# COLLINS & BLAHA, P.C.
## ATTORNEYS AT LAW

# EDUCATION LAW UPDATE

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# After Attorney General Review, Constitutional Challenge to MiLEAP Not Ruled Out

On July 11, 2023, through Executive Order 2023-6,[1] Governor Gretchen Whitmer created the Michigan Department of Lifelong Education, Advancement, and Potential ("MiLEAP"). After the announcement of the Executive Order, the State Board of Education ("SBE") sought clarity from the Michigan Attorney General on the new department, specifically with respect to overlap with the SBE's constitutional authority over public schools. While the Attorney General did not find constitutional issues in her initial review, the constitutionality of MiLEAP may still be called into question following the December 1, 2023, effective date.

***"Governor Whitmer sought to establish MiLEAP to 'ensure[] all available resources, data, and dollars are aligned around a single vision—building an education system from preschool through postsecondary that can support our kids, families, and the economy of the future by ensuring anyone can make it in Michigan.'"***

Governor Whitmer sought to establish MiLEAP to "ensure[] all available resources, data, and dollars are aligned around a single vision—building an education system from preschool through postsecondary that can support our kids, families, and the economy of the future by ensuring anyone can make it in Michigan." According to the Executive Order, the new department will collaborate with the Michigan Department of Education ("MDE") and the SBE to complement their already existing long-term planning efforts. Part of this restructuring includes creating offices in MiLEAP dedicated to early childhood education, higher education, and educational partnerships.

Moreover, the Executive Order transfers three offices from MDE to MiLEAP. The Michigan Office of Great Start, the Governor's Educator Advisory Council, and the Michigan PreK-12 Literacy Commission will be transferred. Additionally, the Executive Order makes transfers from the Department of Labor and Economic Opportunity, Department of Licensing and Regulatory Affairs, and the Department of Treasury, among others.

On August 8, 2023, the SBE unanimously voted to request an opinion from the Michigan Attorney General, Dana Nessel, regarding the constitutionality of MiLEAP.[2] In a press release, the SBE cited the language of the Michigan Constitution, which states in relevant part:

> Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to

[1] See https://www.michigan.gov/whitmer/-/media/Project/Websites/Whitmer/Documents/Exec-Orders/EO-20236-MiLEAP-final-signed.pdf?rev=5592e6766514465d8c2242f7997c6655&hash=5DB451A3D81E29C51156503292339CB5.

[2] See https://www.michigan.gov/mde/news-and-information/press-releases/2023/08/08/state-board-of-education-wants-constitutional-clarity-on-mileap.

> institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith. [Const 1963, art 8, § 3].

The SBE's motion to request an opinion from the Attorney General stated that "there appear now to be potentially two departments with overlapping authority over 'all public education,' particularly preschool public education."[3]

Attorney General Dana Nessel responded to the request in a letter on August 28, 2023,[4] stating that any opinion addressing the potential overlapping authority would be premature because the Executive Order is not effective and has not been implemented. Attorney General Nessel stated that the only review she could provide at the time was whether the Executive Order was unconstitutional on its face. Attorney General Nessel stated that the requirement for an order to be facially unconstitutional pursuant to Michigan Supreme Court precedent is that there must be "no set of circumstances" in existence that would make the order valid. *Straus v Governor*, 459 Mich 526, 543 (1999). It is insufficient that an order might be unconstitutional under some conceivable set of circumstances. Id. She noted that the intent of the Executive Order is "to create a spirit of cooperation, coordination, and collaboration between MiLEAP and the Board that will complement the Board's activities." Moreover, the Executive Order explicitly states that it should not be interpreted to restrict or modify the constitutional authority of the SBE. According to Nessel, if the intent of MiLEAP is properly implemented, "it creates a set of circumstances under which the [Executive Order] would be valid," which means it is not unconstitutional on its face.

Attorney General Nessel stated that an opinion after the implementation of the Order may be appropriate if there are actions taken by MiLEAP that the SBE believes infringes on its constitutional authority. SBE President Dr. Pamela Pugh indicated that the SBE will closely monitor the implementation of the new department when it takes effect December 1.[5]

**Please do not hesitate to contact our office if you have any questions regarding MiLEAP or the Executive Order.**

[3] See https://www.michigan.gov/mde/-/media/Project/Websites/mde/State-Board/Agendas/2023/09/Item-E---SBE-Aug-8-2023-meeting-minutes.pdf.

[4] See https://www.michigan.gov/ag/-/media/Project/Websites/AG/releases/2023/August/Dr-Rice-Response-Letter-Final.pdf.

[5] See https://www.michigan.gov/mde/news-and-information/press-releases/2023/08/28/mde-sbe-respond-to-attorney-generals-letter-regarding-mileap.

# ICYMI: Legal Updates, Case Law on Special Education

**MDE Recommends Prioritizing Substitute Teacher Placements in Special Education**

Recently, the Office of Special Education within the Michigan Department of Education ("MDE") released a memorandum on substitute teacher placement for special education programs and recommended that school districts review the minimum requirements under the federal Individuals with Disabilities Education Act ("IDEA") for teachers placed in special education programs.[6]

Michigan law requires that substitute teachers have a minimum of 60 hours of college credit. MCL 380.1233(5)(a). IDEA requires that school districts provide students with disabilities with a free appropriate public education, which includes teachers who are appropriately trained to design instructions for students with disabilities. Additionally, the federal regulations implementing IDEA require that special education teachers hold at least a bachelor's degree and participate in a special education certification program. See 34 CFR 300.156.

***"IDEA requires that school districts provide students with disabilities with a free appropriate public education, which includes teachers who are appropriately trained to design instructions for students with disabilities."***

Therefore, the MDE recommended that school districts "prioritize substitute teacher placements in each special education program to ensure those programs are staffed by an individual who minimally has a bachelor's degree and is participating in either a traditional or alternative route to a special education certification." By prioritizing substitute teacher placements in special education positions, school districts will ensure that they are compliant with IDEA and its regulations.

**Student Ordered Back to Placement Where Conduct Resulting in Expulsion as Caused By Disability**

In *DMM o/b/o SM v Lakeview Public School*, Office of Administrative Hearings & Rules Decision & Order (Case No. DP-22-0096), issued January 10, 2023, the Administrative Law Judge ("ALJ") held that a student's conduct that resulted in his expulsion from Lakeview High School had a direct and substantial relationship to the student's disability. The student in question had Autism Spectrum Disorder ("ASD") and had a violent incident after becoming anxious and pulling the school's fire alarm. After the incident, the student was expelled from the school.

The relevant section of the IDEA provides that within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the

[6] Available at https://www.michigan.gov/mde/-/media/Project/Websites/mde/Memos/2023/08/SE-Substitute-Teacher-Placement.pdf?rev=a3686833f39242b2815e6aac699ab230.

Local Education Agency ("LEA"), the parent, and relevant members of the child's IEP Team must review all relevant information in the student's file to determine if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability. 34 CFR § 300.530(e)(1)(i).

In the previous eight years, the student had exhibited violent tendencies, especially when he became anxious. On the day of the incident, because of his ASD, the student was not able to calm down or think rationally about what had happened. His mother testified that it usually took at least 60 or 90 minutes for the student to reset and calm down after experiencing that kind of anxiety. Once he was upset and in his condition of anxiety, unable to reset and regulate his emotions, and before his medication could take effect, the student followed the same pattern that he had exhibited since early childhood—he became physically aggressive and fled the building.

The ALJ found that the student's heightened anxiety and the physical aggression he directed toward Lakeview High School staff during the September 2022 incident because of his anxiety had a direct and substantial relationship to his ASD. As in similar previous behavioral incidents, the student's ASD prevented him from being able to calm down, regulate his emotions, and react appropriately. Thus, the petitioner in this case established that the student's behavior was a manifestation of his disability. See 34 CFR § 300.530(e)(1)(i). The ALJ ordered the student to return to the placement from which he had been removed unless the parties were able to mutually agree on a change of placement to an appropriate interim educational setting.

**Special Education Student's Excessive Absences Outside of School's Control a Defense to Denial of FAPE**

In *MR o/b/o CY v Montrose Community Schools*, Office of Administrative Hearings & Rules Decision & Order (Case No. DP-22-0098), issued June 29, 2023, the ALJ found that the student's excessive absences were caused by factors outside of the school's control; therefore, the student was not denied a free appropriate public education ("FAPE").

In *MR*, a parent brought an action under the IDEA to determine if the student was denied a FAPE because of any inaction by the school, such as through content, methodology, or delivery of specially designed instruction, that would have remedied the student's excessive absences. The student was eligible for special education because of an emotional impairment. Over the course of a few school years, the student failed to regularly attend school. At the hearing, several reasons for the absences were found, including that the student was too tired; did not take prescribed sleep medication because of side effects; used marijuana daily, which made the student sleepy and disengaged; and had "a lot going on at home." The ALJ found that the excessive absences were not connected to the student's disability.

Further, the ALJ found that the school partook in many actions to improve the student's attendance: regular contacts to the student and parent, putting attendance goals in his Individualized Education Program ("IEP"), creating a detailed schedule for the student while virtual, providing snacks, allowing breaks, providing tutoring, visiting his home to offer transportation, and coordinating with the student's truancy probation officer to monitor his

attendance. The school continued to evaluate the student and revise his IEP based on the information available to the school.

The ALJ concluded that the fact that the cause of the student's excessive absences was factors outside of the school's control was a defense to a parent's claim that the school denied the student a FAPE. The parent failed to show that the student's absences could have been remedied by the school through the content, methodology, or delivery of specially designed instruction. Rather, the ALJ found that the student's absences, which were outside the school's control, "provides the best explanation for [the] [s]tudent's failure to progress academically."

**ALJ Finds School Had an Obligation to Transport Special Education Student to, From Extracurricular Activities**

In *Troy School District v KF & JF o/b/o MF*, Office of Administrative Hearings & Rules Decision & Order (Case No. 19-00020), issued November 19, 2019,[7] the ALJ found that to fully implement the IEP of a special education student, the school must provide the student with transportation to and from any extracurricular activities at the school. All special education students must have an equal opportunity to participate in extracurricular activities. Overall, the ALJ found that the student was not receiving either FAPE or equal access to extracurricular activities without receiving transportation to and from those activities.

In *Troy*, the student at issue was eligible for special education, was in the center-based deaf and hard of hearing program, and participated in his varsity wrestling team. The school was a 3.5 hour walk, 1 hour bike ride, or 25-55 minute drive from the student's home. The school transported the student to and from *school* via bus where he was the only passenger.

The primary issue addressed during the hearing was whether the school district had an obligation to transport the student to and from extracurricular activities, including wrestling practice, meets, and other team activities. IDEA provides rights to ensure that children with disabilities have available to them a FAPE and related services designed to meet their needs. *Id.*, citing 20 USC 1400(d). "Related services" includes transportation; however, whether transportation to extracurricular activities falls under the definition of related services was an issue of first impression in Michigan.

The ALJ granted the family's request for future transportation for the student to and from extracurriculars. The ALJ recognized that the student was placed at the school, which has the deaf and hard of hearing program, because of his disability. Therefore, his need for transportation to and from school was not at the student's or parent's convenience, but rather to give him access and an opportunity to participate on an equal basis with nondisabled peers.

Additionally, the ALJ found that the student had no *right* to wrestle and it would be inappropriate for the IEP to place him on the team. The student, however, was a good wrestler and made varsity his first three years of high school. Thus, assuming he had the same skills his senior year, the student was "entitled to an equal opportunity to participate and, because of his disability, this

[7] Certain decisions from the MDE's Office of Administrative Law have not been uploaded to its searchable database because of technical difficulties. Accordingly, this decision was not published online at the time of its issuance and was only available by request.

require[d] transportation." Therefore, while participation in the wresting team did not need to be included in his IEP, "[b]ecause the Student is placed at a center-based program so far away from his home, transportation must be provided for nonacademic and extracurricular activities to provide the Student with the same access and opportunity as his nondisabled peers."

**Please do not hesitate to contact Collins & Blaha, P.C. if you have any questions about MDE's memorandum, recent administrative cases, or other special education matters.**

# Michigan Legislature Digest: New Public Acts Signed into Law

Several bills that may impact Michigan school districts in the near future have been signed into law. These Public Acts, listed by effective date, are summarized below:

**PA 110 of 2023 – New Teacher First Aid Certification Requirements**

Pursuant to Public Act 110 of 2023, new Michigan teachers who were employed in classroom teaching as of August 1, 2023, are now required to receive training and certification in first aid during the first year of employment. Those who have "physical limitations that make it impracticable for the individual to complete the course and instruction" will not be required to complete the training. The training is to be implemented into one of the fifteen days of professional development offered to new teachers during the three-year period as provided in the Revised School Code ("RSC"), MCL 380.1526. The training must be through an approved course and include first aid, cardiopulmonary resuscitations (CPR), and foreign body in airway removal. Certification from this training must come from an organization such as the American Red Cross, American Heart Association, or a comparable organization. People who hold certification in this area and perform first aid, CPR, or foreign body airway removal will not be civilly liable for an injury resulting from their action, unless the conduct was gross negligence or willful or wanton misconduct. MCL 380.1526(2), (3).

*"People who hold certification in this area and perform first aid, CPR, or foreign body airway removal will not be civilly liable for an injury resulting from their action, unless the conduct was gross negligence or willful or wanton misconduct."*

Public Act 110 of 2023 was passed with immediate effect on July 27, 2023.

**PA 111 of 2023 – School Counselor Credentialing Requirements Amended**

Public Act 111 of 2023 amends the RSC to ease the process of becoming a school counselor through such means as reciprocity for out-of-state school counselors and by allowing the issuance of preliminary school counselor licenses.

MCL 380.1233 prescribes requirements for an individual to serve in a counseling role in a school district or intermediate school district ("ISD"). The board of a school district or ISD shall not allow an individual to serve in a counseling role unless the individual holds a valid school counselor credential. Pursuant to the RSC, the Superintendent of

Public Instruction ("SPI") must issue such a school counselor license only to an individual who meets one or more of the following requirements:

- The individual holds a master's degree awarded after completion of a SPI approved school counselor education program and has successfully completed the Michigan Department of Education's ("MDE") school counselor examination; or

- The individual holds a school counselor license from another state, country, or federally recognized Indian tribe, holds a master's degree awarded after completion of a school counselor education program, and has either at least 3 years of successful experience serving in a school counseling role in another state, country, or federally recognized Indian tribe, or has successfully completed the MDE's school counselor examination.

- If an individual holding a school counselor license from another state, country, or federally recognized Indian tribe applies for a Michigan school counselor license and meets all requirements for the Michigan school counselor license except for passage of the MDE's school counselor examination, the SPI must issue a nonrenewable temporary school counselor license to the individual that is valid for one year.

The Act also allows the SPI to issue preliminary school counselor licenses to individuals meeting certain criteria. Specifically, the SPI may now issue preliminary school counselor licenses to individuals enrolled in approved school counselor preparation programs as long as the individual has: 1) completed at least 30 semester hours in an approved school counselor preparation program *and* 2) the individual has successfully completed the MDE school counselor examination. MCL 380.1233(13).

Public Act 111 of 2023 was passed with immediate effect on July 27, 2023.

**PA 49 of 2023 – Penal Code Amended To Prohibit Use Of Position Of Authority To Prevent Reporting Of Sex Crimes, Child Abuse**

Public Act 49 of 2023 ("PA 49") prohibits a person from intentionally using their professional position of authority over a person to prevent or attempt to prevent that person from reporting certain crimes committed or attempted by another person. These crimes include child abuse, criminal sexual conduct ("CSC"), and assault with intent to commit CSC. MCL 750.483a(c).

PA 49 amends the Michigan Penal Code and was enacted as part of a response to the events surrounding CSC committed by Larry Nassar, a former physician for Michigan State University and the USA Olympics women's gymnastics team who received multiple life sentences in 2018. The Act's legislative history indicates that it was developed in response to those who used their authority to intentionally prevent Nassar's crimes from being reported and reaching those responsible for their handling.[8] PA 49 was enacted to address inappropriate and illegal relationships between students and those in positions of authority, such as coaches, teachers,

[8] House Legislative Analysis, HB 4123 (May 16, 2023).

and administrators.[9] Thus, the Act is especially applicable to public school employees.

Districts should ensure that all employees are familiar with their obligation to contact the district Title IX coordinator upon a student's report of sexual assault, and their obligations relating to mandatory reporting. PA 49 went into effect on September 27, 2023.

**PA 51 of 2023 – RSC Amended to Prohibit Student Discipline for Action Taken Related to Sexual Assault**

Public Act 51 of 2023 ("PA 51") states that students shall not be expelled or suspended for more than 10 school days for an action taken immediately before, immediately following, or "reasonably tied" to an incident in which the student reported being sexually assaulted, or an incident in which a school employee or other individual witnessed, reported, or received evidence that a student was sexually assaulted. MCL 380.1310e.

Based on PA 51's legislative analysis, the Act is designed to address underreporting of sexual assaults occurring on K-12 campuses by limiting the potential for suspensions or expulsions of a student who reports sexual assault.

According to the language of MCL 380.1310e, this provision does not apply if any of the following conditions are met:

- The student was convicted of, pleaded guilty to, pleaded responsible for, or was adjudicated responsible for aggravated assault, felonious assault, assault with intent to commit murder, assault with intent to commit great bodily harm, assault with intent to maim, attempted murder, homicide, manslaughter, or criminal sexual conduct.

- The student possessed a dangerous weapon in a weapon free zone, committed arson in a school building or on school grounds, or committed criminal sexual assault in a school building or on school grounds.

- A completed Title IX investigation determined by clear and convincing evidence that the report of sexual assault was conclusively false.[10]

- The board or its designee considered any report of sexual assault described above and specific factors under Section 1310d of the RSC — such as the student's age, disciplinary history, or disability status — and determined that the expulsion or suspension of more than 10 days was justified.

This provision explicitly encourages school boards to follow the recommendations of the district's Title IX coordinator in deciding whether to suspend a student. It may be prudent for districts to review disciplinary procedures to ensure compliance with this new provision. PA 51 went into effect on September 27, 2023.

**PA 57 of 2023 – RSC Provisions Provide For Educational Materials, Training On Sexual Assault, Harassment**

Public Act 57 of 2023 ("PA 57") adds two sections to the RSC regarding the distribution of informational materials and the provision of

[9] Relatedly, Public Act 50 of 2023 ("PA 50") adds a provision to the Michigan Penal Code prohibiting a person from intentionally using their position of authority to prevent a person from reporting child abuse and sex crimes *to a Title IX coordinator at a postsecondary educational institution.* MCL 750.478b.

[10] If a report was inconclusive, however, the provision would apply, which means that the student may not be suspended or expelled for more than 10 school days.

professional development training on sexual assault and sexual harassment. MCL 380.1508; MCL 380. 1526(b).

First, Section 1508 provides that by no later than June 1, 2024, the Michigan Department of Education must develop age-appropriate informational material relating to sexual assault and sexual harassment and make these materials available to school districts who operate any grades six through twelve.

These materials must include at least all of the following: (1) information regarding what constitutes sexual assault and sexual harassment, (2) an explanation that sexual assault or sexual harassment is not the victim's fault, and (3) identify resources that are readily available for individuals who have experienced sexual assault or sexual harassment. These resources may include, but are not limited to, information on Title IX, contact information of organizations that offer assistance to victims, or next step actions the individual may take. MCL 380.1508(1).

Under this section, school districts must disseminate the above informational materials to each student in grades six through twelve. Districts must also disseminate the contact information of the district's Title IX coordinator, and the district's policies on sexual assault and sexual harassment, including the prohibition on retaliation for reporting sexual assault or sexual harassment. The district must ensure that all the above information remains accessible to students and their legal guardians, and is included in the student handbook, and on the district's webpage. MCL 380.1508(2).

Next, Section 1526(b) provides that beginning with the 2024-2025 school year, school boards are encouraged to partner with a local organization[11] to provide training to educators and school personnel in responding to students who have experienced sexual assault or sexual harassment. This provision states that the above training should be provided to personnel who have contact with students and should be provided at least every five years. This training may be provided as part of professional development. MCL 380.1526(b).

When districts receive the informational materials from the Michigan Department of Education described in Section 1508, it would be prudent to review this provision to ensure compliance with the above dissemination requirements. Additionally, districts may begin taking steps toward the provision of the training described in Section 1526(b). The above sections went into effect on October 10, 2023.

## PA 116 of 2023 – Teacher Personnel Decisions Modified

Public Act 116 ("PA 116") of 2023 amends Section 1248 of the RSC to modify factors that may be used to inform policies governing teacher personnel decisions. The Act provides that a collective bargaining agreement between a public-school employer and a collective bargaining representative must, at a minimum, include what follows. PA 116 provides that for teachers[12], "when filling a vacancy, placing a

[11] The section provides that this should be an organization that receives funding from the Michigan domestic and sexual violence prevention and treatment board, and that serves the geographic area of the school district. This section further provides that if the district is located in an area without this type of organization, the district is encouraged to provide the training together with the Michigan domestic violence and sexual violence prevention and treatment board, or the Michigan Coalition to End Domestic and Sexual Violence.

[12] The Act amends the definition of who constitutes a teacher for applicability purposes of MCL 380.1248. "Teacher," as originally defined according to MCL 38.71, is now defined according to MCL 380.1249, so that "teacher" means "an

teacher in a classroom, or conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, the board of a school district, ISD, or board of directors of a public school academy shall not adopt, implement, maintain, or comply with a policy or collective bargaining agreement that provides length of service as the *sole* factor in personnel decisions." Public Act 116 of 2023 (emphasis added). This section had previously stated that a policy could not be used providing length of service (otherwise known as seniority) as the *primary or determining* factor in personal decisions. Seniority may still be used as a tiebreaker in personnel decisions involving two or more employees when all other factors distinguishing those employees are equal. MCL 380.1248(1).

PA 116 also provides that "clear and transparent procedures" shall be used for all personnel decisions under Section 1248. Additionally, while effectiveness[13] must be used as a factor for teacher personnel decisions, other relevant factors including but not limited to the teacher's length of service in a grade level or subject area, the teacher's disciplinary record, and the teacher's relevant special training may be used as a factor for teacher personnel decisions. MCL 380.1248(2).

In adopting PA 116, provisions ensuring the use of policies based on retaining effective teachers following decisions of reducing, recalling, or hiring after a personnel determination resulting in the elimination of a position, as well as policies requiring individual performances to be the majority factor in making personnel decisions were eliminated. Furthermore, provisions that provided that a teacher who has been rated ineffective under the performance evaluation system in section MCL 380.1249 is not to be given preference for retention over teachers rated minimally effective, effective, or highly effective have been eliminated.

Public Act 116 of 2023 will take effect July 1, 2024.

**If you have questions about how these new laws may affect your school district, please contact us at Collins & Blaha, P.C.**

individual who has a valid Michigan teaching certificate or authorization or who is engaged to teach under section 1233b; who is employed, or contracted for, by a school district, intermediate school district, or public school academy; and who is assigned by the school district, intermediate school district, or public school academy to deliver direct instruction to pupils in any of grades K to 12 as a teacher of record."

[13] "Effectiveness" as measured under the performance evaluation system in MCL 380.1249 or as otherwise collectively bargained.

# Recent, Upcoming U.S. Supreme Court Cases Signal Major Legal Developments

Among several important decisions issued during its summer term, the United States Supreme Court addressed the definition of a "true threat" following an individual's repeated, unwanted Facebook messages to a Colorado singer-songwriter. Additionally, the Supreme Court addressed whether the use of affirmative action in college admissions programs was unconstitutional.

## Court Clarifies Definition Of "True Threats"

On June 27, 2023, the United States Supreme Court decided the case *Counterman v Colorado*[14], a decision that involved a country singer who was being sent threatening messages and what standard should be applied as to whether this was speech protected by the First Amendment or whether it was considered a "true-threat" and thus not protected. The Court decided (1) whether the First Amendment requires proof of a defendant's subjective mindset in true-threats cases, and (2) if so, which state of mind standard was sufficient.

From 2014 to 2016, Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, C. W. never responded, and C. W. repeatedly blocked Counterman. Each time, however, he created a new Facebook account and resumed his contacts. Some of his messages were good morning texts, except that they were coming from a stranger. Other messages suggested that Counterman might be surveilling C. W. and noted physical sightings of the singer. Most importantly, a number of messages expressed anger at C. W. and envisaged harm befalling her, including telling the woman to die. The messages put C. W. in fear and upended her daily life. She worried that Counterman would hurt her. As a result, she had trouble sleeping and suffered from severe anxiety. She stopped walking alone, declined social engagements, and canceled some of her performances, though doing so caused her financial strain. Eventually, C. W. decided to contact the authorities.

***"In stating what constitutes 'true threats,' the Supreme Court held that true threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'"***

At the trial level, the court rejected the argument that the defendant's messages were protected under the First Amendment, finding that under Colorado law's objective standard, a reasonable person would consider the messages threatening.

The case was then appealed up to the Supreme Court. In stating what constitutes "true threats," the Supreme Court held that true threats are "serious expression[s]" conveying that a speaker means to "commit an act of unlawful violence." *Counterman* at *5, quoting *Virginia v Black*, 538 US 343, 359 (2003). Whether the speaker is aware of, and intends to convey, the threatening

[14] *Counterman v Colorado*, 600 US 66 (2023).

aspect of the message is not part of what makes a statement a threat. Rather, a true threat relies not on the mental state of the speaker, but on what the statement conveys to the individual on the other end.

Thus, a prosecutor must show that the defendant consciously disregarded a substantial risk that his or her communications would be viewed as threatening violence. The state would not need to prove any more demanding subjective intent to threaten another. The Court decided that a subjective mental state standard is required for speech to be a "true threat," and that standard should be one of recklessness.

The Court noted a potential chilling effect that limiting this type of speech would have, as it may lead to people self-censoring.

**SCOTUS Addresses Affirmative Action**

On June 29, 2023, the United States Supreme Court issued its opinion in *Students for Fair Admissions, Inc v President & Fellows of Harvard College*[15], a decision that involved Harvard College ("Harvard") and the University of North Carolina ("UNC" or "North Carolina") using race-based tests for admitting students. The decision will affect the process by which colleges admit students.

At the last state of their admissions process, Harvard applicants were placed on the "lop list," which contained four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, race was a determinative tip for a significant percentage of all admitted applicants. Similarly, at North Carolina, admissions officers made a written recommendation on each assigned application, and they could provide an applicant with a substantial plus in accordance with the applicant's race.

Students for Fair Admissions ("SFFA") filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court addressed the consideration of race in college admissions in 2003 in the decision *Grutter v Bollinger*, where, in a sharply divided decision, the Court for the first time held that racial diversity regarding the makeup of the student body was a compelling state interest that can justify the use of race in admissions. The Supreme Court made clear in *Grutter* that the University of Michigan Law School could not use racial quotas or make the admissions process less competitive for one group but not others. It also could not desire a certain percentage of one group, as was ruled in a 1978 decision, *Regents of University of California v Bakke*.

The Equal Protection Clause, *Grutter* explained, was intended to guard against two dangers that all race-based government action poses. The first is the risk that the use of race will devolve into stereotyping and that race will not be used as a negative. *Grutter* explained that there must be some end point to the program. However, the Court in *Students for Fair Admissions* stated that, regarding Harvard and North Carolina's programs, there was no end in sight.

The Court stated that University programs **must comply with strict scrutiny and may not use race as a stereotype or negative**. The admissions systems, even though they were

[15] *Students for Fair Admissions, Inc v President & Fellows of Harvard College*, 600 US 181 (2023).

implemented in good faith, failed each of these criteria. They were thus invalidated under the Equal Protection Clause of the Fourteenth Amendment.

The Court stated that the admissions programs failed to articulate a meaningful connection between the means they employed and the goals they pursued. The Court used the example of how both colleges grouped together Asian-American students, without taking into consideration or balancing North versus South Asian-American students. Other racial categories were arbitrary or undefined. Although colleges are awarded deference in how they run their programs, they must be run within the bounds of Constitutional limits, and racial categories are too pernicious to permit any but the most exact connection between justification and classification, which did not exist in this situation.

Harvard and North Carolina also suggested that race was not a negative factor because it does not impact many admissions decisions. However, both schools also maintained that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned, as they admitted that some students were taken in large part because of their race.

The Court found that Harvard's admissions process rested on the stereotype that one group of students may bring some quality that another group of students cannot, or that one group of students thinks or acts in a certain way while another group does not. Such stereotyping, the Court held, can only cause continued hurt and injury, and is contrary to the "core purpose" of the Equal Protection Clause.

Finally, the Court held that there was no meaningful endpoint in sight for their programs. The metric of meaningful representation, the schools assert, does not involve any "strict numerical benchmark or "precise number or percentage," or "specified percentage." North Carolina's program would not end until it achieves proportional representation, however their admissions programs "effectively assure[ ] that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Id.* at 223-24, quoting *Richmond v J A Croson Co*, 488 US 469 (1989). The Court also mentions that outright balancing of race is unconstitutional.

The Court finally stated that nothing in the *Students for Fair Admissions* opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.

**Upcoming Cases To Watch**

The Supreme Court will soon consider other cases that may have an impact on schools.

In *Muldrow v City of St. Louis*, the Court is set to answer the question of whether job transfers and denials of requests to change positions can form the basis of a retaliation claim under Title VII when they did not impose a "materially significant disadvantage" on an employee.

The US Court of Appeals for the 8th Circuit ruled that police sergeant Muldrow could not hold the city of St. Louis accountable under Title VII because her rank, pay, and responsibilities were not affected by the city's action to transfer her out of the intelligence unit and then deny her another transfer. However, her overtime pay was changed, though she had other overtime opportunities available to her. She claims that she was forced to transfer the first time and that the next transfer was made because of her sex.

This case may prove important to public school employees who, although they are not affected in a disadvantaging way by a school district's action, try to make a claim under Title VII for discrimination because of their sex.

Another case on the Supreme Court docket is *Loper Bright Enterprises v Raimondo*. The plaintiffs asked the Court to overturn the landmark 1984 case, *Chevron v Natural Resources Defense Council*. The Court held in *Chevron* that judges should defer to administrative agencies when they give a reasonable interpretation of a statute with vague language.

It is possible that the Court can follow the plaintiff's reasoning and overturn *Chevron* entirely, changing the deference given to administrative bodies and their employees.

It is also possible that the Court may narrow *Chevron's* scope to clarify that statutory silence does not equate to ambiguity that gives agencies expansive power, nearly unfettered, to interpret statutes. In either case, this ruling might limit federal agencies' authority and fuel challengers of federal workplace regulations, which may occur at the state level as well for states that have case law similar to *Chevron*.

When a federal court looks at an agency's construction of the statute that it administers, the court looks at whether Congress has directly spoken to the precise question at issue, and, if not, the question for the federal court is whether the agency's answer is based on a permissible construction of the statute. In the first case, there is no deference to agencies.

This ruling will likely affect how much deference will be given to agencies, like the U.S. Department of Education. It is possible that courts will give such agencies less deference if *Chevron* is overturned or narrowed.

**If you have any questions about recent or upcoming United States Supreme Court cases, please contact our office.**

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