CURRENT UPDATES: A BRIEF SURVEY OF EDUCATION LAW IN MICHIGAN

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I. INTRODUCTION

Education law at the federal level is primarily concerned with comprehensive topics, while state educational law is generally more specific with respect to funding, unions, and the regulations of our universities.[1] For Michigan and other states, education is primarily controlled at the state level.[2] Notwithstanding, and like any other body of law, updates emerge that help focus and clarify existing law, or bring about cases of first impression.

The education cases that have emerged during the *Survey* period covered an assortment of issues raised such as appropriating funds, records, quorum, and an exception to governmental immunity.[3] As indicated from the topics above, the cases cover nuances within the overarching theme of education and implications that result from their holdings. While not an exhaustive list of current education law in

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1. *See Michigan Education Laws*, FINDLAW, https://www.findlaw.com/state/michigan-law/michigan-education-laws.html [http://web.archive.org/web/20220125155153/https://www.findlaw.com/state/michigan-law/michigan-education-laws.html] (last visited Jan.12, 2022).

2. *Id.*

3. *See* discussion *infra* Part II.

Michigan, each case stands for its own findings. Together, they represent a clearer interpretation of current education law in the State of Michigan.

II. ANALYSIS

A. Council of Organizations and Others for Education About Parochiaid v. State[4]

In this matter, various organizations brought suit against the State of Michigan, the governor, and other entities, alleging the unconstitutionality of a statute appropriating funding that reimbursed costs incurred by nonpublic schools for compliance with state health, welfare, and safety mandates.[5] To provide context, a brief review of precedent is warranted.

In 1970, Michigan enacted Public Act 100.[6] The Act allowed for a portion of private school teachers' salaries to be paid by the Michigan Department of Education, provided the teachers taught secular subjects.[7] That fall, the Act was rendered unconstitutional when the state constitution was amended to limit payment and other forms of aid to nonpublic schools.[8]

The following year provided further clarification when the Michigan Supreme Court held in *Traverse City v. Attorney General* that private school students could attend public school for certain courses.[9] This "shared arrangement" was deemed constitutional, as public schools received the funding and administered the coursework.[10] The analysis further explored the use of auxiliary funding and remedial funding, finding the usage constitutional.[11] Street crossing guards, speech therapy, and hearing tests are among auxiliary services and are considered to be health safety measures.[12] As such, they only incidentally benefit education and

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4. 506 Mich. 455, 958 N.W.2d 68 (2020).

5. *Id.*

6. *See* Thomas Rheaume & Gordon Kangas, *State Court Docket Watch:* Council of Organizations and Others for Education About Parochiaid v. State of Michigan, THE FEDERALIST SOC'Y (Mar. 10, 2021), https://fedsoc.org/commentary/publications/state-court-docket-watch-council-of-organizations-and-others-for-education-about-parochiaid-v-state-of-michigan [http://web.archive.org/web/20220125155346/https://fedsoc.org/commentary/publications/state-court-docket-watch-council-of-organizations-and-others-for-education-about-parochiaid-v-state-of-michigan].

7. *Id.*

8. *Id.*

9. *Id.* (citing Traverse City Sch. Dist. v. Att'y Gen., 384 Mich. 390, 434, 185 N.W.2d 9, 29 (1971)).

10. *Id.*

11. *Traverse City Sch. Dist*., 384 Mich. at 417, 185 N.W.2d at 20.

12. *Id.* at 417–18, 185 N.W.2d at 40.

were not considered to be an excessive entanglement in religion or state support.[13] However, in a subsequent opinion, state support could not be given for textbooks in private schools.[14] Textbooks were determined to be essential to the educational process, rather than incidental as the prior referenced auxiliary services.[15] These distinctions remained in play for years to come and assisted in framing the issues pertinent to the case at hand.

In this matter, $2.5 million was appropriated for funding the 2016–2017 school year to reimburse nonpublic school costs for safety, health, and welfare compliance.[16] The ACLU and public schools raised the constitutionality of this funding, indicating this violated the prohibition for funding nonpublic schools.[17]

Procedurally, the Michigan Court of Appeals majority held that the appropriation was constitutional because the actions of compliance taken were "truly incidental to providing educational services and focus instead on a student's well-being, i.e., his or her health, safety, and welfare."[18] The specific action in question included disposing of instruments containing mercury as well as conducting criminal background checks for new employees.[19] The dissent disagreed that these costs were auxiliary in nature and rather primary elements for a school's operation.[20] As is it unlawful to employ a teacher who has been convicted of a sexual crime, "[e]mploying legally qualified teachers is a primary function of a school."[21] The case was granted leave to appeal but ultimately the Michigan Supreme Court was evenly split, resulting in affirming the court of appeals' decision.[22]

With a split decision from the Michigan Supreme Court, the analysis of Justice Markman and the dissent written by Justice Cavanaugh should be taken into consideration when contemplating the implications for similar issues raised in the future. Justice Markman's analysis centered around the opposition of a literal interpretation of the services employed, and focused instead on the auxiliary nature of these services as "general

13. *Id.* at 435, 185 N.W.2d at 30.
14. *See* Rheaume & Kangas, *supra* note 6.
15. *Id.*
16. Council of Orgs. and Others for Educ. About Parochiaid v. State, 506 Mich. 455, 460, 958 N.W.2d 68, 71 (2020).
17. *Id.* at 479, 958 N.W.2d at 81.
18. Council of Orgs. and Others for Educ. About Parochiaid v. State, 326 Mich. App. 124, 153, 931 N.W.2d 65, 80 (2018).
19. *Id.* at 150, 931 N.W.2d at 79.
20. *See id.* at 158–68, 931 N.W.2d at 83–88.
21. *Id.* at 169, 931 N.W.2d at 89.
22. *Council of Orgs.*, 506 Mich. 455, 958 N.W.2d 68.

health and welfare measures."[23] The control ultimately rests with the public school system, even though the services in this instant case could be deemed educational.[24] He further reasoned that if the state is constitutionally allowed to provide speech therapy services, the services raised in the instant matter should also be constitutional.[25]

For the dissent, Justice Cavanaugh indicated a series of steps that should control the analysis. The threshold question is whether the law violates the Michigan Constitution.[26] First, the court must determine whether the Michigan Constitution was violated.[27] If the court finds that the law violates the Michigan Constitution, the next step in analysis is whether the application of the Michigan Constitution conflicts with the United States Constitution.[28] If no conflict exists, the funding is permissible.

If conflict does exist, the court must determine "whether there is an alternative constitutional construction" that would preserve the purpose of the Michigan Constitution and is "consonant with a common understanding of the language used" in the provision.[29] Applying this analysis to the case at hand, Justice Cavanaugh found that the underlying law from 1970 conflicted with the Michigan Constitution, but the current holding would put the Michigan Constitution in conflict with the US Constitution. As such, the *Traverse City* court utilized an alternative constitutional construction where this would allow for shared time and auxiliary services under the Michigan Constitution.[30] Ultimately, Justice Cavanaugh thought affirmance was improper as the steps were misapplied.[31] The opinion for affirmance departed from the original *Traverse City* analysis.[32] *Traverse City* "employed the alternative construction to shared-time and auxiliary-services programs only after concluding that the literal application of [the Michigan Constitution] created a conflict with the [F]ederal Constitution[;]"[33] therefore, the opinion for affirmance in this case erred by applying an alternative construction first, rather than establishing a conflict with the Federal

23. *Id.* at 468, 958 N.W.2d at 75 (citing Traverse City Sch. Dist. v. Att'y Gen., 384 Mich. 390, 418–19, 185 N.W.2d 9, 21 (1971)).
24. *Id.* at 479–80, 958 N.W.2d at 81–82.
25. *Id.* at 485, 958 N.W.2d at 84.
26. *Id.* at 488–89, 958 N.W.2d at 86.
27. *Id.*
28. *Id.*
29. *Id.* at 497, 958 N.W.2d at 91 (citing Traverse City Sch. Dist. v. Att'y Gen., 384 Mich. 390, 412–13, 185 N.W.2d 9, 18–19 (1971)).
30. *Id.*
31. *Id.* at 506, 958 N.W.2d at 96.
32. *Id.*
33. *Id.* at 502, 958 N.W.2d at 93–94.

Constitution.[34] Moreover, the opinion for affirmance misapplied the alternative analysis by focusing on the limited discussion in *Traverse City* regarding auxiliary services even though that discussion was explicitly limited to the auxiliary services at issue in that case.[35]

B. Traverse City Record-Eagle v. Traverse City Area Public Schools Board of Education[36]

In this action, plaintiff sought documentation detailing complaints against the superintendent under the Freedom of Information Act (FOIA).[37] Plaintiff filed suit against the board of education, as well as the board's president.[38] Plaintiff further alleged violations of the Open Meeting Act (OMA), where an interim superintendent was hired.[39] defendant objected to both allegations, resulting in the parties filing cross motions for summary disposition.

The trial court ruled in favor of the plaintiff by holding that the FOIA request and subsequent document production was permissible, while ruling in favor of defendant with respect to the OMA claim.[40] Both parties appealed.[41] The court of appeals held that the FOIA request with respect to the documentation was discoverable because the document was not part of the closed meeting's meeting about the superintendent and was created by the president detailing complaints against the superintendent.[42] With respect to the claim concerning hiring the interim superintendent, the court of appeals affirmed the trial court's decision.[43] When looking at the relevant facts the court found that the board and the board's president met in an open meeting and made the decision to hire a candidate.[44] Additionally, the OMA does not require a specific length of time or quality of deliberation at an open meeting before hiring a candidate.[45] Thus, the trial court's decision was affirmed as to both issues.[46]

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34. *Id.*
35. *Id.* at 510, 958 N.W.2d at 97.
36. No. 354586, 2021 WL 1931997 (Mich. Ct. App. May 13, 2021).
37. *Id.* at *1.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at *6–7.
43. *Id.*
44. *Id.* at *6.
45. *Id.* at *7.
46. *Id.*

C. Busuito v. Barnhill

Another issue that came before the court of appeals involving the OMA concerned the issue of determining quorum. This matter was brought about when elected members of a public university's board of governors boycotted a meeting and brought suit against the members who voted at the meeting.[47] In addition to the members, the suit was also levied against the university, the president of the university, and the board.[48]

The specific allegations were that the board violated the OMA by establishing quorum wrongfully and held a closed session without necessary board approval.[49] With specificity to the claim regarding quorum, the boycotting members alleged that the president of the university could not count as a member of the board of governors for the purposes of establishing quorum.[50] The court found that the OMA does not apply to governing boards of public universities.[51] Furthermore, the court found the president was a member of the board by virtue of the office he held, and thus, the president counted as a board member for the purpose of quorum establishment.[52]

Another interesting component to the case is that the boycotting members sought a preliminary injunction and temporary restraining order (TRO) in the matter. At the trial level, these claims were denied.[53] The rationale for denying said claims was that the boycotting members' claim of the alleged voting members violation of the OMA could not form the basis for injunctive relief.[54] The court of appeals upheld this by finding the trial court did not abuse its discretion in doing so.[55] Moreover, the court found that the boycotting members failed to meet their burden of proof as they did not show irreparable harm requiring injunctive relief to the OMA claim.[56] The court of appeals affirmed the trial court's decision for the above-referenced reasons.

47. Busuito v. Barnhill, No. 353424, 2021 WL 2171156, at *1 (Mich. Ct. App. May 27, 2021).
48. *Id.*
49. *Id.*
50. *Id.* at *2.
51. *Id.* at *8.
52. *Id.* at *10.
53. *Id.* at *1–2.
54. *Id.* at *2.
55. *Id.* at *8.
56. *Id.*

D. Elia Companies, LLC v. University of Michigan Regents

The underlying action in this matter stemmed from a coffee shop operator bringing an action against the University of Michigan and alleging several claims.[57] The claims included a breach of contract, unjust enrichment, constructive eviction, and violation of the anti-lockout statute.[58] The coffee shop operator's commercial lease was terminated by the university, thus disallowing the operator from being able to operate inside the university's student union.[59] The parties entered into the lease in 2013, where plaintiff would operate rental space at the student union, and a Starbucks franchise was constructed and operated.[60] Plaintiff already owned and operated several coffee shops and restaurants, which were considered profitable.[61] In turn, defendant operated the student union at a consistent loss.[62]

In March 2017, defendant indicated the student union would be renovated.[63] On April 17, 2018, defendant terminated plaintiff's lease and sent a letter indicating several pages worth of alleged violations caused by plaintiff that occurred between April 2014 and December 2017.[64] As such, defendant required plaintiff to vacate the premises and the union closed down for renovations that same year.[65]

In late summer of 2018, plaintiff filed suit in the Washtenaw Circuit Court, which defendant filed noticed to transfer the case to the court of claims, pursuant to MCL 600.6404(3) and MCL 600.6419(1).[66] The case was then transferred to the court of claims. In defendant's affirmative answers, defendant alleged many of plaintiff's claims were barred by governmental immunity and the complaint was not verified as required by law.[67]

While the court of claims allowed plaintiff to file an amended complaint to avoid being barred by immunity, the court ultimately dismissed the case upon defendant's motion for summary disposition on the basis that plaintiff did not follow notice requirements.[68] Additionally,

57. Elis Companies, LLC v. Univ. of Mich. Regents, 335 Mich. App. 439, 966 N.W.2d. 755 (2021).
58. *Id.* at 445, 966 N.W.2d 760.
59. *Id.* at 443, 966 N.W.2d at 759.
60. *Id.* at 444, 966 N.W.2d at 759–60.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 444–45, 966 N.W.2d at 760.
68. *Id.* at 445, 966 N.W.2d at 760.

the court found that many of the plaintiff's claims would be subject to dismissal independently as a matter of law on the grounds of governmental immunity.[69] The appeal followed suit, as filed by plaintiff.

One of the first issues the court of appeals analyzed was that plaintiff did not deny that defendant was entitled to immunity but that immunity did not apply as defendant was engaged in a proprietary function.[70] To establish a proprietary function, "[t]wo tests must be satisfied: [t]he activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees."[71] If the exception is met, it allows for tort liability, when otherwise protected from governmental immunity. "Whether the activity generates a profit or a loss is relevant, but not conclusive, evidence."[72]

Looking to the case at hand, plaintiff alleged that defendant leased the commercial space for a profit.[73] However, the unrefuted fact remains that the student union was operated at a consistent loss.[74] While that evidence is relevant, it is not dispositive.[75] The court of appeals found plaintiff to erroneously view the student union general activity with too narrow of a focus.[76] Ultimately, the court found the general activity was to run and operate the student union and not primarily operating for a profit.[77] Rather, the court reasoned that "[f]ar from showing profit-generation to be the *primary* purpose of renting out commercial space in the Union, the evidence showed that defendant sought primarily to provide services for students but wished to do so with as little loss as feasible."[78] Therefore, the proprietary-function exception for governmental immunity did not apply to plaintiff's claim. As this was a case of first impression, the court further found that the anti-lockout statue claim was barred in tort law and barred by governmental immunity.[79]

The court further held that the existence of the lease precluded a claim for unjust enrichment as well as the termination of the lease by the university did not amount to an exercise of eminent domain powers.[80] Finally, the court found that while plaintiff must comply with the

69. *Id.* at 445–46, 966 N.W.2d at 760–61.
70. *Id.* at 447–48, 966 N.W.2d at 761.
71. *Id.* at 448, 966 N.W.2d at 761 (citing Coleman v. Kootsillas, 456 Mich. 615, 621, 575 N.W.2d. 527, 530 (1998)).
72. *Id.*, 966 N.W.2d at 762.
73. *Id.*
74. *Id*.
75. *Id.*
76. *Id*. at 449, 966 N.W.2d at 762.
77. *Id.*
78. *Id.* (emphasis in original).
79. *Id.* at 452, 966 N.W.2d at 764.
80. *Id*. at 452–55, 966 N.W.2d at 764–65.

verification requirements indicated above, plaintiff may have an opportunity to cure the defect.[81] If plaintiff cannot provide proper verification, the claim must be dismissed. However, the court of appeals held that the court of claims dismissed the matter prematurely before plaintiff had the opportunity to cure.[82] Thus, this matter was affirmed in part, reversed in part, and remanded.

III. CONCLUSION

Looking to the cases above, one can arguably say the area of education law is ever evolving. Whether the case is one of first impression or whether novel issues arise, each matter deserves a close look as well as the examination of any precedent. It also bears to mind that these cases, having been recently decided, may have further unknown potential impacts. At the very least, they serve as reminders that the law evolves as do the times we live in.

81. *Id.* at 459, 966 N.W.2d at 767.
82. *Id.* at 459–60, 966 N.W.2d at 768.