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“Oh, What a Tangled Web We Weave”

Commissioner Jurisdiction after *Davis*; With a Little  
DOI and Charter Thrown In

**Paul Tapp**

Author Contact Information:

Paul Tapp

ATPE

Austin, TX

[ptapp@atpe.org](mailto:ptapp@atpe.org)

512.467-0071

## THE DAVIS OPINION AND WHY IT MATTERS

The Texas Supreme Court's May 2021 *Davis v. Morath* opinion is significant to the public education world, to attorneys that practice in it and administrators that deal with grievances. In addition to simply being a rare example of a public education issue (not involving school finance) making it to the Texas Supreme Court, the opinion involves a common and significant issue: when does a grievance have to be filed for the Commissioner of Education<sup>1</sup> to be obligated to consider an appeal?

The local grievance process is significant. Not only is it often the best way to get a controversy resolved quickly, the Commissioner has historically held that completing the local grievance process is a prerequisite to his administrative jurisdiction under Texas Education Code §7.057<sup>2</sup>; under the doctrine of exhaustion of administrative remedies.

The *Davis* opinion addresses and answers some significant questions relating to the timing of the grievance submission and how the local district and Commissioner can and should address those timing issues. Unfortunately, the Court's opinion leaves some questions unanswered, but the *Davis* opinion significantly changes the legal landscape.

### THE DAVIS STORY: BACKGROUND

In May of 2014 Dallas ISD adopted a local teacher appraisal instrument, the "Teacher Excellence Initiative" (TEI). The district published a "guidebook" in May of 2014, describing the appraisal process. The parties disagreed whether this guidebook was a statement of policy or an unofficial administrative resource. The district conducted training in the TEI in August of 2014. The parties also disputed whether this training put the teachers on notice of all the components of the TEI.

There were several unique components of the TEI that differed from the commissioner-approved T-TESS appraisal instrument. The difference most significant to the *Davis* opinion was that the TEI incorporated student test data and, since that data was not available until after the end of the school year, the teachers would not receive their final ratings, documented on "scorecards" until the Fall of the subsequent school year. These scorecard ratings affected the teachers' compensation.

In September of 2014, the district adopted regulations providing more details about the TEI process, including that the scorecards for the 2014-15 school year would be shared with the teachers in the Fall of 2015. The scorecards for the 2014-15 school year were shared with the teachers on September 18, 2015.

The teachers filed a grievance, pursuant to the district's local grievance policy, within ten business days of the date they received their scorecards.<sup>3</sup> The grievance stated that the distribution of the scorecards

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<sup>1</sup> Subsequent references to the "Commissioner" refer to the Commissioner of Education.

<sup>2</sup> Texas Education Code §7.057 is frequently referenced throughout this paper. For brevity, it will be cited simply as §7.057.

<sup>3</sup> The grievance complained of a number of different issues, the scorecards and the TEI process in general as well as a change in health insurance premium that affected the teachers' take home pay. This paper will only address the issues that are relevant to the Court's opinion on grievance timeline and Commissioner jurisdiction.

was the basis, or “trigger” for the grievance. It also stated that the scorecards violated several provisions of the Texas Education Code.

The district’s grievance process followed the standard process of grievance conferences at successively higher levels of the administration, culminating with a presentation to a subcommittee of the district’s board of trustees. At each level of the local grievance process, the district held that the grievance had not been timely filed, as the grievance was *really* about the TEI process in general, not the scorecards themselves and teachers knew of the TEI processes they claimed were violations of law from the information previously provided in the guidebook and training and dismissed the grievance based on that finding. The teachers’ grievance was ultimately denied, based on the district’s determination that it was untimely.

The teachers filed an appeal with the Commissioner, pursuant to §7.057. The Commissioner held that he did not have jurisdiction over the appeal, agreeing with the district that the grievance had not been timely filed.

The teachers appealed the Commissioner’s dismissal to district court which upheld the Commissioner’s ruling that he had no jurisdiction. The teachers appealed to the Third Court of Appeals. This court partly upheld the prior rulings, holding that to the extent that the grievance complained of “components” of the TEI process known to the teachers earlier, the Commissioner was correct in dismissing those matters as untimely. But the appeals court reversed and remanded the prior rulings for the issues related to the scorecards themselves, holding that on these issues, the grievance was timely filed. All three parties: teachers, district and commissioner appealed to the Texas Supreme Court, which accepted the case, ruling on the matter on May 28, 2021.

### **THE TEXAS SUPREME COURT’S DAVIS RULING**

In *Davis*, the Court significantly altered the legal landscape of Commissioner jurisdiction under §7.057. The framework created by the appeals court decision, distinguishing between the complaints related to the scorecards themselves and the complaints relating to “components” of the appraisal process provided the Court with a unique opportunity to consider what triggers a district’s grievance timeline and how that affects Commissioner jurisdiction. The Court also addressed the significant issue of “ripeness” – or when a situation has developed enough that a legal complaint can be pursued.

#### **Section 7.057, Exhaustion of Local Remedies and Commissioner Jurisdiction: “Like it or not – You got it”**

##### The History or the Commissioner’s Opinions on timeliness and jurisdiction: “No soup for you!”

Commissioners have long held that they did not have jurisdiction to rule on a grievance that a district had determined was not timely-filed as a completed local grievance with a school board determination on the substance of the complaint was held to be mandatory. This position appeared to be supported by Texas courts, *See, Van Ind. Sch. Dist. v. McCarty*, 165 S.W.3d 351 (Texas 2005); *Hitchcock v. Bd. Of Trustees Cypress-Fairbanks Ind. Sch. Dist.*, 232 S.W.3d 208 (Tex. App. – Houston [1<sup>st</sup> Dist]. no pet.) The Commissioners’ reasoning has consistently been that an appellant’s exhaustion of their local

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