

**PRESENTED AT**

**35<sup>th</sup> Annual School Law Conference**

February 20-21, 2020  
Austin, TX

## **Commissioner Decisions Update**

**Mark Tilley**

Author Contact Information:  
Mark Tilley  
Texas Association of School Boards  
Austin, TX

[legal@tasb.org](mailto:legal@tasb.org)  
800.580.5345

## Summary of Selected Commissioner Decisions

The commissioner issued 34 decisions in 2019, not including decisions related to special education. These opinions cover a range of topics, including nonrenewal, termination, detachment and annexation, and local grievances.

Significant decisions summarized below are categorized by subject matter and arranged alphabetically under each heading. An alphabetical chart of all commissioner decisions follows the summaries. *See page 16.*

### TERMINATION

#### **Evidence of standardized testing irregularities and mishandling of student funds constituted good cause for termination.**

The Trenton ISD board of trustees voted to terminate the contract of teacher Wendy Burk based on testing irregularities and mishandling student funds. Students that Burk monitored during administration of the STAAR exam complained that their test answers had been changed. Based on the evidence at the hearing, the independent hearing examiner (IHE) determined that Burk was responsible for changing the students' answers. The IHE also determined that Burk mishandled 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 argued on appeal 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, the district's decision was supported by substantial evidence, and that a flawed investigation is not grounds for overturning a termination, the commissioner affirmed the board's decision to terminate and denied Burk's appeal. *Burk v. Trenton Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 018-R2-11-2019 (Dec. 20, 2019).

#### **Termination of teacher who tweeted to Trump about immigration overturned for failure to adopt conclusion of law as to good cause.**

The Fort Worth ISD board of trustees proposed terminating the continuing contract of teacher, Georgia Clark, 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 believed violated the standards of conduct for educators and resulted in reduced 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 ..."

The IHE concluded that the district did not provide sufficient evidence to show good cause for terminating Clark's contract. Specifically, the IHE found that the allegations of racially insensitive classroom incidents did not prove that Clark's statements violated district policy or the Code of Ethics and Standard Practices for Educators. Further, the IHE concluded that Clark's tweets to the president were statements by 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 rejected some of the IHE's findings of facts and conclusions of law, as allowed by Texas Education Code section 21.259, and voted to terminate Clark's contract. Importantly, the board did not adopt new conclusions of law or change any conclusions of law to support a claim 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. The district argued that Clark waived her First Amendment rights by signing her contract.

The commissioner rejected the district's argument that Clark waived her First Amendment rights by signing an employment contract and analyzed to what extent a public employee has a protected interest in contacting a public official about a matter of public concern during non-work hours. Referencing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), which requires balancing an employee's First Amendment interests against the school district's interest in efficiency, the commissioner noted that the relevant balancing test is difficult due to the lack of guiding case law. Declining to make new constitutional law, the commissioner decided the case on other issues.

The commissioner also addressed whether the district had good cause under the U.S. Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which held that public schools must educate all children, regardless of immigration status. The commissioner noted that it seemed likely that Clark was not aware of *Plyler*, but that she could not have violated the holding in the case because she neither refused to educate a child nor inquired into a child's immigration status.

The commissioner ultimately based his decision on whether the board properly changed the IHE's recommendation and whether the changes supported a finding of good cause. The board rejected, at least in part, thirty-two of the IHE's fifty-two conclusions of law, did not change any conclusions of law, and adopted no alternative or new conclusions of law beyond those the IHE had written.

Also available as part of the eCourse

[2020 School Law eConference](#)

First appeared as part of the conference materials for the  
35<sup>th</sup> Annual School Law Conference session

"Commissioner Decisions Update"