TASB Community College Services
Legal Update

July 2023

Contents

Highlights

Join us August 4th at the 2023 TASB/TACCA Post-Legislative Seminar

New on eLaw:
Notice of Candidate Filing Period for November Elections

Resources

Texas Higher Education Coordinating Board
Texas Legislature
Texas Statutes
Texas Attorney General
U.S. Department of Education

Case of the Month

U.S. Secretary of Education's student loan forgiveness program exceeded the statutory authority granted by the HEROES Act.

In response to the COVID-19 pandemic which was declared a national emergency and affected the finances of many individuals with student debts, the U.S. Secretary of Education invoked the federal Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to establish the first comprehensive student loan forgiveness program allowing up to $10,000 to $20,000 in debt cancellation per eligible person. The HEROES Act authorizes the Secretary to issue waivers or modifications to provisions applicable to student loan programs in response to national emergencies.

Six states pursued a preliminary injunction in federal court, claiming the plan exceeded the Secretary's statutory authority granted by the HEROES Act. The district court dismissed the suit for lack of standing and the states appealed. The Eighth Circuit Court of Appeals issued a nationwide preliminary injunction pending the decision on appeal. The court held that Missouri, through the Missouri Higher Education Loan Authority (MOHELA), a nonprofit government corporation that holds and services student loans, likely had standing, that Missouri's challenge raised substantial questions on the merits, and that the equities favored maintaining the status quo pending further review. The Secretary appealed.

The U.S. Supreme Court held that Missouri had standing because MOHELA would potentially lose fees from borrowers, and since MOHELA is a public instrumentality of the state, Missouri would be directly injured. The Court rejected the Secretary's argument that MOHELA has a legal personality separate from Missouri because, among other reasons, MOHELA operates to fulfill a public function. Additionally, the Court held that the Secretary's actions effectively rewrote the HEROES Act because the program was a novel and fundamentally different modification rather than a moderate or minor modification previously allowed under the HEROES Act. The Court also rejected the Secretary's appeal to congressional purpose—that Congress passed the HEROES Act with the intention of allowing the Secretary to respond to national emergencies as needed because the plan would result in unlimited power granted to the Secretary. The Court emphasized the Secretary's attempt to enact such a broad program amounted to the executive branch seizing power over the legislature. The Court reversed the lower court's decision and remanded the case. *Biden v. Nebraska*, 143 S. Ct. 2355 (June 30, 2023).

Why is This Case Significant?

The U.S. Supreme Court's decision clarified the roles of the executive branch and legislative branch, authorizing only Congress to enact a broad debt forgiveness plan. The President has directed the U.S. Department of Education to enact a new student debt forgiveness plan under the Higher Education Act.

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Whether speech constitutes a "true threat" which is not protected by the First Amendment is subject to a subjective analysis.

Billy Counterman, a Colorado citizen, sent C.W., a local singer and musician, a Facebook request which she accepted even though the two had never met. Over several years, Counterman sent C.W. frequent and numerous messages such as "was that you in the white Jeep?" and "You're not being good for human relations. Die." Though she never responded and tried to stop the messages by blocking him on Facebook, Counterman would create new accounts to continue communicating with her. C.W. interpreted many of the messages to mean Counterman was following her or that Counterman was angry with her, resulting in C.W. experiencing anxiety, withdrawing from her social life and canceling performances. C.W. eventually contacted the authorities, and Counterman was criminally charged under a stalking statute for his conduct.

Counterman argued his messages were protected under the U.S. Constitution First Amendment, U.S. Const., amend I, because they could not be true threats which violated the stalking statute if he did not have a subjective understanding his messages were threatening. The trial court rejected his argument, ruling that true threats were evaluated under an objective reasonableness standard, and he was convicted and appealed. The appeals court upheld his conviction because it agreed with the trial court's determination that the standard did not require a subjective standard, and Counterman again appealed.

The U.S. Supreme Court first considered whether the lower courts had applied the correct standard for evaluating true threats, and while the Court agreed that true threats of violence are not protected speech under the First Amendment, the Court held that a subjective test was most appropriate to determine if a statement is a true threat of violence in order to avoid a chilling effect on protected speech. The Court then considered the types of subjective knowledge required under the First Amendment, and concluded a recklessness standard, showing a person consciously disregarded a substantial risk that the person's conduct will cause harm to another, provided the best balance between the risk of chilling public speech and the need to prosecute true threats of violence. The Court reversed and remanded to the lower courts to apply the clarified standard to his criminal case. *Counterman v. Colo.*, 143 S. Ct. 2106 (June 27, 2023).

Why is This Case Significant?

The U.S. Supreme Court's determination that a subjective standard based on recklessness is required for true threats could affect how the First Amendment protections impact a wide range of speech.

Universities race-based admissions programs violated the Fourteenth Amendment Equal Protection Clause.

Students for Fair Admissions, a nonprofit organization which includes in its membership Asian-American students denied admission to Harvard College and the University of North Carolina, sued the universities arguing that the schools' race-based admissions programs violated the Equal Protection Clause of the U.S. Constitution Fourteenth Amendment, U.S. Const. amend XIV, among other claims.

The district court upheld both universities' race-based admissions programs, which provided determinative factors in favor of African American and Hispanic students, and SFFA appealed. The First Circuit Court of Appeals found Harvard had a compelling interest in a diverse student body, considered race as one part of a holistic review process, and did not intentionally discriminate against Asian Americans. Harvard's program was affirmed by the First Circuit, and the U.S. Supreme Court granted certiorari and consolidated both cases before judgment was reached by the Fourth Circuit Court of Appeals in the UNC case.

The U.S. Supreme Court reviewed its precedent, stating it has permitted race-based admissions when in compliance with strict scrutiny, if they never use race as a stereotype or negative, and must end at some point. The Court reviewed the interests and goals of the respondents' race-based admissions programs and found that both lack sufficiently focused and measurable objectives warranting the use of race, and failed to draw a sufficient connection between those objectives and the specific way race was considered in admissions decisions. The Court also found that the programs employ race in a negative manner because it benefited some applicants at the expense of others, and lacked definitive end points to the use of race in admissions decisions. The Court reversed the decisions of the lower courts. *Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (June 29, 2023).[1]

Why is This Case Significant?

This case represents a trend of increased scrutiny towards diversity initiatives, as demonstrated by recent legislation focusing on diversity, equity and inclusion efforts in institutions of higher education. This trend may extend to other areas such as diversity initiatives in employment matters.

Employers must show substantial costs in order to prove undue hardship in denying an employee's religious accommodation request under Title VII of the Civil Rights Act of 1964.

Gerald Groff is an Evangelical Christian who worked for the United States Postal Service (USPS) and requested Sundays off as a religious accommodation when his rural post office branch began making Sunday deliveries for Amazon. USPS tried to find other workers to cover Groff's Sunday shifts but was unable to find other workers. Groff still refused to work Sundays, and facing escalating discipline, eventually resigned.

Groff claimed he was unlawfully denied a religious accommodation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. USPS argued that providing his requested accommodation would result in undue hardship. The district court ruled in favor of Groff, and the Third Circuit Court of Appeals relied on previous U.S. Supreme Court precedent, which stated that requiring an employer to bear more than a de minimis cost to provide a religious accommodation is an undue hardship, to determine that exempting Groff from Sunday shifts would cause an undue hardship by burdening his coworkers, disrupting the workplace, and diminishing morale. Groff appealed.

The U.S. Supreme Court re-evaluated its previous decision and the undue hardship standard in light of statutory construction, including the plain meaning of undue hardship, guidelines from the Equal Employment Opportunity Commission, and use of undue hardship in other statutes, and determined that the current standard requires more than de minimis cost. The Court clarified that the standard requires a burden be substantial in the overall context of an employer's business to be an undue hardship, which includes substantial increased costs in relation to the conduct of its particular business. The Court reversed judgment and remanded the case to the lower courts to apply the clarified standard. *Groff v. DeJoy*, No. 22-174, 2023 WL 4239256 (June 29, 2023).

Why is This Case Significant?

The U.S. Supreme Court clarified a heightened standard for undue hardship. Colleges should revisit their policies for religious accommodation requests to ensure compliance with the heightened standard.

[1] This case was summarized in the November 2020 Community College Services Legal Update.

From the Courts and the Attorney General

Business and Finance

Businessowner's First Amendment right to freedom of speech violated by state law forbidding businesses from engaging in discrimination when selling goods and services to the public because it could be used to compel the businessowner to create speech she does not believe or endorse. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (June 30, 2023).

Personnel

Former medical resident failed to provide sufficient evidence to support her claim that she was wrongfully dismissed from her educational program on the basis of her morbid obesity in violation of the Texas Commission on Human Rights Act (TCHRA) because morbid obesity does not qualify as an impairment under the TCHRA without evidence it is caused by an underlying physiological disorder or condition. *Texas Tech Univ. Health Scis. Ctr. – El Paso v. Niehay*, No. 22-0179, 2023 WL 4278585 (Tex. June 30, 2023).

Former workers provided sufficient evidence of their work schedules and completed work orders to overcome summary judgment on their claim that their employer failed to pay them overtime in violation of the Fair Labor Standards Act because the employer did not keep and maintain records to rebut former employee's evidence. *Flores v. FS Blinds*, No. 22-20095, 2023 WL 4484245 (5th Cir. July 12, 2023).

Students and Instruction

Student borrowers that objected to certain elements of the U.S. Secretary of Education's student loan debt forgiveness plan because they did not qualify lacked Article III standing under the U.S. Constitution because they could not show they were likely to be harmed by the plan. *U.S. Dep't of Educ. v. Brown*, 143 S. Ct. 2343 (June 30, 2023).[2]

Open Records Letter Rulings

This month, the attorney general issued Open Records Letter Rulings[3] based on requests from Texas community colleges related to:

- Three requests for proposals. Tex. Att'y Gen. OR2023-21491 (June 26, 2023); OR2023-22301 (June 30, 2023);
- A case subject to a compliance program investigation. Tex. Att'y Gen. OR2023-22117 (June 29, 2023); and
- Specified employment records. Tex. Att'y Gen. OR2023-22828 (July 10, 2023); and
- Information pertaining to a request for proposal. Tex. Att'y Gen. OR2023-22876 (July 10, 2023).

[2] This case was summarized in the November 2022 Community College Services Legal Update.
[3] Open record letter rulings are limited to the particular records at issue and the facts as presented to the attorney general. These rulings must not be relied upon as a previous determination regarding any other records or any other circumstances.

Recent Regulations and Guidance

The Texas Higher Education Coordinating Board (THECB) announced its intention to engage in negotiated rulemaking to amend rules relating to the Texas Educational Opportunity Grant allocation methodology for community colleges and other qualifying entities, proposing that representatives from Amarillo College, Collin College, Houston Community College, McLennan Community College, Northeast Texas Community College, South Texas College, Texarkana College Vernon College, Victoria College, Western Texas College, and Wharton County Junior College serve on the committee.

The U.S. Department of Education, Office of Postsecondary Education, announced its intention to establish a negotiated rulemaking committee to prepare proposed regulations for the Federal Student Aid programs authorized under title IV of the Higher Education Act of 1965.

The U.S. Equal Employment Opportunity Commission updated guidance regarding the federal Pregnant Worker's Fairness Act, which requires employers to provide accommodations to employees with known limitations relating to employee's pregnancies and associated medical conditions, and was effective June 27, 2023.

Policy Spotlight

Welcome to Policy Spotlight! This new section will cover policy-specific topics each month. For this issue, this section with focus on the recent legislative session and how it will inform future policy.

By September 1, many of the bills passed during the 88th legislative session will go into effect. During the fall, Community College Services will be preparing Update 46. Much of that update will be informed by the most recent legislative session. The update to the legal frameworks in the TASB Community College Reference Manual (CCPRM) will be complete in November. For those colleges that subscribe to our policy updating services, the full Update 46 packet, including recommended local policy updates, should be sent by the end of December.

During the interim period between when the bills have passed and when Update 46 will be completed, we will be hosting the 2023 TASB/TACCA Post-Legislative Seminar for Community Colleges at TASB Headquarters on August 4. This will provide our colleges with information on all the bills that relate to colleges that were passed during the session. Click here for more the agenda, more details, and registration information.

In addition, TASB Community College Services will be sending an email to each college prior to September 1 detailing some of the important bills colleges should consider addressing in college policy and regulations by that date. To account for the time between a law's effective date and the release of Update 46, TASB Model Policy BE(LOCAL) includes a Harmony with Law section, which says that any new laws supersede policy or regulation if there is a conflict.

If you have questions about how a bill will impact local policy, please contact your policy consultant. If you have legal questions related to a bill, email colleges@tasb.org or call 1-800-580-1488.

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In the News

The second special session of the 88th legislative session focusing on property taxation rates ended on July 13, 2023.

Texas Mutual Insurance Company awarded Amarillo College a $100,000 grant toward the college's Safety and Environmental Technology Program, which provides workplace safety and health courses for the community.

The Texas Governor announced over $6.5 million in Texas Talent Connection grants awarded to workforce training and job placement programs in Texas communities, including programs at Alvin Community College, Lone Star College, and North Central Texas College.

The governor announced over $3.5 million in Jobs and Education for Texans (JET) grants to support career and technical training programs, including programs at Collin College, Grayson College, and North Central Texas College.