TASB Community College Services
Legal Update

June 2024

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Case of the Month

The U.S. Supreme Court overturned the *Chevron* doctrine, restricting the power of federal agencies to regulate.

The National Marine Fisheries Service (NMFS) issued a rule under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. §§1801-1891d, requiring the herring industry to pay for federal observers required to monitor for overfishing on boats if federal funding was not available. Commercial fishermen sued U.S. Secretary of Commerce Gina Raimondo, alleging that the MSA does not authorize NMFS to impose the fee. Other commercial fishermen sued the U.S. Department of Commerce based on similar allegations. The government moved for summary judgment in both cases, which was granted by the federal district courts. The fishermen appealed.

The U.S. D.C. Circuit Court of Appeals and the U.S. First Circuit Court of Appeals, in their respective cases, applied a longstanding and frequently cited doctrine adopted by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). The *Chevron* doctrine, also referred to as *Chevron* deference, requires that, when reviewing the validity of a federal agency's interpretation of a statute the agency is charged with implementing, a court must rely on the agency's expertise and defer to its interpretation if the statute is ambiguous and the agency's interpretation is reasonable. Each court affirmed the lower court's decision, determining the MSA was unclear whether NMFS may require the fishermen to pay for the observers and NMFS's interpretation of the MSA was reasonable. The fishermen appealed, arguing that *Chevron* should be overruled.

Agreeing with the fishermen, the U.S. Supreme Court overturned the *Chevron* doctrine. The Court concluded that the doctrine is contrary to the U.S. Administrative Procedure Act (APA), 5 U.S.C §§ 551-559, which codified Court precedent on the judiciary's function and is consistent with U.S. Constitution article III. The APA requires courts to exercise their independent judgment in deciding whether a federal agency acted within its statutory authority. Agencies do not have the expertise to resolve statutory ambiguities, but courts do. While a court may consider the agency's opinion, it may not defer to the agency's interpretation of the law merely because a statute is unclear. The Court found that *Chevron* is inconsistent with the APA as it did not allow the courts to fulfill their duty to resolve statutory ambiguities, vacated the circuit courts' decisions, and remanded the cases. *Loper Bright Ent. v. Raimondo*, No. 22-451, 2024 WL 3208360 (June 28, 2024).

Why is This Case Significant?

The U.S. Supreme Court overturned decades of precedent, reserving the matter of resolving statutory ambiguities in federal statutes solely for the courts. While the Court's previous decisions under the old precedent were preserved, Congress may need to pass more specific legislation in order to avoid future challenges which would be subject to judicial review, limiting the agencies' ability to regulate.

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The 2021 U.S. Department of Education guidance documents addressing the scope of Title IX may not be enforced against Texas community colleges.

Following the U.S. Supreme Court's decision in *Bostock v. Clayton County*[1], 590 U.S. 644 (2020), the U.S. Department of Education (DOE) released the June 22, 2021 Notice of Interpretation, June 23, 2021 Dear Educator Letter, and June 23, 2021 Fact Sheet ("2021 guidance documents"), clarifying the DOE's interpretation that the prohibition on discrimination on the basis of sex found in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, encompasses discrimination based on sexual orientation and gender identity consistent with the Court's holding regarding similar language found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. The state of Texas sued U.S. Secretary of Education Miguel Cardona, the DOE, the U.S. Department of Justice, and the U.S. Attorney General, claiming that the 2021 guidance documents were not consistent with Title IX, exceed the DOE's statutory authority, and constituted rulemaking which required notice-and-comment under the U.S. Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559. The state filed a motion for summary judgment.

The federal district court rejected the DOE's argument that the *Bostock* decision applied to Title IX because Title VII's prohibition of discrimination "because of sex" was sufficiently comparable to Title IX's prohibition against discrimination "on the basis of sex." The court cited the differences between Title VII, which *Bostock* was limited to and which applies to employment actions, and Title IX, which applies to educational opportunities. When Congress drafted Title IX, the term "sex" meant only a person's biological sex – male or female – and the guidance documents amounted to a rewrite of clear statutory terms. The court also determined that the DOE exceeded its authority in interpreting Title IX to include discrimination based on sexual orientation and gender identity, which ran counter to the intent of Congress in drafting Title IX. The DOE's interpretation of Title IX also imposed new obligations on states and educational institutions without any public participation, in violation of the APA requirement for notice-and-comment prior to rulemaking. The court held that the DOE's guidance documents were unlawful, granted Texas's motion for summary judgment, and enjoined the federal government from implementing or enforcing the guidance documents against Texas and its educational institutions. *Tex. v. Cardona*, No. 4:23-cv-00604-O, 2024 WL 2947022 (N.D. Tex. June 11, 2024).

Why is This Case Significant?

This decision prevents the DOE from enforcing its interpretation expressed in the 2021 guidance documents that Title IX prohibits discrimination based on sexual orientation and gender identity against Texas community colleges, pending the results of any appeal. The opinion does not address the applicability of similar language found in the 2024 amendments to the Title IX regulations, which are effective August 1, 2024.

The U.S. Supreme Court clarified its test for whether firearm restrictions violate the Second Amendment.

Zackey Rahimi was prohibited from possessing a firearm after his then-girlfriend filed a domestic violence restraining order against him. After several incidents where Rahimi fired guns at people or their property or in the air, police executed a search warrant at his residence and discovered loaded firearms and a copy of the restraining order. Rahimi was indicted under 18 U.S.C. § 922(g)(8) on one count of possessing a firearm while subject to a domestic violence order. Rahimi appealed, arguing that the statute violated his U.S. Constitution Second Amendment, U.S. Const. amend. II, rights. The court rejected his challenge, and Rahimi appealed again.

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

The U.S. Fifth Circuit Court of Appeals initially upheld Section 922(g)(8), holding that the societal benefits of the statute outweighed its burden on Rahimi's constitutional rights. About two weeks later, the U.S. Supreme Court decided *New York St. Rifle & Pistol Assn., Inc. v. Bruen*[2], 597 U.S. 1 (2022), concluding that when a firearm regulation is challenged under the Second Amendment, the government must show a firearm restriction is consistent with the nation's historical tradition of firearm regulation. The Fifth Circuit withdrew its opinion to apply the new framework, and reversed the lower court's decision and vacated his conviction, concluding that section 922(g)(8) did not fit within tradition of firearm regulation because previous laws disarming individuals did not address the same dangers to public safety as Rahimi's situation. The federal government appealed.

The U.S. Supreme Court applied the historical tradition analysis from *Bruen*, but clarified that the analysis should not look for exactly identical aspects of previous laws, but relevantly similar laws to the challenged statute. The Court reviewed the history of firearm regulations to determine whether the challenged law was relevantly similar, and identified two legal approaches which gave courts the power to require individuals believed to be a threat to post bond to prevent future instances of misbehavior, and laws which punished individuals for threatening others with firearms. Reviewing these two approaches, the Court concluded section 922(g)(8) did fit within the tradition of firearm regulation. Though the historical laws did not address domestic violence, the laws addressed the intention to prevent dangerous individuals from possessing firearms. An individual who poses a clear threat of physical violence to another may be disarmed, and this restriction did not violate the Second Amendment. The Court reversed the Fifth Circuit's decision and remanded to the lower court to apply the clarified standard. *U.S. v. Rahimi*, No. 22-915, 2024 WL 3074728 (June 21, 2024).

Why is This Case Significant?

The court clarified the test introduced in *Bruen* for determining whether a firearms restriction violates the Second Amendment. Courts should uphold firearms restrictions only when there is a history of such regulation, but an historical analysis should involve relatively similar laws and not identical laws.

From the Courts and the Attorney General

Governance

South Carolina's congressional voting map, which was drawn along partisan lines did not constitute racial gerrymandering and vote dilution in violation of the U.S. Constitution Fourteenth Amendment. *Alexander v. South Carolina St. Conf. of the NAACP*, No. 22-807, 144 S. Ct. 1221 (May 23, 2024).

The National Rifle Association (NRA) provided sufficient evidence to support its claims that the former superintendent of the New York Department of Financial Services violated the NRA's U.S. Constitution First Amendment rights by coercing regulated entities to terminate their business relationships with the NRA to suppress gun-promotion advocacy. *Nat'l Rifle Assoc. v. Vullo*, No. 22-842, 144 S. Ct. 1316 (May 30, 2024).

Citizen failed to provide sufficient evidence on his claims that the Dallas County commissioner prevented him from completing his public comment during a commissioners court meeting in violation of his U.S. Constitution First Amendment and Fourteenth Amendment rights. *Stein v. Dallas Cnty.*, No. 3:22-CV-1255-D, 2024 WL 2946572 (N.D. Tex. June 11, 2024) (mem. op.).

The Texas attorney general concluded that members of the public may obtain copies of spoiled ballots as required by Texas Election Code section 1.012 preserved in ballot box no. 4 during

[2] This case was summarized in the July 2022 Community College Services Legal Update.

the 22-month preservation period established by Texas Election Code section 66.058. Tex. Att'y Gen. Op. No. KP-0463 (May 7, 2024).

Business and Finance

An individual who was denied a trademark application for a phrase that named a former president failed to provide sufficient evidence to support her claims that the Lanham Act's prohibition on registering trademarks which identify a living person without their consent violates the U.S. Constitution First Amendment. *Vidal v. Elster*, No. 22-704, 2024 WL 2964139 (June 13, 2024).

The Bureau of Alcohol, Tobacco, Firearms and Explosives exceeded its statutory authority when it issued a rule classifying a "bump stock" firearm attachment as a prohibited "machinegun" in violation of the U.S. Administrative Procedure Act (APA). *Garland v. Cargill*, No. 22-976, 2024 WL 2981505 (June 17, 2024).

Vendor failed to provide sufficient evidence to overcome dismissal of its breach of contract claim against a community college because the vendor was required to exhaust administrative remedies under Texas Government Code chapter 2260. *Anthology, Inc. v. Tarrant Cnty. Coll. Dist.*, No. 4:24-cv-00279-P, 2024 WL 3015321 (N.D. Tex. June 14, 2024) (mem. op.).

Personnel

Former employee who was terminated following his complaints against his manager failed to provide sufficient evidence to overcome dismissal of his claims that a university racially discriminated and retaliated against him in violation of Title VII of the Civil Rights Act of 1964. *Thornton v. Univ. of Tex. Southwestern Med. Ctr.*, No. 3:22-CV-2079, 2024 WL 2787886 (N.D. Tex. May 29, 2024) (mem. op.).

Students and Instruction

The U.S. Department of Education's (DOE) 2024 Title IX of the Educational Amendments Act of 1972 final rule was enjoined in Louisiana, Mississippi, Montana, and Idaho, because the court rejected the DOE's interpretation that the U.S. Supreme Court's holding in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964's prohibition on discrimination "based on sex" includes prohibitions on gender identity and sexual orientation discrimination extends to the provisions prohibiting discrimination "on the basis of sex" in Title IX of the Education Amendments of 1972 and the DOE exceeded its statutory authority in issuing the rules. *La. v. U.S. Dept. of Ed.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024) (mem.).

The U.S. DOE's 2024 Title IX final rule was enjoined in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia, because the court rejected the DOE's interpretation that the U.S. Supreme Court's holding in *Bostock v. Clayton County* that Title VII's prohibition on discrimination "based on sex" includes prohibitions on gender identity and sexual orientation discrimination extends to the provisions prohibiting discrimination "on the basis of sex" in Title IX and the DOE exceeded its statutory authority in issuing the rules. *Tenn. v. Cardona*, No. 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024).

Open Records Letter Rulings

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

- Information pertaining to pending litigation involving the requestor. Tex. Att'y Gen. OR2024-19455 (May 31, 2024); and
- Information pertaining to a specified request for qualifications. Tex. Att'y Gen. OR2024-20681 (June 11, 2024).

[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 Commission on Law Enforcement (TCOLE) amended regulations regarding TCOLE's minimum standards for the creation or continued operation of a law enforcement agency based on the size, function, and jurisdiction of the agency, in response to statutory changes made by the 88th Legislature.

TCOLE adopted regulations regarding the process for determining whether a licensee had good cause to refuse to submit to a requested fitness for duty examination following a law enforcement agency's submission of a report of refusal to TCOLE, in response to statutory changes made by the 88th Legislature.

TCOLE adopted regulations regarding requirements for the psychological examination of school marshal applicants and licensees, and school marshal licensees for whom a fitness for duty examination may be necessary, in response to statutory changes made by the 88th Legislature.

TCOLE adopted model policies for law enforcement agencies regarding investigation into misconduct allegations against a license holder, procedures for hiring a license holder, maintenance of license holder personnel files, and the medical and psychological examination of a license holder, in response to statutory changes made by the 88th Legislature. The model policies addressing medical and psychological examination of a license holder model policy or a substantively similar policy must be adopted by September 1, 2024. The model policies addressing misconduct allegations, hiring procedures, and personnel files model policies or substantively similar policies must be adopted by June 1, 2025.

The Texas Department of Insurance amended regulations regarding the coordination of vision and eye care benefits for enrollees under two different health or vision plans which provide overlapping services, in response to statutory changes made by the 88th Legislature.

The Texas Higher Education Coordinating Board (THECB) announced its intention to engage in negotiated rulemaking to develop new rules for the Minority Health Research and Education Grant Program, proposing that representatives from Dallas College, Houston Community College, and Tarrant County College serve on the committee.

THECB announced its intention to engage in negotiated rulemaking to develop new rules for the Nursing, Allied Health and Other Health-Related Education Grant Program, proposing that representatives from Alvin Community College, Blinn College, Central Texas College, Dallas College, Tarrant County College, and Tyler Junior College serve on the committee.

Policy Spotlight

Medical and Psychological Examinations for Peace Officers, Telecommunicators, and/or School Marshals

As discussed in last month's Policy Spotlight, one of the bills from the 88th Legislative Session that impacted several policies in Update 47 is Senate Bill (SB) 1445, which requires a law enforcement agency to adopt model policies issued by the Texas Commission on Law Enforcement (TCOLE), or substantively similar policies, regarding employment matters affecting peace officers and telecommunicators. Recommended revisions to the local policies were issued only to colleges that have previously notified us that they have police departments or school marshals. If you did not receive this policy and

believe you should have, contact your policy consultant.

TASB Community College Services provided model policy language addressing legal requirements from SB 1445 in Update 47, but colleges employing peace officers, telecommunicators and/or school marshals should update their administrative regulations to address legal and practical considerations for medical and psychological examinations of these employees.

TCOLE recently adopted final versions of the model policies referenced in SB 1445. TCOLE's model policy regarding medical and psychological examinations of license holders, or a substantively similar policy, must be adopted by the law enforcement agency by September 1, 2024. Though SB 1445 and TCOLE use the term "policy" when referring to the models issued by TCOLE, the term is not intended to refer to a board-adopted policy, but more akin to what we refer to as regulations.

A regulation should address criteria for requiring an examination. For license holders, this includes outlining their responsibilities to notify supervisors in the event they no longer feel they can perform their responsibilities. For supervisors, a regulation includes their responsibilities to observe members and identify objective signs that a member may be impaired or otherwise unable to perform duties.

A regulation must also address provision of notice to license holders and to TCOLE. The agency must provide notice to non-sworn personnel and peace officers regarding the reasons for the examination. Additionally, the agency must also notify TCOLE when a final determination regarding a license holder's status is made, when a license holder fails to submit to an examination, and if a license holder has completed a required examination or if the license holder's circumstances have been resolved.

A regulation must also address examination procedures, which include the minimum qualifications for selecting an examiner, and specify what types of background and supporting documentation to provide to the examiner relating to performance issues or the suspected mental impairment.

A regulation should also provide for the determination of duty status during and following an exam, which should include consideration of whether a member should be returned to duty or be placed on leave pending further examination, and notification procedures.

Lastly, the regulation includes the process for appeals of the application or interpretation of the regulations, including how a license holder may submit a grievance request and the process for grievances.

If you have any policy questions about this topic. or in general, contact your assigned policy consultant. If you have legal questions about this topic. or in general, email colleges@tasb.org or call 800.580.1488 to get connected with a TASB Community Colleges attorney.

In the News

The U.S. Department of Education, Office for Civil Rights, released resources for students with disabilities including sickle cell disease, epilepsy, or cancer, and their families and community colleges regarding the students' rights under Section 504 of the Rehabilitation Act.

The Texas governor announced the Texas Workforce Commission awarded Jobs and Education for Texans (JET) grants to Northeast Texas Community College and Paris Junior College.

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