

September 2023

SCHOOL LAW SECTION OF THE STATE BAR OF TEXAS

NEWSLETTER

www.schoollawsection.org



A WELCOME MESSAGE FROM THE CHAIR

I am honored to serve as the 2023-24 Chair of the School Law Section of the State Bar of Texas. Before attending law school at the University of Houston, I taught bilingual kindergarten and third grade in Galveston Independent School District. My classroom experience serves me well in my school law practice, as I'm sure it does many other of our Section members who came to their own school law practice after experience working for a school district. I also worked for several years for the commercial litigation sections of two international law firms before joining my dad in his employee-side school-law practice.



Giana Ortiz
Chair, School Law Section
2023-2024

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A WELCOME MESSAGE FROM THE CHAIR CONTINUED . . .

Our Section comprises lawyers for every type of school-related constituent—from parents and students, to employees and their employing public schools and charters, state agencies, and education related associations. Nonetheless, our Section strives to maintain a collegial and respectful environment among all those stakeholders. Our annual summer retreat is traditionally such an opportunity for lawyers on all sides of the bar to come together for quality CLE in a casual environment.

This is my favorite school-law event as we learn together from our members and other experts in school law matters, while also enjoying fellowship and relationship-building with one another. Our members consistently report that interrelating with one another outside the context of a dispute permits them to better represent their clients when conflict arises. I personally intend to take all steps to ensure that this tradition of collegiality is preserved.

We welcome your suggestions for CLE speakers (including yourself) and contributors for our newsletter. Please reach out to me anytime on that or any other matter.

Gratefully yours,

Giana Ortiz

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ARTIFICIAL INTELLIGENCE AND ARTIFICIAL LAW: A CAUTIONARY TALE
BY: TREVOR HALL¹

Artificial intelligence (AI) once occupied only the space of science fiction, a concept for whimsical musing and box office productions. In the last few months, however, AI has seemingly dominated public discourse, from the classroom to the boardroom and, in one published circumstance, the courtroom.

In *Mata v. Avianca, Inc.*,² the court sanctioned an attorney who used the popular AI program ChatGPT not simply as an office aid, but to create an entire brief. Responding to a Motion to Dismiss, the attorney used ChatGPT to “search” for various legal concepts and arguments, eventually relying on the software to craft “his” brief to the court. The attorney admittedly operated “under the false perception that this website could not possibly be fabricating cases on its own.”³ The brief cited “cases” that appeared nowhere in the Federal Reporter or Federal Supplement. Simply put, the ChatGPT software “fabricated the cited cases”⁴ and created false arguments. For this and myriad other reasons, the court ultimately sanctioned the attorney, his law partner, and his law firm.⁵ At least one federal judge now preemptively warns counsel regarding the unfettered use of AI. In the Northern District of Texas, Judge Brantley Starr requires each party (read, attorney) to file an attestation that they “will be held responsible under Rule 11 for the contents of any filing ... regardless of whether generative artificial intelligence drafted any portion of that filing.”⁶

¹ Trevor Hall is a Senior Associate in the Austin office of Powell Law Group, LLP, where he practices general school law on behalf of school districts throughout Texas.

² 2023 U.S. Dist. LEXIS 108263 (S.D.N.Y. Jun. 22, 2023).

³ *Mata*, 2023 U.S. Dist. LEXIS 108263, at *9.

⁴ *Id.*

⁵ *Id.* at *42.

⁶ <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>

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AI may serve a purpose in the practice of law, such as automating legal research, assisting pro se litigants, or preparing routine forms. Contrarily, AI may produce “lazy lawyering” or an overreliance on a machine that, unlike lawyers, holds “no allegiance to any client, the rule or law, or the laws and Constitution of the United States”⁷ or the State of Texas.

Technology has undoubtedly advanced the practice of law. Typewriters gave way to word processors. The books gave way to web-based research at a time when people of a certain age declared that a computer would never replace a newspaper.⁸ AI may prove a useful tool to prepare a Level II decision or notice of proposed termination. AI may assist in drafting an appeal to the Commissioner or a notice of election. Perhaps AI currently assists with all these things. For now,⁹ however, “generative artificial intelligence is the product of programming devised by humans who did not have to swear ... an oath” to uphold the law.¹⁰ As such, attorneys must remain vigilant in protecting the integrity of the profession by not ceding their judgment to software and digitized code.¹¹

⁷ Judge Starr, *id.*

⁸ See, e.g., Trevor Hall in Law School (Fall Semester 1999) (“I’ll never get my news from a computer.”).

⁹ A machine taking an oath is a seemingly ludicrous concept; however, the author recognizes that a seemingly ludicrous concept can eventually become reality. See, e.g., footnote 7.

¹⁰ Judge Starr, *id.*

¹¹ The author did not use AI for any portion of this article. Or did he?



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THE LADY IN RED¹

If you've practiced school law in Texas for any length of time, or have ever gone to a School Law seminar anywhere, you have seen the Lady in Red. You've heard her speak at her CLE presentations, you've read articles that she wrote, and you've met lawyers that she trained to be good school lawyers.

As someone who has practiced only School Law in Texas for 37 years, it may surprise you to know that Lynn Rossi Scott wasn't born in Texas. The oldest of five children, she was born in Chicago, Illinois, where her father worked for Standard Oil of Indiana. One of her many memories of Chicago is the Pizzeria Uno where her mother and father went on their first date. At age 13, she moved to Texas when her father was transferred to the Chocolate Bayou plant of Amoco Chemicals, where he headed the Human Resources Department. He settled the family in Alvin, Texas, where Lynn attended four years of high school.

After graduating from high school, Lynn was offered a two-year tuition, fees, and books scholarship to Alvin Community College. As the oldest of five, you can bet that her parents insisted she take that offer. She earned an Associate's Degree in General Liberal Arts from Alvin Community College, got her bachelor's degree in journalism at Texas A&M University, got a master's degree from University of Houston Clear-Lake (in college teaching) and received her law degree from the University of Texas Law School. Lynn is very proud that she was an editor of the student yearbooks at Alvin High School, Alvin Community College, Texas A&M University, and University of Texas Law School!

¹ Thank you to Tom Myers, partner at Brackett & Ellis, PC, for his tribute to the Section's 2023 Kelly Frels Lifetime Achievement Award winner, Lynn Rossi Scott.



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Before going to law school, Lynn worked at Alvin Community College for five years as the Coordinator of Student Activities, Student and Public Information. (When she left that job, she was replaced by three people!) Lynn's time at ACC convinced her to pursue school law, so she headed to UT because it had the most School-Law-related courses at that time. While she was at UT Law School (did her love for red clothing clash with UT orange?), she was a law clerk for the Texas Association of School Boards' Legal Services Department under John Aldridge.

When Lynn graduated from law school, she began her legal career at the law firm of Rohne Hoodenpyle Lobert & Myers in Arlington, Texas. While there, Lynn developed rapidly as a school lawyer and quickly gained a reputation as the school lawyer to call when things go wrong at your school district; or when you want to prevent things from going wrong. Lynn was able to do all that she did by learning how to work 24-hours-a-day, 7 days-a-week, including sending emails to you in the middle of the night! Lynn has given more presentations to professional organizations, school boards, school districts, and school affiliated organizations than most groups of school lawyers together.

Despite saying that she was "not a litigator," Lynn became a very well-respected trial lawyer, representing school districts before every level of court in Texas and in the Federal Court System, Special Education due process hearings, Commissioner hearings, and every other type of contested School Law matter. (She was actually a "criminal investigator" for me when I once defended a school district employee accused of stealing money from her school district. Since this was before I was a school lawyer, I asked Lynn to go with me so I would know what evidence to ask for concerning school bookkeeping standards. She even asked for copies of the records from the superintendent of the district and got them!)

After 12 years at what was then Rohne Hoodenpyle Lobert Myers and Scott, Lynn joined what was then Bracewell and Patterson in its Dallas office. There she continued her excellent work and reputation in School Law. In 2007, Brackett & Ellis was fortunate enough to convince her to come to Fort Worth and practice School Law with us, and Lynn has been here since then.

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Through the years and at those law firms, Lynn has been a trainer and mentor for a new generation of school lawyers including, among others, me, Miles Bradshaw, Janet Bubert, Dianna Bowen, Mari McGowan, and many others. She also has served on the TASB Construction Contracts Committee since its inception, manning the keyboard so that she can influence the contract language (and finish the edits while everyone else is talking!)

In addition to practicing law, Lynn has served as chair of the State Bar of Texas School Law Section, chair of the Texas Association of School Boards' Council of School Attorneys, and president of the Education Law Association. She has been selected by her peers for inclusion in The Best Lawyers in America since 2009. She was honored as one of Thirty Extraordinary Women in Texas Law by Texas Lawyer in 2009. She was awarded the Marion A. McGhehey award for outstanding service to the field of Education Law and to the Education Law Association by ELA in 2019. She has been listed in Texas Lawyer as a Super Lawyer in the field of Schools and Education Law for many years.

In addition to legal services, Lynn has been active in her church, Most Blessed Sacrament Church in Arlington, she was a director of the Gladney Center for Adoption for over 20 years, was a director of the Alvin ISD Education Foundation and now serves on its advisory board, and she was a director of the Arlington Chamber of Commerce. Lynn is currently a member of the Board of Directors for Theatre Arlington, and she will become president of the Board in 2024. The Theatre recently completed a huge renovation project, and the Theater bears her and her husband's names.

Some interesting facts about Lynn that you may or may not know: her love of red in cars, suits, briefcases, and (occasionally) hair; her love for outlet mall shopping; her red candy jars, which supply much-needed chocolate, mints, and fruity snacks to everyone in her law office; her favorite song – “Sugar Sugar” by the Archies (the ringtone on her cellphone); and her love of live musical theater and Broadway productions. Lynn is married to Peter Scott and they have two adult children, Krissy and Joseph. She is also a proud grandmother to her grandson, Hudson.

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Lynn has been named the recipient of the Kelly Frels Lifetime Achievement Award by the State Bar of Texas School Law Section. Please join me in congratulating Lynn for another outstanding honor in her practice of School Law!



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LEGISLATIVE UPDATE

BY: DANIEL STOCKTON¹

The 88th Legislative Session began with a historic budget surplus due to massive inflation increasing sales tax revenue, and property value increases. As a result, schools, and virtually every other group, began the session optimistic that the state would provide additional funding. Legislators also had significantly more ongoing money to spend this session based on revenue estimates for the next two years from the Texas Comptroller.

Despite these increases, the legislature spent just about \$800 million beyond what was necessary to restore funding cut during the last legislative session or required by existing law. That money was split between funding for school safety (\$300 million) and funding to purchase state-approved instructional materials (\$500 million). The legislature did appropriate additional money to help offset some increases to TRS Active Care Premiums, but those premiums still rose by as much as 10%. Another nearly \$4 billion remains appropriated in limbo pending the passage of legislation to spend it.

Throughout the session, districts made clear to lawmakers that schools are feeling the impact of inflationary pressures while simultaneously dealing with a massive teacher shortage and political influences that take the focus off educating students.

Nevertheless, lawmakers spent time focused on passing new unfunded mandates including HB 3's armed peace officer requirement and HB 114's e-cig DAEP placement requirement. One piece of legislation that has the potential to drastically impact schools but got significantly less attention than other bills during the session is HB 18 which requires the TEA to develop new standards for the use of technology, including software and apps, in classrooms. While the standards are designed to address important emerging issues in instruction, several provisions have the potential to create significant logistical challenges for school districts; and yet the legislature did nothing to provide funding for districts that will grapple with these challenges.

¹ Danny is the General Counsel of Frisco ISD.

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The session was also defined by battles between the House and Senate, including on school voucher programs. As the session moved into its final stages, the Senate refused to provide additional flexible funding to schools to address inflation, staff compensation, and school safety without the passage of a universal voucher program. The House refused to cooperate in this regard and as a result, school funding remains a hostage of the voucher debate.

However, the saga continues as the Governor is expected to call a third special session in October. His first two sessions focused on property tax relief, an issue that proved surprisingly divisive between the chambers, and took two full special sessions to iron out. Now, the Governor plans to bring lawmakers back to Austin to debate school vouchers, teacher raises, and perhaps other school funding just a few days after the TEA releases its first school ratings under the new accountability system.

The new system dramatically increases cut-scores for the college, career, and military readiness indicator and is being applied retroactively to students who graduated prior to the new cut-scores being set. This change is expected to result in lower school and district ratings across the state. As a result, schools looking to push back on the narrative that public schools are failing, and sending public money to private schools is the answer, will have their work cut out for them in October as members of the public will be told that schools' ratings have dropped, even if their performance actually improved.



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TITLE IX UPDATE

BY: JANET BUBERT¹

In May 2020, just as school administrators and teachers were trying to navigate how a worldwide pandemic was going to impact the upcoming school year, the U.S. Department of Education (“DOE”) released Title IX regulations that became effective August 14, 2020. Generally, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal funds. For the first time, the 2020 regulations addressed a recipient’s response to sexual harassment under Title IX. Prior to 2020, courts recognized potential Title IX liability for sexual harassment and the DOE released multiple guidance documents on the topic; but there had been no formal rulemaking to identify specific responsibilities for responding to sexual harassment or to define sexual harassment.

At the time the 2020 regulations were adopted, the DOE’s stated purpose was to develop “a more reliable adjudication process” in response to allegations of sexual harassment. The 2020 regulations incorporated certain expectations for responding to such allegations, including a required framework for a formal complaint process, along with notice provisions and a program for providing supportive measures to both complainants and respondents. As schools scrambled over the summer to ensure compliance through policy development and professional development training, attorneys and other commentators predicted potential complications with implementing the regulations. Many of those difficulties have been realized, particularly in the K-12 educational setting. For example, the formality of the complaint procedures, as well as the opportunity for both parties to inspect and review evidence obtained during an investigation, may produce a chilling effect on a complainant’s interest in initiating a formal complaint.

¹ Janet is a Shareholder with Underwood Law Firm.

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Additionally, when a formal complaint is filed, the current regulations prohibit any disciplinary consequences for a respondent until the complaint process, including any right of appeal, is completed – a process that routinely takes many weeks as the result of the required timelines for complaint procedures. From a fairness perspective, such a restriction may seem reasonable. But school administrators may often feel that the prolonged timeline for resolving the complaint unnecessarily interferes with their ability to effectively manage the school environment. Typically, school administrators respond to other types of conduct violations within no more than a few days. Another concern has been that the complaint framework required under the 2020 regulations applies only to sexual harassment complaints, which results in inconsistent procedures for responding to sexual harassment versus other conduct prohibited under Title IX.

In June 2022, the DOE unveiled a new regulatory proposal for Title IX. Now under a different administration, the DOE stated its intent to “restore crucial protections for students who are victims of sexual harassment, assault, and sex-based discrimination.” Most notably, the proposed regulations would expand Title IX protections to incorporate a broader understanding of sex-based discrimination that includes discrimination based on sexual orientation or gender identity as well as expanding the definition of sexual harassment. Other proposed revisions would seek to simplify the formal complaint procedures, which would no longer be limited to sexual harassment claims. For complaints involving students with disabilities, the proposed regulations would require that the Title IX coordinator consult with the student’s IEP (Individualized Education Program) Team to ensure compliance with applicable federal laws for students with disabilities related to the implementation of supportive measures and throughout any formal complaint process. Additionally, to address a gap identified by DOE in current federal laws, the proposed regulations would require recipients to provide reasonable modifications for pregnant students. This would include referring a student to the Title IX coordinator for further assistance upon receiving notice of a pregnancy, to discuss options for individualized, reasonable modifications as needed to prevent discrimination and to ensure equal access to the education program or activity. Required accommodations related to pregnancy may include excused absences for medical reasons and providing the student with a clean, private space for lactation.

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A complete summary of the proposed Title IX changes published by the DOE is available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>.

Initially, the DOE anticipated finalizing the proposed Title IX regulations in June 2023. However, after receiving more than 240,000 public comments – twice the number of public comments generated by the 2020 regulations – the DOE announced in May that it would delay release of the final rules until October 2023. As multiple commentators have recognized, the DOE is required to provide notice of the final rules at least 60 days prior to the effective date of the new rules. Therefore, a release by the end of October could result in a mid-school-year implementation deadline as early as January 1, 2024.

The Title IX changes proposed by the current administration did not stop with changes to how schools manage harassment complaints. In April 2023, the DOE proposed a new regulation related to participation in athletics. Specifically, the DOE's proposed language states: "If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." Currently, more than twenty states have laws in place that limit participation on a school sports team based on a student's identified gender that is different from the gender assigned at birth. A sure indication that if the proposed rule is adopted as proposed, the implementation of the final rule will likely generate much controversy and litigation. A fact sheet published by the DOE on the proposed Title IX regulations related to eligibility for athletic teams is available at <https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams>.

Our school law colleague, Sarah Orman, ended her 2019 article on Title IX for this same newsletter with the prophetic movie quote to, "Fasten your seatbelts, . . ." – it appears that advice still applies and no doubt there are more bumpy times ahead.

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