court has recognized that a First Amendment violation creating a reputational injury is enough to establish harm for a plaintiff to have standing. Wilson’s request for an injunction was moot, as he was no longer a member of the HCCS board of trustees. The court reversed the lower court’s dismissal and remanded the case for further proceedings regarding Wilson’s claims for damages. *Wilson v. Houston Comm. Coll. System*, No. 19-20237, 2020 WL 1682780 (5th Cir. Apr. 7, 2020).

- **Attorney general opined that state law does not expressly authorize a school district to buy land outside of its boundaries for purposes of building and operating a new school.** Texas Attorney General Ken Paxton was asked whether Texas Education Code section 11.167, authorizing a school district to “operate a school or program, including an extracurricular program, or hold a class outside the boundaries of the district” authorized Laredo ISD to purchase land outside of its boundaries in order to build and operate a new middle school. The attorney general opined that Section 11.167 did not expressly permit the purchase. The attorney general could not state with certainty whether a court would determine that the statute implied the power to do so. *Tex. Att’y Gen. Op. No. KP-0291* (Mar. 9, 2020).
II. COVID-19

- The U.S. Department of Education (DOE) issued guidance regarding serving students during school closure related to the current pandemic. The U.S. DOE posted online guidance documents regarding the application of federal law to a multitude of practical issues and concerns raised by the coronavirus pandemic. The resources available on the U.S. DOE’s COVID-19 Website include a fact sheet from the U.S. DOE’s Office of Civil Rights (OCR) reminding districts of the obligation to ensure that educational equity for all students remains a primary consideration in virtual instruction. U.S. Dep’t of Educ., Office of Civil Rights, Fact Sheet: Addressing the Risk of COVID-19 While Protecting the Civil Rights of Students (Mar. 16, 2020). The website also includes links to question-and-answer documents regarding serving the needs of children with disabilities, meal flexibilities offered by the U.S. Department of Agriculture, resources from the Centers for Disease Control, and many other resources. U.S. Dep’t of Educ., COVID-19 (“Coronavirus”) Information and Resources for Schools and School Personnel.

- The U.S. DOE provided guidance about student privacy, COVID-19, and virtual instruction. In March 2020, the U.S. DOE’s Student Privacy Policy Office (SPPO) issued a frequently asked questions document regarding protecting student privacy in connection with COVID-19. For example, the document provides guidance on when the health and safety emergency exception under the Family Educational Rights and Privacy Act (FERPA) might apply to disclosures regarding students who might be infected with the new coronavirus. U.S. Dep’t of Educ., Student Privacy Policy Office, FERPA and Coronavirus Disease-2019 (COVID-19), Frequently Asked Questions (Mar. 2020). In addition, the SPPO has posted on its website material from a webinar regarding the application of FERPA to online instruction during school closures as a result of the coronavirus pandemic. Both the FAQ document and the webinar material are located on the SPPO’s FERPA and Virtual Learning Website.

- OSEP issued guidance regarding special education dispute resolution during the pandemic. The U.S. Office of Special Education and Rehabilitative Services’ Office of Special Education Programs (OSEP) issued guidance regarding implementation of the Individuals with Disabilities Education Act (IDEA) dispute resolution procedures in the current COVID-19 environment. According to the guidance, a state education agency, such as TEA, must determine on a case-by-case basis whether the pandemic provides extraordinary circumstances that would justify suspending the 60-day timeline for resolving a complaint. OSEP, IDEA Part B Resolution Procedures.

- The U.S. Department of Labor (DOL) issued guidance regarding employee leave under the Families First Coronavirus Response Act (FFCRA). The U.S. DOL posted questions and answers regarding the FFCRA, which Congress enacted in order to respond to the ongoing coronavirus pandemic. Among other issues, the DOL
guidance addresses eligibility for paid sick leave under the Emergency Paid Sick Leave Act and expanded leave under the Emergency Family Medical Leave Expansion Act, both components of the FFCRA. U.S. Dep’t of Labor, *Families First Coronavirus Response Act: Questions and Answers*.

- **TEA created a website page for coronavirus resources and information.** The Texas Education Agency (TEA) posted practical guidance and multiple question-and-answer documents related to COVID-19 and the resulting school closures. Among the topics addressed are serving students with disabilities and other special populations, attendance, academics, instructional continuity support, and educator evaluation. In addition, the website contains summary debriefs from TEA’s superintendent calls regarding the pandemic. See Tex. Educ. Agency, *Coronavirus (COVID-19) Support and Guidance*.

- **TASB shared COVID-19 resources.** TASB created a Coronavirus (COVID-19) Resources Page, which includes links to the documents above, as well as FAQs from TASB Legal Services, TASB HR Services, TASB Policy Service, and TASB Risk Management. See Tex. Assoc. of Sch. Bds., *Coronavirus (COVID-19) Resources Page*.

### III. Charter Schools

- **Texas Supreme Court finds open-enrollment charter schools immune to the same extent as public schools.** The Burnham Wood Charter School District operates open-enrollment charter schools in El Paso. In April 2008, Iris Burnham, the president and superintendent of the district, informed the board of directors that she had identified a new school site and had begun to negotiate a lease agreement with Amex Properties. Burnham and one of Amex’s owners signed a lease requiring the district to pay $3.4 million over ten years and Amex to construct two school buildings for the district’s use. Burnham signed on behalf of “The El Paso Education Initiative, Inc.,” representing herself as the school’s authorized agent. Despite these representations, emails between Burnham and Amex’s attorney showed that Amex understood the lease could not be finalized without board approval. Negotiations over the terms of the lease continued, and in May, the district rejected the lease without ever presenting it to the board of directors for approval. Amex built the buildings anyway and ultimately leased to another tenant at a lower rate. Amex sued the district for breach of contract, seeking some of the construction costs as damages. The district argued that that it was immune from the lawsuit to the same extent as a public school district under Texas Local Government Code chapter 271, which waives immunity for breach of contract claims only for certain contracts. Relevant to this dispute, a contract must be “properly executed” on behalf of the district for immunity to be waived. The Texas Supreme Court first considered whether open-enrollment charter schools and charter-holders have governmental immunity to the same extent as public schools. Holding that they do, the court
reasoned that extending governmental immunity to open-enrollment charter schools satisfies governmental immunity’s purposes by protecting state funds from being reallocated from the legislature’s intended purpose. The court then turned to the question of whether the lease was “properly executed.” The court pointed out that by TEA rule, certain powers and duties, including authorizing the expenditure of state funds, are vested with a charter school’s board and may not be delegated without approval by the commissioner. Because the board of directors did not approve the lease at issue, it was not “properly executed” and the district enjoyed immunity from a lawsuit claiming a breach of contract arising from the lease. *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, No. 18-1167, 2020 WL 2601641 (Tex. May 22, 2020).

IV. Personnel

A. Hiring

- **Fifth Circuit upheld injunction against enforcement of EEOC guidance on criminal history.** In 2012, the Equal Employment Opportunity Commission (EEOC) issued guidance for employers on the use of criminal history records in the hiring process. The intent of the guidance was to mitigate the impact of historically disproportionate rates of arrest and conviction among minorities. The guidance encouraged employers to make hiring decisions based on an individualized assessment of each applicant’s criminal history and whether the history related to the position sought by the applicant. Notably, the guidance rejected any “policy or practice requiring an automatic, across-the-board exclusion from all employment opportunities,” because such a policy or practice “does not focus on the dangers of particular crimes or the risks in particular positions.” In 2013, the State of Texas sued the EEOC and the U.S. attorney general in federal court, arguing that the agency had improperly issued a substantive rule without going through the required notice-and-comment period under the Administrative Procedure Act (APA). The district court found that the guidance was a substantive rule issued without notice and the opportunity for comment. Thus, the court enjoined enforcement of the guidance until the EEOC complied with the requirements of the APA. On appeal, the Fifth Circuit upheld the injunction against enforcement of the Guidance with one modification. The court agreed that the guidance was a substantive rule implementing Title VII of the Civil Rights Act, but the court found that Title VII does not grant the EEOC the authority to make substantive rules. As such, the court modified the injunction to prohibit enforcement of the guidance unconditionally, regardless of whether the EEOC complies with the APA’s notice and comment requirements. *Tex. v. Equal Emp’t Opportunity Comm’n*, 933 F.3d 433 (5th Cir. Aug. 6, 2019).
B. Chapter 21 Contracts

• **Athletic director on multi-year certified administrator contract reassigned to teacher position mid-year.** Caddo Mills ISD employed Steven Sumrow as an athletic director for fifteen years on a certified administrator contract, although he lacked administrator certification. In 2018-2019, during the first year of a two-year contract, the district reassigned Sumrow to the position of teacher at the disciplinary alternative education program. The district also decreased Sumrow’s salary for 2019-2020 by $35,595. Sumrow argued that the reassignment violated Texas Education Code section 21.206(b), which requires a district to employ a teacher whose contract is about to expire in the same professional capacity the following year unless the teacher receives notice of proposed nonrenewal. The district responded that Sumrow was not entitled to remain athletic director without administrator certification. On appeal, the commissioner interpreted Section 21.206 as requiring that an educator be employed in the same professional capacity for the first year of a multiyear contract. In this case, because the contract stated that Sumrow was employed as a “certified administrator,” yet Sumrow did not have administrator certification, the district could invoke its right to enforce the contract as written. Because the district compensated Sumrow at the same rate of pay during the year in which he was reassigned and only reduced his pay in between school years after giving Sumrow formal and specific notice, the commissioner held that this action was not a breach of contract. Although the mid-year reassignment was a change in professional capacity, the commissioner opined that Sumrow did not hold the administrator certification his contract required and dismissed Sumrow’s appeal. *Sumrow v. Caddo Mills Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R3-05-2019 (Jan. 1, 2020).

• **Commissioner finds board failed to properly nonrenew contract of athletic coordinator reassigned outside of her professional capacity.** Two volleyball coaches, one of whom was married to the school board president, filed grievances alleging that the athletic coordinator, Tracy Lutich, treated their daughters unfairly. The board president’s mother-in-law, also a board member, alleged that Lutich disparaged the district’s athletic director. In response, the superintendent eliminated the athletic coordinator position and reassigned Lutich to a secondary business teacher position without changing her contract or bringing the program change before the board. Lutich filed a grievance complaining about the elimination of her position and reassignment. The board did not act on Lutich’s grievance, but instead voted to nonrenew her contract based on a program change reduction in force (RIF) in the area of secondary business teachers. A TEA-appointed independent hearing examiner (IHE) recommended the board renew Lutich’s 2018-2019 athletic coordinator contract. However, the board voted to change the IHE’s findings and proceeded
with the nonrenewal. Lutich appealed the board’s decision to the commissioner. In his opinion, the commissioner highlighted the board’s failure to act on Lutich’s complaint that the superintendent had reassigned her outside of the professional capacity of administrator. Because the board failed to act on a program change related to the athletic coordinator position, Lutich was entitled to employment as athletic coordinator. The board’s actions to change the IHE’s findings of facts were also improper because the IHE’s findings were supported by substantial evidence. Furthermore, the commissioner stated that the board president and his mother-in-law should have recused themselves during the grievance process because of their connections to the underlying allegations. Granting the appeal, the commissioner mandated that the district reinstate Lutich or pay her one year’s salary. *Lutich v. Fabens Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 002-R1-09-2019 (Nov. 5, 2019).

**District did not waive right to nonrenew teacher’s term contract.** The board voted to nonrenew the 2019-2020 term contract of kindergarten teacher Patty Kenyon based on an incident that occurred in May of 2019, after she received an offer to teach the subsequent year. The district issued Kenyon a contract for the 2019-2020 school year on April 26, 2019. On May 1, 2019, Kenyon slapped a kindergarten student in the face. The district removed Kenyon from the classroom and investigated the incident. Kenyon signed and returned her 2019-2020 contract on May 9, 2019. On August 5, 2019, after the district completed its investigation, the board voted to nonrenew Kenyon’s 2019-2020 term contract at the end of the 2019-2020 school year. Kenyon appealed, arguing that her contract could not be terminated for actions that occurred in a prior school year. In his decision, the commissioner addressed the doctrine of waiver, which sometimes precludes termination for actions in a prior year. According to the commissioner, waiver occurs when a district has full knowledge of a teacher’s actions and offers the teacher a new contract. In the current case, the district did not have full knowledge of Kenyon’s actions when it offered a new contract, so it did not waive its right to take action against her contract. In upholding the nonrenewal, the commissioner noted that the district took prompt action by removing Kenyon from the classroom and investigating. In his decision, the commissioner included guidance on calculating the last day of instruction, stating that determining the date was a local decision, but testing days are included. *Kenyon v. Round Rock Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 040-R1-08-2019 (Oct. 1, 2019).

**Commissioner upholds nonrenewal of term contract for failure to obtain supplemental bilingual certification required by state law.** In October of 2018, the superintendent of Progreso ISD informed special education teacher Margarita Cantu and 18 other teachers that they were required to pass the exam to obtain bilingual/ESL certification by March 29, 2019. The district provided
training workshops to assist teachers in obtaining certification, but Cantu did not participate in the workshops. By May of 2019, Cantu had not passed the examination and failed to obtain the required certification. The board acted to nonrenew Cantu’s term contract, specifying four reasons relating to her failure to obtain bilingual supplemental certification to support the proposed nonrenewal. Cantu argued on appeal that the district made a material change to her contract during the term of the contract by requiring the supplemental certification mid-year. The commissioner noted that, while Cantu received notice that she was to obtain supplemental certification mid-year, her contract required her to maintain applicable certification. As such, requiring certification by the end of the year was not a material change to the contract. The commissioner noted that Texas Education Code section 29.061, which was incorporated into her contract, also mandated that teachers in the bilingual/ESL program obtain supplemental bilingual/ESL certification. The commissioner denied Cantu’s appeal, holding that the nonrenewal for failure to obtain certification was based on substantial evidence and was not arbitrary or capricious. Cantu v. Progreso Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 038-R1-08-2019-A (Sept. 23, 2019). See also Valle v. Progreso Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 038-R1-08-2019 (Sept. 23, 2019) (upholding nonrenewal of teacher’s contract for failure to obtain supplemental bilingual certification despite lack of notice that the teacher was out of compliance).

- Attorneys from same law firm properly represented board and served as administrative official in nonrenewal hearing. Arlington ISD nonrenewed the term contract of homebound teacher, Mary Hernandez, for numerous reasons related to incompetency, performance issues, and falsification of records. Hernandez requested a hearing to appeal her nonrenewal, which the district provided with the help of a private law firm. During the hearing, the board utilized two attorneys from the same firm. One attorney assisted the board in conducting the hearing and another attorney consulted with the superintendent to present the case in support of the proposed nonrenewal. At the time of the hearing, Hernandez complained that using attorneys from the same firm was unfair because both attorneys were involved in prior proceedings relating to her employment before the district pursued nonrenewal. On appeal to the commissioner, Hernandez raised the same objections. Analyzing the district’s practice of using two attorneys from the same law firm during the hearing, the commissioner clarified that the attorney conducting the hearing served as a hearing officer, distinct from the role of hearing examiner under Texas Education Code section 21.207(b). The commissioner opined that the involvement of two attorneys from the same law firm did not create an unfair hearing for Hernandez and upheld the district’s decision to nonrenew. The commissioner dismissed
additional claims of evidentiary errors because substantial evidence existed to support nonrenewal and there was no indication that the admission of evidence led to an erroneous decision to nonrenew. *Hernandez v. Arlington Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 024-R1-12-2019 (Jan. 27, 2020).

**District may only suspend a teacher without pay after the required hearing process.** The Sheldon ISD board of trustees voted to suspend assistant football coach and teacher Brandon Romero without pay because he admittedly sent texts to female students after school hours and offered alcohol to minor students. The suspension without pay was effective once the board gave Romero notice of the board’s vote on the day following the meeting, March 6, 2019. Romero requested a hearing in front of an IHE, who opined on June 21, 2019 that, while the board had good cause to suspend Romero without pay, the board could not act to suspend him until after considering the IHE recommendation. On June 25, 2019 the board voted to reject the IHE’s conclusion that the district’s suspension without pay was not effective on March 6, 2019, based on Romero’s admission that he texted students while drunk and invited them over for alcohol.

On appeal, the commissioner considered whether Romero was entitled to compensation up until the date that the board voted on the IHE’s recommendation. In his decision, the commissioner opined that the district must follow the procedure set forth in Chapter 21, Subchapter F, prior to suspending a teacher without pay. Citing Texas Education Code section 21.251(a)(3), which authorizes IHEs to hear a proposed suspension without pay, the commissioner opined that the decision to suspend Romero without pay was not final until the board gave notice of the proposed action and voted on the IHE’s recommendations. Addressing the board’s attempt to reject the IHE’s recommendations, the commissioner noted that Texas Education Code section 21.259 requires a board to state in writing the reason and legal basis for changing or rejecting a conclusion of law or a proposal for relief. The commissioner opined that the board improperly rejected the IHE’s conclusions of law because the board did not provide an explanation of the basis for the changes, but simply restated undisputed facts relating to Romero’s conduct and established principles of law. The commissioner also rejected the board’s changes to the IHE’s conclusions of law because there was no explanation or legal basis for the changes in the meeting minutes. The district asserted that Texas Education Code section 21.257(b), which allows for the award of backpay if a suspension without pay is overturned, supports a district’s right to suspend a teacher’s pay prior to an IHE hearing. However, the commissioner responded that such a conclusion would contradict and render meaningless Section 21.251. The commissioner also rejected the board’s change in the IHE’s recommended

C. Good Cause Termination

- **Texas Supreme Court rules on good cause per se termination of continuing contract.** Dehann Riou was employed by North East ISD as an elementary school teacher under a continuing contract. In 2015, the principal recommended Riou’s termination after discovering, while Riou was on medical leave, that she had not conducted any reading benchmark testing and had not electronically recorded students' checklist scores for half of the school year. The IHE determined that good cause existed to terminate Riou’s contract, and the North East ISD board proceeded to terminate her continuing contract. On appeal, the commissioner of education upheld the board’s decision. Normally demonstrating good cause to terminate a continuing contract requires testimony about standards in other similarly situated school districts. In this case, however, the commissioner determined that good cause had been proven per se. The San Antonio Court of Appeals reversed the decision, holding that a continuing contract may not be terminated based on good cause per se absent evidence about standards in similarly situated school districts. On appeal, the Texas Supreme Court disagreed that evidence from other similarly situated districts was always required in order to establish good cause for terminating a continuing contract. When “state or federal law provides a standard,” stated the Court, “specific evidence from other school districts is unnecessary to establish that the standard is one ‘generally recognized and applied’ in all other school districts.” The Court went on to determine that substantial evidence supported the board’s decision to terminate Riou’s contract for good cause. *North East Indep. Sch. Dist. v. Riou*, No. 18-0986, 2020 WL 1492410 (Tex. Mar. 27, 2020).

- **Court affirmed commissioner’s decision that good cause existed to terminate principal whose nude selfie was disseminated to students by a third party.** Edinburg ISD terminated the term contract of middle school principal Christine Esparza after someone hacked into Esparza’s computer and disseminated a nude selfie that she had intended for only her husband to see. When Esparza appealed her termination, the IHE found that the actions of a third party were not sufficient to provide good cause for termination. However, the school board rejected the IHE’s conclusion of law and proceeded to terminate Esparza’s contract. The commissioner found that the school board had properly changed the IHE’s recommendation and upheld the board’s decision, on the grounds that the third party’s actions impacted Esparza’s ability to perform an essential
function of her job. After a trial court reversed the commissioner’s decision, the district and the commissioner appealed. On appeal, the Thirteenth Court of Appeals, Corpus Christi—Edinburg, analyzed the statutory scheme that allows a school board to “adopt, reject, or change” an IHE’s conclusion of law.

The court noted that, prior to 2011, whether good cause existed to terminate a Chapter 21 contract was considered a question of fact rather than a conclusion of law. In 2011, the legislature amended Texas Education Code sections 21.257 and 21.259 to define a determination regarding good cause for termination as a conclusion of law. According to the court, the amended statutory language unambiguously provides that an IHE’s determination “regarding good cause” is a conclusion of law that may be adopted, rejected, or changed by a school board regardless of whether the determination is supported by substantial evidence. Furthermore, whether Esparza’s effectiveness was impaired was a good cause determination and, thus, a conclusion of law that the board was entitled to reject or modify without regard to whether the determination was supported by substantial evidence. Esparza also argued that the district’s decision was arbitrary and capricious, but the court determined that reasonable minds could disagree as to whether dissemination of the photo among students and the community interfered with her effectiveness as a principal. As the decision was rationally connected to the facts and to reasoned decision making, the court stated that it was bound to uphold the commissioner’s decision. Therefore, the court overturned the order to reinstate Esparza and entered judgment affirming the commissioner’s ruling. In a separate concurrence, Justice Leticia Hinojosa wrote that the court’s decision “should not be understood as tacit approval” of the district’s decision to terminate Esparza. According to Justice Hinojosa, “We are now faced with the reality of an ‘always connected’ society with rapidly evolving technologies. It is incumbent upon school districts in this State to continue to review and develop their policies to reflect this reality and to do so in ways that protect educators from the malicious actions of others.” Edinburg Consol. Indep. Sch. Dist. v. Esparza, Number 13-18-00412-CV, 2020 WL 1304048 (Tex. App.—Corpus Christi—Edinburg Mar. 19, 2020, no pet. h.).

- **Commissioner upheld termination of teacher’s continuing contract for testing irregularities.** The Klein ISD board of trustees voted to terminate the continuing contract of Alana Sisk for testing irregularities. Specifically, Sisk reminded a student to use a whisper phone while administering the STAAR test by handing the device to a student who was not using it. The whisper phone, which allows a student to hear himself read aloud, was an allowable accommodation in the underlying situation. Klein ISD’s Policy EKB(LEGAL) prohibits a teacher from indirectly assisting students with responses to test questions. The IHE who conducted the hearing determined that Sisk did not provide unauthorized assistance during the test administration and, therefore, did not find good cause to terminate Sisk’s contract. The board reviewed the IHE’s findings and
conclusions and modified three findings of fact and four conclusions of law. The board proceeded to terminate Sisk’s contract after revising the IHE’s recommendation. On appeal to the commissioner, Sisk argued that the district improperly rejected and modified the IHE’s findings, conclusions, and recommendation. The district responded that its changes were supported by substantial evidence and its decision to terminate was proper. On appeal, the commissioner analyzed the board’s decision under Texas Education Code section 21.259, which authorizes a school board to adopt, reject, or change an IHE’s findings, conclusions, and recommendation, as long as substantial evidence supports the ultimate decision. Reviewing the record, the commissioner noted that the board relied on undisputed evidence that Sisk reminded a student to use a whisper phone during the STAAR test as a reason for changing the IHE’s findings, conclusions, and recommendation. A district has the authority to interpret and apply its own policies and change determinations regarding good cause based on its reasonable interpretation. Because the district reasonably interpreted Policy EKB(LEGAL) to prohibit handing a student a whisper phone during test administration, the commissioner upheld the good cause termination of Sisk’s continuing contract. *Sisk v. Klein Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 013-R2-10-2019 (Dec. 16, 2019).

- **Commissioner upheld termination of term contract for mishandling of student funds and testing irregularities.** The Trenton ISD school board voted to terminate the contract of teacher Wendy Burk based on testing irregularities and mishandling of student funds. According to the allegations, students monitored by Burk while taking the STAAR exam complained that their test answers were changed. Based on the evidence, the IHE determined that Burk changed the students’ answers. The IHE also determined that Burk failed to properly handle student funds as faculty sponsor of the Jr. Beta Club when she failed to follow school policy related to accounting for funds raised and expended. Burk appealed the termination, arguing that substantial evidence did not support the district’s claims and that the investigation into the allegations was flawed. Noting that the IHE is the sole judge of the witnesses’ credibility, and that the district’s decision was supported by substantial evidence, the commissioner denied Burk’s appeal. *Burk v. Trenton Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 018-R2-11-2019 (Dec. 20, 2019).

- **Commissioner overturned termination of teacher who tweeted to Trump about immigration.** Fort Worth ISD proposed terminating teacher Georgia Clark’s contract based on her history of making insensitive and offensive statements in class and on Twitter regarding students of Hispanic ethnicity and/or Mexican national origin, which the board found violated the standards of conduct for educators and reduced Clark’s effectiveness in the classroom. In one instance considered by the board, Clark tweeted to the Twitter account of President
Donald Trump asking for help “. . . to remove the illegals from Fort Worth . . .” On appeal, the IHE opined that the district did not provide sufficient evidence to support the good cause termination of Clark’s contract. The IHE opined that Clark’s tweets to the president were statements of a citizen on a matter of public concern, and therefore protected by the First Amendment. Finding no good cause for termination, the IHE recommended the district continue to employ Clark on her continuing contract. Upon review of the IHE’s recommendation, the board proceeded with the termination, rejecting some of the IHE’s findings of facts and conclusions of law, as allowed by Texas Education Code section 21.259. However, the board did not adopt new conclusions of law or change any conclusions of law to support a finding of good cause. Clark appealed the board’s termination of her contract to the commissioner, arguing that the district violated her First Amendment rights, improperly changed the IHE recommendations, and violated the statute requiring her evaluation to remain confidential. With respect to the First Amendment issues, the commissioner rejected the district’s argument that Clark waived her First Amendment rights by signing an employment contract. Additionally, the commissioner noted that, based on Clark’s tweets, it did not appear that Clark knew about Plyler v. Doe, 457 U.S. 202 (1982), the U.S. Supreme Court opinion requiring public education regardless of immigration status. However, because Clark did not refuse to educate someone based on immigration status, she did not violate the law. Ultimately, however, the commissioner based his decision on whether the board properly changed the IHE’s recommendations and whether the changes supported a good cause termination of Clark’s continuing contract. Upon receipt of the IHE’s recommendation, the board rejected thirty-two of the IHE’s fifty-two conclusions of law but did not adopt any conclusions of law to support a determination of good cause. The commissioner reversed Clark’s termination, holding that, without any conclusions of law relating to good cause, the board’s decision to terminate was arbitrary, capricious, and contrary to law. Clark v. Fort Worth Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 006-R2-10-2019 (Nov. 25, 2019).

D. Use of Force

- Nonrenewed librarian entitled to immunity from discipline based on reasonable use of force. Southside ISD nonrenewed the term contract of middle school librarian Paul Zarsky after he used physical force to prevent students from entering the in-school-suspension (ISS) room while acting as hall monitor. Zarsky was monitoring the seventh-grade hall when a group of eighth graders entered the hall and attempted to go into the ISS room. Zarsky told the students to leave several times, but they ignored him and instead tried to push their way into the room. Zarsky took up a position to block the room entrance and actively moved the students away from the ISS room by pushing them back, eventually pushing one student down the hall toward the office. According to the facts, Zarsky was concerned that the eighth graders were entering the ISS room to start a fight, and
he believed his actions averted a dangerous situation. After the altercation, Zarsky reported the incident to the school authorities. The school board acted to nonrenew Zarsky’s contract based on this incident. Zarsky appealed the nonrenewal, arguing that his use of force was reasonable and that he was entitled to immunity from disciplinary proceedings. On appeal, the commissioner addressed whether Zarsky was entitled to immunity under Texas Education Code section 22.0512, which provides immunity from disciplinary action when a professional uses reasonable force. Whether force is reasonable is determined by applying the standard from Texas Penal Code section 9.62, which requires that the actor reasonably believe the force was necessary to maintain discipline. To determine whether the use of force was reasonable, the commissioner looked to relevant factors listed in the Restatement of Torts, Second Edition, including the age, sex, and condition of the child, as well as whether the force was disproportionate or likely to cause serious injury. Noting that the district had the burden to prove Zarsky’s use of force was not reasonable, the commissioner examined the local record to see if a rational fact finder could have made such a determination. The record indicated that Zarsky pushed eighth-grade students away from ISS in order to prevent a fight, the force used was necessary to get the students to comply with the directive to leave, the force was not disproportionate, and that no students were hurt. The commissioner opined that Zarsky’s use of force was reasonable and therefore he was entitled to immunity under Section 22.0512. The commissioner granted Zarsky’s appeal and ordered that the board overturn its decision to nonrenew the contract.


E. Discrimination

- **Supreme Court holds that Title VII is violated when an employer fires an individual for being gay or transgender.** Three lawsuits in federal court recently asked whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an employee’s homosexuality or transgender status. In the first case, Gerald Bostock, a child welfare advocate for Clayton County, Georgia, was terminated for conduct “unbecoming” a county employee after he joined a gay recreational softball league. In the second case, Donald Zarda, a skydiving instructor, mentioned to a client that he was gay and was fired days later. In the third case, Aimee Stephens, a funeral director in Michigan who was born a biological male, was fired after she wrote a letter informing her employer that she intended to “live and work full-time as a woman.” Each of the former employees sued their employer under Title VII, which prohibits unlawful discrimination “because of . . . sex.” The U.S. Supreme Court agreed to consolidate and review the cases in order to resolve the split among the circuit courts as to the meaning of sex discrimination under Title VII, which states that it is “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to
his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). According to the employers in the three cases, the term “sex” was understood when Title VII was enacted in 1964 as meaning a person’s “status as either male or female based on reproductive biology.” Since homosexuality and transgender status are conceptually different from sex, argued the employers, Title VII does not prohibit firing someone for being gay or transgender. In a 6-3 decision, the U.S. Supreme Court disagreed. According to the Court, Title VII prohibits employment decisions that would not have been made “but for” a person’s sex, even if other factors were also relevant to the decision. For example, an employer may have two employees, a male and a female, both of whom are attracted to men. The employer fires the male employee because he is attracted to men but does not fire the female employee. Although the employer may argue that it did not intend to treat male and female employees differently, the employer’s decision singled out the male employee based, at least in part, on his sex. Thus, the employee’s sex is a but-for cause of the employment decision. Similarly, if an employer fires a transgender person who was born a biological male but now identifies as a female but retains an employee who was identified as a male at birth, the employer intentionally penalizes a person identified as male at birth for traits it tolerates in an employee identified as female at birth. “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” Bostock v. Clayton County, Ga., No. 17–1618, No. 17–1623, No. 18–107, 2020 WL 3146686 (June 15, 2020).

Employee’s poor work performance was legitimate, nondiscriminatory reason for her termination. Jessica DeValentino worked for Houston ISD as an educator for over 15 years. After returning from maternity leave on April 6, 2016, DeValentino, who is African-American, alleged she was subjected to disparate treatment and a hostile work environment by a new manager. According to DeValentino, her new manager wrote “libelous” memos regarding her and negatively evaluated her. In September 2016, the district terminated DeValentino, allegedly replacing her with a white employee. Acting pro se, DeValentino filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and then sued the school district, alleging illegal discrimination and retaliation. Among other claims, her complaint alleged that she was terminated based on her race and color in violation of Title VII of the Civil Rights Act of 1964 and the Texas Commission on Human Rights Act (TCHRA). A federal district court ruled in the district’s favor, and DeValentino appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit noted that the lower court had appropriately applied the McDonnell Douglas burden-shifting analysis to
review both DeVantilno’s Title VII and TCHRA claims. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the burden-shifting analysis in Title VII employment discrimination cases). Under this test, the plaintiff must establish a prima facie case of employment discrimination in order to create a presumption of discrimination, which the employer may rebut by providing sufficient evidence of a legitimate, nondiscriminatory reason for the employment action. Houston ISD conceded that Devantilno had set out a prima facie case of employment discrimination. However, the district provided sufficient evidence of Devantilno’s poor work performance as a legitimate, nondiscriminatory reason for her termination. Therefore, the Fifth Circuit affirmed the lower court’s ruling in Houston ISD’s favor. DeVantilno v. Houston Indep. Sch. Dist., No. 20-20025, 2020 WL 3966970 (5th Cir. July 13, 2020) (per curiam).

V. Special Education/504

- **Claims that student with disability was injured by aide dismissed for failure to exhaust administrative remedies.** The parents of A.H., a student with a disability at Austin ISD, requested an administrative due process hearing before a TEA-appointed hearing officer, alleging claims under the Individuals with Disabilities in Education Act (IDEA) as well as Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA). The hearing officer dismissed the Section 504 and ADA claims, and the parents reached a settlement with Austin ISD as to the IDEA claims. Afterwards, the parents sued the district under Section 504 and the ADA, alleging their son suffered serious dental damage after an aide threw a trash bin at him. According to the parents’ lawsuit, the aide was not sufficiently trained to handle A.H.’s emotional breakdown. The district argued that the parents were required to exhaust their administrative remedies as to their claims, and the courts agreed. Applying the U.S. Supreme Court’s test from Fry v. Napoleon, the Fifth Circuit held that exhaustion was required because the “heart of the complaint across these claims is that AISD failed to provide educational accommodation and oversight in the form of an adequately trained and supervised teaching aide for A.H. and the IDEA requires exhaustion for claims that fundamentally concern a student’s educational needs.” The court upheld the district court’s judgment, dismissing the lawsuit against the district. Heston ex rel. A.H. v. Austin Indep. Sch. Dist., No. 19-50664, 2020 WL 3066440 (5th Cir. June 9, 2020) (per curiam).

- **SRO’s conduct toward student with autism did not fall under exception to ADA and Section 504.** S.W., an eight-year-old student in the second grade, received special education from Carroll ISD due to autism, oppositional defiant disorder, and separation anxiety disorder. On January 23, 2014, S.W. became upset while serving ISS in the office of Principal Stacy Wagnon. While in Wagnon’s office, S.W. used obscenities, crumpled papers, threw items on the floor, and threw a cup a coffee against the wall. He then made a comment about “home-built nunchucks” and took...
a jump rope out of his backpack, swinging the rope around and trying to hit Wagnon. While Wagnon tried to calm S.W., he ran into the hall with his jump rope, where he encountered the school resource officer (SRO), Sergeant Randy Baker. Baker was told by a district employee to “stand and watch right here, say nothing.” Baker, however, handcuffed S.W. and took him back to Wagnon’s office, where he screamed at S.W., called him “punk” and “brat,” and mocked him. When S.W.’s parents arrived, his mother asked if Baker realized that handcuffing a child with autism would cause trauma. Baker responded, “You know what? You’re right, I don’t know that. I’m not a psychologist.” Baker continued to laugh and stated, “Great parenting!” He then demanded that S.W.’s family leave the school. Following the incident, a district investigation concluded that Baker’s conduct was “unprofessional and unreasonable,” and the City of Southlake terminated Baker’s employment. S.W.’s parents sued Baker, the City of Southlake, and the Southlake Police Department under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. The federal district court granted summary judgment for the defendants, and S.W. appealed.

In the Fifth Circuit, the legal standard for lawsuits under Section 504 and the ADA are virtually the same. Therefore, the court reviewed the parents’ ADA and Section 504 claims together. The district court had relied on a prior case, *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), in finding that an exception to the ADA applied to Baker’s conduct. According to the *Hainze* exception, a police officer does not have to consider whether his or her actions comply with the ADA “in the presence of exigent circumstances and prior to securing the safety of themselves” and others or when reacting to “potentially life-threatening situations.” *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000). The Fifth Circuit disagreed with the lower court’s application of *Hainze* to Baker. The court noted that, although the appellees referred to S.W.’s “nunchucks,” in fact the item brandished by S.W. was a jump rope given to him by the school as part of the “Jump Rope for Heart Program.” Moreover, the situation was not exigent or life-threatening, as evidenced by the conduct of the district employees who did not try to remove the jump rope or restrain S.W. prior to Baker’s arrival. In addition, the district court had relied, at least in part, on Baker’s assertion that he did not know about S.W.’s autism and would have had to inquire in order to learn that he was a student with disabilities. In fact, Baker had participated in a meeting at the school about S.W. several months before the incident, at which time S.W.’s parents had informed the school that he was seeing a psychologist and psychiatrist for depression, anxiety, and Asperger’s Syndrome. Regardless of whether he knew or did not know about S.W.’s conditions, the Fifth Circuit found “no reasonable basis for Baker’s verbal attacks and antagonizing behavior after S.W. was handcuffed.” The court vacated and remanded the decision to the lower court. *Wilson ex rel. S.W. v. City of Southlake*, 936 F.3d 326 (5th Cir. Aug. 28, 2019).
**District violated IDEA by delaying evaluation of student with suspected disability for an unreasonably long time.** D.C. began attending Klein ISD as a first grader in 2013. In the second grade, he received interventions for reading difficulties, and in the spring of third grade the district developed a plan for him under Section 504 of the Rehabilitation Act of 1973. D.C. continued to struggle, but the district did not find him eligible for special education until January 2018, after his parents requested an evaluation under the IDEA. The parents were unhappy with the district’s individualized education program (IEP) providing for co-teaching and dyslexia services, and they requested a due process hearing. The hearing officer found in favor of the parents, and Klein ISD appealed in federal court. In court, the district argued that it had evaluated D.C. in a reasonable time based on when the parents requested an evaluation. According to the court, however, “[a] child’s right to a FAPE [or, free appropriate public education] does not depend on the vigilance of the parents; child find is the responsibility of the school district. [. . .] KISD should have proactively sought to evaluate D.C. for special education eligibility as soon as it was on notice of a likely disability irrespective of whether the parents ever requested an evaluation.” The district suspected that D.C. had a disability in April 2017, but he was not evaluated until January 2018. The court agreed with the hearing officer and parents that the delay was unreasonable under the Fifth Circuit’s decision in O.W. v. Spring Branch Independent School District. In addition, the court found that the district’s delay was not harmless, as D.C. could have been receiving special education services much earlier if the evaluation had not been delayed. With regard to the IEP, the court also upheld the hearing officer’s finding that the IEP failed to provide meaningful educational benefit as required by IDEA based, among other reasons, on the district’s provision of dyslexia services at the request of D.C.’s parents although there was no evidence that D.C. had dyslexia. The court upheld the ruling against the district. *D.C. v. Klein Indep. Sch. Dist.*, Civil Action No. 4:19–CV–00021, 2020 WL 2832968 (S.D. Tex. May 30, 2020).

**District violated child find duty under IDEA by failure to timely refer student for evaluation.** O.W., a student with a history of attention deficit hyperactivity disorder (ADHD) and mental illness, enrolled in the fifth grade at Spring Branch ISD in the beginning of the 2014-2015 school year. O.W. struggled with behavior from the first day of school. However, the district did not refer O.W. for an evaluation until January 2015. Based on the evaluation, the district determined that O.W. was eligible for special education and developed an IEP and a behavior intervention plan (BIP) for O.W. When O.W. engaged in inappropriate conduct, he was provided a redirection, warned, and then directed to a desk in his classroom for five or ten minutes (“Take 5” or “Take 10”). O.W. was also physically restrained on eight occasions due to incidents of physical aggression. On one occasion, the district called law enforcement to O.W.’s classroom after he repeatedly struck his teacher with his fist and then charged at her. The next day, without convening O.W.’s special education committee, school staff and O.W.’s mother agreed to shorten O.W.’s
school day to three hours. O.W.’s parents ultimately withdrew him from the district, enrolled him in private school, and filed a complaint against the district. The special education hearing officer (SEHO) found that the district violated IDEA by failing to timely evaluate O.W., provide a FAPE in 2014-2015, or implement O.W.’s IEP by reducing his school hours and using restraints, time-outs, and police intervention. The district appealed the SEHO’s decision to federal district court and then to the Fifth Circuit Court of Appeals. Spring Branch ISD argued that it had reasonably attempted general education behavioral interventions, or response to intervention (RTI), before making a referral for special education. The Fifth Circuit disagreed, stating that the district should have known by October 8, 2014, that the regular behavior interventions were not successful based on troubling behaviors that resulted in O.W.’s removal from the classroom on a daily basis. The court clarified:

“We in no way suggest that a school district necessarily commits a child-find violation if it pursues RTI or § 504 accommodations before pursuing a special education evaluation. We instead recognize that determining whether a child find violation occurred is a fact-intensive inquiry and highlight that § 504 accommodations are not a substitute for an evaluation once a school district is ‘on notice of acts or behavior likely to indicate a disability.’ ”

Therefore, the court affirmed the lower court’s finding that the district violated its child find duty. The court also agreed that the district’s repeated use of Take 5 and Take 10 substantially departed from the IEP since the practice was essentially a form of time-out, which was not provided for in O.W.’s IEP or BIP. However, the Fifth Circuit overturned the lower court’s finding that the eight instances of district staff using physical restraint with O.W. violated his IEP. Given that the district generally avoided involving police and only contacted them when O.W.’s conduct posed a serious risk of harm, the court also found the single call to law enforcement was not a violation. With regard to the length of O.W.’s school day, the court noted that O.W.’s IEP was actually changed twice: initially, the school day start time was changed from 7:30 a.m. to 9:00 a.m., and after that the school day was shortened to a total of three hours. According to the court, the initial modification complied with an IDEA regulation permitting parents and districts to agree in writing to a modification. 34 C.F.R. § 300.324(a)(4). In the second instance, however, there was no formal agreement in writing to reduce the school day to three hours. Thus, shortening the school day substantially departed from the IEP. Spring Branch Indep. Sch. Dist. v. O.W. ex rel. Hannah O., No. 18-20274, 2020 WL 3118754 (5th Cir. June 12, 2020).

- **Fifth Circuit held that school district provided free appropriate public education to student with disabilities.** A.A., an elementary school student at Northside ISD, was diagnosed with serious emotional disturbance and other disabilities for which he received special education and related services at school. A.A.’s parent sued the school district under the IDEA, alleging that the district denied A.A. a FAPE and
committed various procedural errors, including delaying his reevaluation and improperly changing his IEP. The Fifth Circuit disagreed. Although the parent alleged that the district delayed evaluating A.A. for four months, the court found that the district had conducted an evaluation in November 2016, only two months after the parent’s formal request in September 2016. In addition, A.A.’s statement to the school counselor that he wanted to “see a doctor like one you can talk to” did not amount to a request to be evaluated for counseling services. The Fifth Circuit also rejected the parents’ claim that the district improperly moved A.A. to a general education classroom, noting that the functional differences between A.A.’s prior and new classrooms did not amount to a change of placement. Finally, the court reviewed the standard for FAPE established by the U.S. Supreme Court and determined that there was no substantive violation of the IDEA. The court affirmed the dismissal of the parent’s claims. *A.A. ex rel. K.K. v. Northside Indep. Sch. Dist.*, No. 19-50007, 2020 WL 1073064 (5th Cir. Mar. 6, 2020).

VI. **Title IX**

On November 16, 2018, OCR proposed new rules to amend Title IX regulations. The proposed rules were designed to address sexual harassment and to address due process concerns raised by advocates for accused students in higher education. Nonetheless, in most respects the proposal treated K-12 schools and colleges identically. On May 6, 2020, OCR released its long-awaited final regulations. U.S. Dep’t of Educ., Office for Civil Rights, *Title IX Regulations Addressing Sexual Harassment (Unofficial Copy)*, (May 6, 2020).

The new rules, which went into effect on August 14, 2020, define *sexual harassment* as conduct on the basis of sex that satisfies one or more of the following:

1. An employee conditioning an aid, benefit, or service of the district on an individual’s participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity; or
3. *Sexual assault, dating violence, domestic violence, or stalking*, as these terms are defined in the federal Violence Against Women Act (VAWA).

The rules require a district to respond promptly, in a manner that is not deliberately indifferent, to actual knowledge of sexual harassment in an education program or activity of the district. In many respects, the rules adopt the federal judicial standard for liability under Title IX – with one notable exception. While courts have not imposed liability unless a district official with a certain level of authority had actual knowledge of
the harassment, the new Title IX rules provide that notice of potential sexual harassment by any employee of a K-12 school district is enough to trigger the district’s duty to respond. In Update 115, TASB Policy Service issued changes to model policies to assist districts in compliance with the new rules.

VII. Professional Organization Dues

- Attorney general opines that a one-time authorization to deduct union fees from public employees’ salaries is inconsistent with Janus. State Representative Briscoe Cain asked Attorney General Ken Paxton three questions about payroll deductions being used to support public unions. In Texas, state laws entitle public employees, including school district employees, to elect to deduct membership fees or dues for professional organizations from their paychecks. Participation in the payroll deduction program is voluntary and can be revoked by the employee at any time. In Janus v. American Federation of State, County, and Municipal Employees, 138 S. Ct. 2448 (2018), the U.S. Supreme Court held that an Illinois law requiring public employers to deduct payroll amounts from non-union members compelled private speech in violation of the First Amendment. In light of the Janus decision, Cain asked whether a public employer in Texas has a duty to provide employees notice of their First Amendment rights against compelled speech. The attorney general responded that an employer must ensure that the method of payroll deductions for union fees ensures the voluntary nature of the employee’s consent. According to the attorney general, this could include requiring the employee, rather than the organization, to directly transmit authorization to the employer. Cain also provided a sample notice and asked whether it would be sufficient to provide notice to an employee under Janus. The attorney general noted that Janus did not require specific language or a specific method of obtaining consent, but he opined that the language proposed by Cain would suffice. Finally, Cain asked whether a public employer in Texas must periodically inquire into the employee’s consent to have union fees deducted, and if so, for what period of time does consent remain valid. The attorney general acknowledged that Texas law provides that an employee’s consent is valid until revoked or amended, effectively allowing continuous consent. Nonetheless, the attorney general stated that a “one-time, perpetual authorization is inconsistent with the Court’s holding in Janus that consent must be knowingly and freely given.” Although the Janus decision does not indicate a period of time for which an employee’s voluntary consent remains valid, the attorney general opined that a court would likely find that consent is valid for one year. Tex. Att’y Gen. Op. No. KP-0310 (May 31, 2020).
VIII. Elections and Tax Rate Adoption

A. Elections

Shortly after declaring a state of disaster in Texas due to the coronavirus pandemic, Governor Abbott issued a proclamation allowing political subdivisions, including school districts, to postpone their May 2 elections to the November 3, 2020 uniform election date. Nearly all school districts took action to postpone their elections. For more on postponement, see TASB Legal Services’ *Postponing the May 2, 2020 Election*.

These districts, as well as those that generally hold elections in November, are now preparing for their trustee elections, bond elections, and voter approval tax rate elections in November. In July, Governor Abbott issued another proclamation extending the early voting period to begin on October 13, 2020. For more on the deadlines and requirements for the November 3 election, see TASB Legal Services *Postponing the May 2, 2020 Election*.

As districts plan for their elections, they must also consider safety at school facilities used as polling places. For more on safety at polling places, see TASB Legal Services *Schools as Polling Places*.

B. Budget and Tax Rate Adoption

Although House Bill 3 and Senate Bill 2 impacted the budget and tax rate adoption process for school districts after they were passed in 2019, several important changes did not become effective until this year:

- The names of the tax rates changed:
  - The rollback rate is now the voter-approval tax rate.
  - The effective tax rate is now the no new revenue tax rate.
  - The effective maintenance and operations tax rate is now the no new revenue maintenance and operations tax rate.

- TEA calculated each district’s tier one tax rate [or maximum compressed tax rate (MCR)] in early August based on local property value information provided by each district.
  - Many districts submitted information based on a certified *estimate* of property values received under a new law allowing chief appraisers to provide a certified estimate in July if the certified appraisal roll is not available.

- Because TEA determined each district’s MCR, all districts adopted their budgets first and their tax rates after getting the information from TEA.
• A district could include $0.05 instead of $0.04 in its voter-approval tax rate, but the board had to adopt the tax rate by a unanimous vote.

• A district must now conduct a voter-approval tax rate election on the November uniform election date.

These changes gave rise to other questions, such as how to calculate some of the required tax rates, how the certified estimate of property values could be used, and the consequences of failing to unanimously adopt a tax rate with the fifth penny.

For more information on these and other issues, see *Budgets Tax Rates, and VATREs: What’s New in 2020*.

IX. **Vouchers**

• **Court decides that private religious schools cannot be excluded from state tax voucher programs.** In Montana, the state legislature enacted a law that allowed people to get a tax credit for donations to a nonprofit organization that paid private school tuition. In order to comply with a provision in the state constitution prohibiting government aid to any school controlled in whole or in part by a church, the tax credit program prohibited families from using the scholarship for religious schools. Three mothers who were barred from using the scholarship funds to pay tuition at Christian schools sued, alleging that the state’s rule discriminated against them on the basis of their religious views and the religious nature of their chosen schools in violation of the First Amendment’s Free Exercise Clause. The U.S. Supreme Court first determined that the state’s “no-aid provision” excluded religious schools based solely on their religious nature. As such, the Court applied a strict scrutiny analysis to determine whether to uphold the rule. Under this approach, a state’s rule must be narrowly tailored to further an interest of “the highest order.” Montana argued that its rule was necessary in order to preserve separation of church and state. However, the Court explained that a state may not justify an infringement of First Amendment rights by arguing that the infringement advances religious liberty. In addition, according to the Court, the infringement on religious liberty here burdened not only the schools but the families who wished their children to attend the schools. In an opinion written by Chief Justice John Roberts, the Court ruled that state constitutional provisions preventing public money from being spent on religious schools are unconstitutional. In the majority opinion, Chief Justice Roberts wrote, “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious. *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (June 30, 2020).
X. Student Issues

A. Free Speech

- Cheerleader did not have a clearly established right to free speech in social media posts. San Benito High School’s varsity cheerleading constitution banned inappropriate posts on social media and provided that a student would be dismissed from the squad based on ten demerits. M.L. and her mother signed the constitution when M.L. joined the squad. M.L. was terminated from the squad based on ten tweets that her cheerleading coaches found inappropriate. M.L. sued the district, the coaches, and her principal, alleging that the decision to kick her off the squad due to expression that occurred off campus and after school hours violated her First Amendment rights. The district court found that M.L. had established a First Amendment claim. Qualified immunity, however, protected the individual employees from M.L.’s claim, because her First Amendment rights were not clearly established by legal precedent at the time of her discipline. The court also dismissed M.L.’s claims against the school district. On appeal, the Fifth Circuit affirmed the lower court’s finding that the school employees were protected by qualified immunity, regardless of the merits of M.L.’s First Amendment claim. In an effort to provide guidelines in a murky legal area, however, the court went on to discuss discipline for off-campus student speech under a line of cases interpreting the U.S. Supreme Court case, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969). M.L. had argued that her discipline was clearly unconstitutional based on Bell v. Itawamba County Sch. Bd., 799 F.3d 379 (5th Cir. 2015), in which the Fifth Circuit held that a Mississippi high school could discipline a student who posted a threatening and profane rap recording online, even though the rap was made and posted off campus and outside of school hours, because the speech was intended to reach the school community.

According to M.L., Bell made clear that the student’s intent to reach the school community was the most important factor when determining whether the student may be disciplined for off-campus speech under Tinker. The Fifth Circuit disagreed, stating that Bell was limited to its facts and was not intended to create a general rule. The court further noted that, unlike in Bell, M.L. had identified herself as a member of the San Benito cheerleading squad on her Twitter page. In addition, M.L. was dismissed from an extracurricular activity, which distinguished her case from Bell and other cases following Tinker. The court noted that this jurisprudence should not be read to support disciplining a student for off-campus, non-threatening speech simply because an administrator found the speech “offensive, harassing, or disruptive.” Furthermore, as a general rule, the court stated that when a student does not intend speech to reach the school community, that speech should remain outside the reach of school

B. Dress Code

- **Court ordered district not to enforce hair length policy against African-American student.** K.B., a junior in high school, had attended Barbers Hill ISD since first grade except for a brief period in his sophomore year. In K.B.’s freshman year, the district’s policy prohibited male students from having hair that extended beyond their eyebrows, ear lobes, or the top of a shirt collar. K.B., who is African-American, had formed his hair into the style commonly known as dreadlocks in grade 7 and had not cut his hair since then. (K.B., and the court, referred to his hairstyle as “locs” because the more common term was coined by slavers to refer to enslaved people.) As a freshman, K.B. wore his locs behind a thin headband so that they did not violate the hair length policy. Midway through his sophomore year, the district changed its hair length policy, adding that male students’ hair “must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.” K.B. did not cut his hair to comply with the policy, therefore the district placed him in in-school suspension (ISS). K.B. transferred to Goose Creek CISD to finish out his sophomore year, but he missed being a student at Barbers Hill ISD, where he had received As and Bs and played trombone in the marching band. K.B. and other family members sought a court order that would prevent Barbers Hill ISD from enforcing its hair length policy against him, arguing that the district’s policy violated the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, Title VI of the Civil Rights Act, Title IX of the 1972 Education Amendments, and various state laws. The district argued that the policy was intended to maintain a standard for excellence and an educational atmosphere, and to prepare students for success in college, military, and the workplace. The district’s website stated that the dress code was “established to teach grooming and hygiene, prevent disruption, avoid safety hazards, and teach respect for authority.” However, testimony by the principal and superintendent failed to establish any relationship between the policy and these stated justifications. For example, the administrators testified that the district had excepted Native American students from the policy with no noticeable impact on school safety or any student’s ability to receive an education. Also, the principal could not point to any disruption related to K.B.’s hairstyle before the policy was amended. Thus, the court found that the amended policy that prohibited hair length “when let down” was “particularly unmoored” from the district’s stated objectives. The court also found that K.B. had provided sufficient evidence to show that he was
likely to succeed on his claim that racial discrimination was a substantial or motivating factor behind the policy. For example, during K.B.’s sophomore year African-American students were three times more likely than white students to lose at least one day of instruction, and the African-American students who were placed in ISS lost an average of 3.5 days of instruction while white students lost an average of one day. In addition to selective enforcement of the policy, the fact that the district changed its policy in the middle of the year and allegedly prevented Arnold’s mother from commenting on the policy at a board meeting suggested racial discrimination was a substantial motivating factor. The court also agreed that K.B. would likely succeed on his First Amendment claim. K.B. testified that his hairstyle was “part of [his] Black culture and heritage” and intended to emulate family members with West Indian roots. Dr. Wendy Greene, an expert witness for K.B., confirmed that hair texture has long served as a racial marker and that having locs, in particular, has long been a recognized expression of African-American and West Indian identity. The court also found that K.B. successfully showed the other required elements of his request for a preliminary injunction: that he would suffer irreparable harm without an injunction; that the injunction would not result in even greater harm to the district; and that the injunction would serve the public interest. As such, the court granted the request for a preliminary injunction. Arnold v. Barbers Hill Indep. Sch. Dist., Civil Action No. 4:20-CV-1802, 2020 WL 4805038 (S.D. Tex. Aug. 17, 2020).

C. Search and Seizure

- **School district police officer had reasonable suspicion to search student for firearm.** In December 2018, a middle school student in San Antonio told the school secretary about rumors that J.A.M., another student, had brought a gun to school. The secretary told the principal, who then asked the police officer assigned to the school district to accompany him to J.A.M.’s classroom, where the officer patted J.A.M. down and discovered a loaded handgun on his left hip. When J.A.M. was charged with delinquent conduct for possessing a firearm at school, he moved to suppress the evidence, arguing that the police officer did not have reasonable suspicion to conduct a warrantless search. J.A.M. based his argument on testimony by the police officer that the search was based on an anonymous tip. Although the police officer did not know the reporting student, both the secretary and the principal had known him for three years and considered him credible. According to the court, the relevant inquiry in assessing the existence of reasonable suspicion is what was “known collectively to the cooperating officials, not just the individual who personally conducted the search.” Holding that the search was based on reasonable suspicion, the court denied J.A.M.’s appeal. In the Matter of J.A.M., No. 04-19-00415-CV, 2020 WL 1159045 (Tex. App.—San Antonio Mar. 11, 2020, no pet. h.) (mem. op).
D. Parental Rights

- **Parents’ right to full information about their child’s school activities includes information regarding the child’s location during the school day.** A fifteen-year-old high school student reported physical abuse to a staff member at her school. In response, the staff contacted Child Protective Services and law enforcement. Based on the child’s assertion that she did not want to go home, the district’s at-risk coordinator contacted a domestic violence center and arranged for the student to stay at the center. When her mother arrived at school later that day to pick up her daughter and could not find her, the at-risk coordinator did not tell the mother where her daughter was. The student spent several days at the shelter and returned home only after a visit from her stepfather. The parents filed a grievance, complaining that district staff violated their right to full information under Texas Education Code section 26.008(a) by releasing their daughter to a shelter and not disclosing her location. The commissioner agreed that the law entitles parents to information regarding the location of their child, but held that in this case there was no relief that could be granted because the parents eventually received all the information they sought. The commissioner clarified that a parent’s right to information is not limited by Texas Education Code section 38.004, which requires a school district’s child abuse reporting policy to provide for actions without parental consent when necessary. Ultimately, the commissioner dismissed the parents’ claims for lack of jurisdiction, adding that the State Board for Educator Certification, not the commissioner, had jurisdiction over disciplinary complaints. *Parents, a/n/f Student v. El Paso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 004-R10-09-2019 (May 18, 2020).

- **Commissioner dismissed parent’s claim that district denied her right to be a partner in her child’s education.** On the Friday before spring break in 2019, a student at Hurst-Euless-Bedford ISD was seen with his cell phone out on campus during the school day. The assistant principal tried to confiscate the phone, but the student said he would rather receive a day of in-school-suspension (ISS). Therefore, the assistant principal informed the student that he would be assigned to a day of ISS when he returned from spring break because he was on his phone and refused to hand in the phone when requested. The student’s parent filed a grievance, arguing that her son was not “on his phone” but just had his phone “out.” The district changed the disciplinary referral to reflect that student’s phone was “out.” However, whether the student was on the phone or not did not change the disciplinary consequences, because campus policy stated that student phones should not be visible during the school day. In a second grievance, the parent alleged that district staff discriminated against her son because he was bi-racial and gay, and retaliated against him because she was a district employee who had filed a grievance. She then filed an appeal with the
commissioner of education, arguing, among other claims, that the district’s handling of the incident violated her right to be a partner in her child’s education under Texas Education Code section 26.001. The commissioner found the parent had not provided any evidence of unequal treatment. In addition, the commissioner noted that in response to the parent’s grievance, the student’s disciplinary referral was changed to indicate that his cell phone was “out” rather than “on.” The commissioner stated that the district’s “willingness to work with Petitioner in this way is the essence of allowing a parent to be a partner in their child’s education as required by Texas Education section 26.001, not a violation of the statute.” Furthermore, the district provided some of the requested remedies in response to the parent’s second grievance. For example, when the parent stated that she could not provide doctor’s notes because “she is a conscientious objector to Westernized medicine and opts out of vaccinations and doctor visits,” the student’s unexcused absences were changed to excused. “Overall,” stated the commissioner, “Petitioner’s complaints and remedies were given serious consideration by the administration and a relatively positive outcome was achieved.” Therefore, the parent failed to properly allege a violation of school law that would give the commissioner jurisdiction over her state law claims, and the commissioner further stated that he did not have jurisdiction over her federal discrimination and retaliation claims. Parents, a/n/f v. Hurst-Euless-Bedford Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 005-R10-005-R10-10-2019 (Apr. 24, 2020).

- **Fifth Circuit upheld dismissal of student’s lawsuit regarding transfer for athletic purposes.** When N.M. transferred from New Deal ISD to Cooper ISD in the middle of his sophomore year, his former football coach from New Deal ISD filled out a Previous Athletic Participation form (PAPF) indicating to the University Interscholastic League (UIL) that he believed N.M. had transferred for athletic purposes. As a result of the process initiated by the coach’s report, N.M. became ineligible to participate in varsity sports for one year. N.M.’s father sued New Deal ISD under the Equal Protection Clause, alleging that the district treated him differently from two other students who also transferred from New Deal ISD to Cooper ISD during their sophomore year. The district court dismissed the father’s claims, and the Fifth Circuit upheld the district court’s decision. The Fifth Circuit upheld the decision for two reasons. First, the court correctly found that N.M. was not similarly situated to the two other students. The other students transferred to Cooper ISD before the beginning of their sophomore year. N.M., however, transferred in the middle of his sophomore year, after the end of football season, even though he had already been living in Cooper ISD for two years. According to the Fifth Circuit, it was rational for the district to fill out the PAPF differently for N.M. than for the other students based on the timing and circumstances of their transfers. In addition, even if N.M. were similarly situated to the other two transfer students, the lawsuit failed to allege that the school district lacked a rational basis for treating them differently. The PAPF asked the
school to answer the question: “Based on your knowledge of the student and their circumstances, is this student changing schools for athletic purposes?” Therefore, the coach’s belief, based on his knowledge of N.M. and his circumstances, provided a rational basis for the district’s action. The court noted that there are times when public officials have discretion to make decisions based on “a vast array of subjective, individualized assessments.” In such instances, treating similar individuals differently is an acceptable consequence of the authorized discretion. Furthermore, the Equal Protection Clause prohibits arbitrary decisions but not unwise ones. As long as the assumptions underlying a decision are arguable, a court may find the decision to be rational, even if the underlying assumptions were incorrect. *Martinez ex rel. N.M. v. New Deal Indep. Sch. Dist.*, No. 19-50603, 2020 WL 536253 (5th Cir. Feb. 3, 2020).