STATE OF CONNECTICUT *v.* PATRICK M.*
(SC 20476)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

Convicted of the crimes of murder and criminal possession of a firearm in connection with the death of his wife, Y, the defendant appealed to this court. The police had reported to the defendant's apartment, where he lived with Y and their two year old daughter, P, in response to a 911 call concerning a domestic disturbance. Upon entering the apartment, the police found the body of Y, who had died from multiple gunshot wounds to her head, as well as narcotics, packaging materials, and cash. The police thereafter located P in Brooklyn, New York, at the home of the defendant's sister, who indicated that the defendant had dropped off P the morning after Y's murder. The defendant was found in Massachusetts and arrested several days later. Following his arrest, the defendant was advised of and exercised his right to remain silent pursuant to *Miranda* v. *Arizona* (384 U.S. 436). Before trial, the state filed notice of its intent to introduce evidence of the defendant's uncharged misconduct, including the testimony of J, an ex-girlfriend of Y with whom Y had recently reunited, for the purpose of demonstrating the defendant's intent and identity. The defendant moved to exclude J's testimony, but

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the trial court ultimately concluded that it was relevant and not unduly prejudicial. At trial, J testified about two incidents that occurred a few months before Y's murder, when the defendant threatened J with a firearm at a funeral and when the defendant broke down the door to J's apartment while J and Y were in bed together. The state also elicited testimony from T, who was a drug runner for the defendant. T testified that he had been with the defendant in a car owned by T's mother on the day of Y's murder and that the defendant had texted the following morning asking him to look up "[h]ow much time do you get." The defendant testified in his own defense at trial. He admitted that he was a drug dealer and stated that, when he returned to his apartment on the night of the murder, he found Y dead and a large amount of cash and a certain quantity of heroin missing. The defendant claimed that he fled with P to his sister's home in Brooklyn because he feared the perpetrators of the purported robbery. He also testified that T picked him up in Brooklyn and drove him to New London, where he stayed for two days before going to Massachusetts. During closing arguments, which commenced later in the day on which the defendant testified, the prosecutor sought to cast doubt on the credibility of the defendant's testimony by emphasizing the defendant's delay in telling his version of events. The prosecutor repeated that "today" or "this morning" at trial was the "first time" the defendant had shared his story and argued that, if Y's murder was the result of a botched robbery, as the defendant claimed, common sense would have compelled the defendant to share that information with the police "closer to the time of the crime" in order to assist with the investigation. The prosecutor also stated during rebuttal argument that, in comparison to the months long delay it took J to report the incident at the funeral, "[t]here was a much bigger delay in hearing [from the defendant] about the missing large quantity of money." Defense counsel objected to the prosecutor's statements regarding the defendant's silence, but the court overruled the objection. After the defendant was found guilty, defense counsel moved for a new trial, claiming that the prosecutor had violated the defendant's right to due process by commenting on his post-*Miranda* silence. The court denied that motion, concluding that the prosecutor's statements referred to the defendant's prearrest silence, which is permissible. *Held*:

1. The evidence was sufficient to satisfy the state's burden of proving beyond a reasonable doubt that the defendant had committed the crimes of murder and criminal possession of a firearm: although there was no direct evidence linking the defendant to Y's murder, the cumulative impact of the circumstantial evidence was sufficient to support a reasonable inference that it was the defendant who murdered Y with a firearm insofar as that evidence revealed that his marriage with Y was disintegrating due to his own extramarital affairs and Y's romantic relationship with J, that the defendant previously had threatened to kill Y and had threatened J with a gun, and, therefore, that the defendant had a motive

to murder Y and had expressed a willingness to take action consistent with that motive; moreover, the defendant's own testimony placed him at the scene of the murder less than one hour before the 911 call, the trier of fact was not required to credit the defendant's testimony that Y was dead when he arrived at the apartment, particularly because it was inconsistent with the timeline of events established by the 911 call and certain video surveillance footage that was admitted at trial, and it was undisputed that the defendant was a drug dealer who routinely possessed large quantities of cash and narcotics, which permitted a reasonable inference that the defendant possessed a firearm and had the means and opportunity to kill Y with such a weapon; furthermore, the defendant's flight from the scene of Y's murder without calling the police or seeking medical assistance for Y, certain incriminatory statements that he made indicating that he was "sorry" and "on the run," as well as his inquiry to T regarding "[h]ow much time do you get," constituted indirect evidence of the defendant's guilt.

2. The prosecutor improperly commented on the defendant's post-*Miranda* silence, in violation of the defendant's due process right to a fair trial, and, accordingly, the judgment of conviction was reversed, and the case was remanded for a new trial: the state conceded that the prosecutor's comment during rebuttal argument regarding the significant "delay in hearing [from the defendant] about the missing large quantity of money" was improper because its context revealed that it referred both to the defendant's pre-*Miranda* and post-*Miranda* silence, and the prosecutor's other references to the defendant's silence during closing argument were ambiguous because they referred generally to the defendant's delay in disclosing his version of events and could reasonably have been understood to include both the four days of pre-*Miranda* silence between the murder and the defendant's arrest and the lengthier post-*Miranda* period between his arrest and trial; moreover, this court adopted a contextualized approach for the purpose of construing such ambiguous prosecutorial remarks, pursuant to which the court must analyze whether the language used by the prosecutor was manifestly intended to be, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the defendant's post-*Miranda* silence, and pursuant to which the defendant bears the initial burden of proving an impermissible comment on his post-*Miranda* silence, after which the state bears the burden of demonstrating that the error was harmless beyond a reasonable doubt; in the present case, viewing the prosecutor's remarks in the context in which they were made, the jury naturally and necessarily would have construed them to refer to both the defendant's pre-*Miranda* silence, insofar as the comments focused on the defendant's flight to Brooklyn, New London, and Massachusetts before his arrest, and his post-*Miranda* silence, insofar as the prosecutor repeatedly emphasized that "today" or "this morning" was the "first time" the defendant told his story; furthermore, the

prosecutor emphasized the recent nature of the defendant's disclosure by arguing that the police had not investigated Y's death as a botched robbery because, between the date of the murder and the date the defendant testified, he never informed the police that a robbery occurred, and, thus, the prosecutor's remarks encompassed the full continuum of the defendant's pre-*Miranda* and post-*Miranda* silence, and the natural and necessary impact of the prosecutor's statements during initial closing argument was reinforced by the admittedly improper comment during rebuttal argument when the prosecutor expressly noted that the defendant's silence far exceeded four months; in addition, the state failed to satisfy its burden of demonstrating that the prosecutor's improper remarks were harmless, as it failed to explain how the prosecutor's repeated emphasis on the defendant's post-*Miranda* silence during initial closing argument, which struck at the jugular of the defendant's testimony that Y was killed during a botched robbery, was harmless beyond a reasonable doubt.

3. The trial court did not abuse its discretion in admitting J's testimony regarding the funeral incident as evidence of the defendant's uncharged misconduct on the ground that the probative value of that evidence outweighed its prejudicial effect: J's testimony regarding her relationship with Y and the defendant's threatening conduct clearly was relevant to the issue of the defendant's motive to commit the crimes of conviction, as the jury reasonably could have found that the defendant blamed the breakdown of his marriage on Y's relationship with J, that he was willing to resort to violence to end their relationship, and that his willingness to use violence extended to Y herself, especially in light of evidence that the defendant had threatened to kill Y and that Y had called the police after the defendant burst in on her and J in bed together; moreover, the uncharged misconduct evidence was not unduly prejudicial, as the defendant's threatening conduct toward J at the funeral was less severe than the conduct that formed the basis for his conviction of Y's murder and, therefore, was unlikely to unduly arouse the emotions of the jurors; furthermore, the trial court instructed the jury that its use of J's testimony regarding the funeral incident was limited to showing or establishing the motive for the commission of the charged crimes, which minimized any prejudicial effect that the evidence otherwise may have had.

Argued May 5—officially released September 2, 2022**

Procedural History

Substitute information charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial dis-

** September 2, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

trict of New Britain, where the charge of murder was tried to the jury before *Oliver*, *J.*; verdict of guilty; thereafter, the charge of criminal possession of a firearm was tried to the court, *Oliver*, *J.*; finding of guilty; judgment of guilty in accordance with the jury's verdict and the court's finding, from which the defendant appealed to this court. *Reversed*; *new trial.*

Emily H. Wagner, assistant public defender, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *Brett J. Salafia*, executive assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. The defendant, Patrick M., was convicted of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1) in connection with the death of his wife, Y. On appeal, the defendant raises four claims: (1) the evidence was insufficient to establish his identity as the perpetrator of the crimes of conviction; (2) the prosecutor violated the proscriptions set forth in *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), by improperly commenting on the defendant's invocation of his right to remain silent following his arrest and advisement of rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); (3) the prosecutor's comments during closing argument on the defendant's post-*Miranda* silence and pretrial incarceration constituted prosecutorial improprieties that deprived the defendant of his due process right to a fair trial; and (4) the trial court improperly admitted evidence of the defendant's prior uncharged misconduct in violation of our rules of evidence. We conclude that the evidence was sufficient to support the defendant's conviction but that the

prosecutor improperly commented on the defendant's post-*Miranda* silence. We therefore reverse the conviction and remand the case for a new trial.

The jury reasonably could have found the following facts. The defendant and Y were married in 2015 and had one child together, P. Their relationship was tumultuous and plagued by infidelity. The defendant had a series of extramarital affairs with various women, and, by 2017, Y was in a sexual relationship with her former girlfriend, Kye Jones. The defendant, who did not approve of Y and Jones' relationship, at one point threatened to kill Y[1] and, on a different occasion, also threatened Jones with a gun, yelling at her, "I told you I ain't no punk."

On April 7, 2017, the defendant, Y, and P, who was two years old at the time, lived in a second floor apartment in New Britain. Their neighbor, M, lived in the apartment directly below them. On the night of April 7, M arrived home at approximately 9 p.m. Less than an hour later, M heard "a lot of ruckus coming from upstairs," which she characterized as fighting, yelling, and bodies being tossed around. M called 911, and the police arrived shortly thereafter, at 10:05 p.m.

The police knocked on the locked door of Y's apartment, but there was no answer. After speaking to M, the police decided to force entry into the apartment. Inside, they found Y in the master bedroom face down in a pool of blood. Attempts to revive Y were unsuccessful, and she was pronounced dead at the scene. A subsequent autopsy revealed the cause of Y's death to be multiple gunshot wounds to the head and that the manner of her death was a homicide.[2]

[1] Y's mother testified that the defendant was abusive toward Y and that, in March, 2017, less than one month before the murder, the defendant said that "he was going to kill [Y]."

[2] Y sustained three gunshot wounds: one to the face, one to the temple, and one to the shoulder.

The police searched the apartment, but neither the child nor anyone else was there. Inside the master bedroom, the police discovered multiple nine millimeter shell casings and bullet fragments. There also was evidence of a struggle: a blood like substance was found on the bed, and Y was wearing only one shoe. The search also resulted in the seizure of multiple cell phones, narcotics, packaging materials, and approximately $2900 in cash.

Given the nature of the initial 911 call as a domestic disturbance, the police focused their efforts on locating the defendant and P. When those efforts yielded no results, an Amber Alert was issued, insofar as P was "a missing child [who was] in danger because there was a homicide." The Amber Alert also warned that the defendant was "considered dangerous" and should be approached with "extreme caution." The police later located P at the home of the defendant's sister in Brooklyn, New York. The defendant's sister informed the police that the defendant had stopped by unannounced on the morning of April 8, 2017, and told her to "take care of [his] daughter." On that same date, the defendant also called Y's aunt and said to her, "I love you. . . . I'm sorry. I'm on the run."

The defendant was found on April 11, 2017, in Massachusetts. He was arrested and charged with murder and criminal possession of a firearm. The defendant elected a jury trial on the murder charge and a bench trial on the criminal possession of a firearm charge.

At trial, the jury heard testimony from Dwayne Watson, who was familiar with the defendant through Y's sister, with whom he had a child. Watson testified that he saw the defendant on the afternoon of April 7, 2017, picking up P after school in a gray Chevrolet Malibu. Watson also saw the defendant later that evening in Hartford in the same gray vehicle. The jury also heard

testimony from Daniel Thomas, an associate of the defendant's. Thomas testified that he went with the defendant to pick up P after school on the afternoon of the day of the murder in a silver Chevrolet Malibu, which was registered and insured in the name of Thomas' mother. Thomas spent a couple of hours with the defendant and P and then went home.

Later that night, Thomas learned that Y had been shot and killed. Thomas subsequently received a phone call from the defendant, in which the defendant asked him "what was going on out there." Thomas responded that "people [were] saying that you killed your girl," and the defendant replied, "for real? That's what they saying?" The defendant also said that "he probably wasn't going to see his daughter."

The defendant texted Thomas again during the early morning hours the following day and asked him to look up "[h]ow much time do you get." Thomas told the defendant to park the Chevrolet Malibu and to "take the plates off so [his] mother won't be a part of [a criminal investigation]." The defendant asked Thomas to pick up the car in Brooklyn. Thomas drove to Brooklyn, where he and a friend picked up the Chevrolet Malibu and the defendant's cell phone. They delivered the Chevrolet Malibu to the home of Thomas' mother, but Thomas kept the cell phone in his possession. On cross-examination, Thomas admitted that he currently was incarcerated as a result of a conviction for the sale of narcotics and that, prior to his incarceration, he was "a drug runner" for the defendant. He explained that he kept the defendant's cell "phone because [he] wanted to wrap up any loose ends [regarding] drug deals."

The state adduced video surveillance footage showing a vehicle matching the description of the gray Chevrolet Malibu driving through an intersection near Y's apartment at approximately 10 p.m. on the day of the

murder. Additionally, cameras operated by the city of New York captured images of the Chevrolet Malibu's license plate in various areas of New York a few hours later, between 1 and 2:30 a.m. on April 8, 2017.

The defendant testified in his own defense. The defendant admitted that he was a drug dealer and a convicted felon. He explained that, as a drug dealer, he drove many cars, one of which was the Chevrolet Malibu owned by Thomas' mother. The defendant testified that, on the afternoon of April 7, 2017, he drove the Chevrolet Malibu to pick up his daughter from school at approximately 3 p.m. Thomas accompanied the defendant and returned with him and P to the apartment in New Britain for two or three hours. Sometime thereafter, the defendant left the apartment with P to go to Hartford to purchase "some weed." According to the defendant, he did not drive the Chevrolet Malibu to Hartford. Instead, he drove a blue Acura because he "needed to bring money to New York" and the Acura "had a stash box," or "a hidden compartment under the seat."

The defendant testified that he returned to his New Britain apartment with P at approximately 9 p.m. He noticed that Y's truck was parked in the parking lot and that the door to his apartment was open. When the defendant entered the apartment, he realized that a large amount of cash and illicit drugs were missing. The defendant placed P on the couch and searched the apartment. In the master bedroom, he found Y dead on the floor. In panic and fear, the defendant "grabbed [P] and ran out the door" of the apartment. In order to "[get P] to safety," the defendant fled in the blue Acura to his sister's home in New York.

According to the defendant, he received a phone call from Thomas on the way to New York, in which Thomas informed him that "[his] wife got killed and they saying [that he] did it." The defendant also received notice of

the Amber Alert, which described him as "[a]rmed and dangerous . . . ." Because he was a suspect in Y's murder, the defendant was afraid to contact the police. Instead, he dropped P off at his sister's house and arranged to have Thomas pick him up in Brooklyn. Thomas arrived to pick him up in the Chevrolet Malibu and then drove the defendant to a girlfriend's house in New London. The defendant stayed in New London for two days, after which Thomas drove him to Massachusetts in the Chevrolet Malibu. The police arrested the defendant in Massachusetts one and one-half days later.

On the basis of the foregoing evidence, the jury found the defendant guilty of murder, and the trial court found the defendant guilty of criminal possession of a firearm. The trial court rendered judgment in accordance with the jury's verdict and the court's finding, and sentenced the defendant to fifty-five years of incarceration.[3] This direct appeal followed.

I

The defendant first claims that the evidence was insufficient to support his conviction because the state failed to prove the essential element of identity. We disagree.

"[T]he question of identity of a perpetrator of a crime is a question of fact that is within the sole province of the jury to resolve. . . . To determine whether the evidence was sufficient to establish the essential element of identity, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom, the [jury] reasonably could have concluded

[3] The trial court sentenced the defendant to fifty-five years of incarceration for the crime of murder and imposed a concurrent sentence of ten years of incarceration for the crime of criminal possession of a firearm, for a total effective sentence of fifty-five years.

that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . . In doing so, we are mindful that the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Citation omitted; internal quotation marks omitted.) *State* v. *Abraham*, 343 Conn. 470, 476, 274 A.3d 849 (2022).

In view of these principles, it is readily apparent that the evidence was sufficient to support a reasonable inference that the defendant committed the crimes of murder and criminal possession of a firearm. The evidence at trial revealed that the defendant's marriage with Y was disintegrating due to the defendant's extramarital affairs and Y's romantic relationship with Jones. As their marriage unraveled, the defendant threatened to kill Y and threatened Jones with a gun. The defendant had a motive to murder Y and had expressed a willingness to take action consistent with that motive. See id., 479 (although motive is not essential element of murder, "the existence or absence of motive often is used at trial to construct a narrative of guilt or innocence"); see also part III of this opinion.

The defendant also had the opportunity and means to commit the crimes with which he was charged. The defendant's own testimony placed him at the scene of the murder at approximately 9 p.m., less than one hour before the 911 call complaining of fighting, yelling, and bodies being tossed around inside the apartment. Although the defendant testified that Y was dead when he arrived at the apartment, the triers of fact were not required to credit the defendant's testimony, particularly because it was inconsistent with the timeline of events established by the 911 call and the video surveillance footage, which depicted the Chevrolet Malibu driven by the

defendant earlier in the day leaving the area at 10 p.m. See, e.g., *State* v. *Roy D. L.*, 339 Conn. 820, 849, 262 A.3d 712 (2021) ("[I]t is well established that [w]e may not substitute our judgment for that of the [finder of fact] when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the [finder] of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.)).

The defendant also had the means to commit the crimes because there was evidence from which the jury reasonably could have found that he had access to a firearm. It was undisputed that the defendant was a drug dealer who routinely possessed large quantities of cash and narcotics. "Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms . . . ." (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 240, 249 A.3d 683 (2020). "The jury is permitted to rely on its common sense, experience and knowledge of human nature in drawing inferences . . . and may draw factual inferences on the basis of already inferred facts." (Citation omitted; internal quotation marks omitted.) Id.; see *United States* v. *White*, 356 F.3d 865, 870 (8th Cir. 2004) ("[w]e allow a [fact finder] to infer a connection between drugs and firearms when a defendant distributes quantities of illegal drugs because firearms are viewed as a tool of the trade for drug dealers"). Thus, the jury and the trial court reasonably could have inferred that the defendant had the means to kill Y with a firearm.

Lastly, following the murder, the defendant did not call the police or summon emergency medical assistance to treat Y's grievous injuries; instead, he fled the

apartment and was found four days later out of state. Under certain circumstances, "[f]light, when unexplained, tends to prove a consciousness of guilt. . . . The flight of the person accused of a crime is a circumstance [that], when considered together with all the facts of the case, may justify an inference of the accused's guilt." (Citations omitted; internal quotation marks omitted.) *State* v. *Rosa*, 170 Conn. 417, 432–33, 365 A.2d 1135, cert. denied, 429 U.S. 845, 97 S. Ct. 126, 50 L. Ed. 2d 116 (1976). The defendant's flight from the scene of Y's murder, coupled with his incriminatory statements that he was "sorry" and "on the run," as well as his inquiry into "[h]ow much time do you get," constituted indirect evidence of the defendant's guilt. See *State* v. *McClain*, 324 Conn. 802, 819, 155 A.3d 209 (2017) (consciousness of guilt is "indirect evidence of the defendant's guilt"); *State* v. *Groomes*, 232 Conn. 455, 474, 656 A.2d 646 (1995) (jury may use consciousness of guilt evidence "as independent evidence of guilt *along with the other facts of the case* to determine whether . . . [the defendant] has been proven guilty" (emphasis in original; internal quotation marks omitted)).

We recognize that there was no direct evidence, such as eyewitness testimony, or physical evidence, such as DNA, linking the defendant to Y's murder. The absence of such evidence, however, does not preclude a finding of guilt on the basis of circumstantial evidence that satisfies the constitutional standard. As we previously have explained, "[w]hen reviewing the sufficiency of the evidence, we must focus on the evidence presented, not the evidence that the state failed to present . . . . Additionally, we do not draw a distinction between direct and circumstantial evidence so far as probative force is concerned . . . . Indeed, [c]ircumstantial evidence . . . may be more certain, satisfying and persuasive than direct evidence. . . . It is not one fact . . .

but the cumulative impact of a multitude of facts [that] establishes guilt in a case involving substantial circumstantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Abraham*, supra, 343 Conn. 477. On the basis of our review of the record, we conclude that the cumulative impact of the circumstantial evidence was sufficient to satisfy the state's burden of proving beyond a reasonable doubt that it was the defendant who murdered Y with a firearm.

II

The defendant contends that he was deprived of his due process right to a fair trial because the prosecutor repeatedly commented on his post-*Miranda* silence during closing argument, in violation of *Doyle* v. *Ohio*, supra, 426 U.S. 610.[4] The following additional facts are relevant to this claim. The defendant was arrested four days after the murder, on April 11, 2017, at which time he was advised of his right to remain silent pursuant to *Miranda* v. *Arizona*, supra, 384 U.S. 478–79. Following his arrest, the defendant exercised his right to remain silent.

At trial, the defendant broke his silence and testified in his own defense as to what occurred on the night of April 7, 2017. The defendant explained that he arrived at his New Britain apartment at approximately 9 p.m. to find Y dead and $83,000 in cash and 600 grams of heroin missing. The defendant was afraid, so he grabbed his daughter, P, and fled with her to New York, where he dropped her off at his sister's house. The defendant's testimony raised the possibility that Y had been killed

[4] The defendant also claims that the prosecutor's comments on the defendant's silence impermissibly shifted the burden to the defendant to prove his innocence, in violation of *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because we agree with the defendant that some of the prosecutor's challenged comments referred to the defendant's post-*Miranda* silence, in violation of *Doyle*, we do not address the defendant's burden shifting claim.

in a robbery gone wrong and that his flight was prompted by fear of the perpetrators rather than his own guilt.

During closing argument, the prosecutor repeatedly sought to cast doubt on the credibility of the defendant's testimony by emphasizing the defendant's delay in telling his story. The prosecutor first invoked this theme, i.e., the belated timing of the defendant's disclosure, by arguing: "Now, the defendant told you today [that] his fear [was] the reason for taking the child to New York. Considering your common sense, would it be reasonable to tell your close family about the event? *I submit to you* [*that*] *the first time we're hearing anything about this sequence of events or the basis was this morning through* [*the defendant's*] *testimony*." (Emphasis added.) The prosecutor asked the jury whether the defendant's "reaction, this fear reaction and the actions that [the defendant] testified to you today that he took, does that fit your commonsense view of how a parent would behave in the wake of the violent death of [his] spouse, or would that parent be taking every step possible to comfort, to shield [P] from what had just happened, and to try very hard, if there were an alternative theory, and I submit to you that there isn't . . . to make sure that that theory was properly investigated? But [the defendant] didn't do that." Instead, he "went to New London, and he hung out with some woman for a couple days," and then went to Massachusetts.

The prosecutor soon returned to the theme that the version of events to which the defendant testified at trial was a recent fabrication: "Now, today you heard *for the first time* about this subsequent meeting where [the defendant] goes to Hartford to see . . . Thomas, gets some marijuana, change[s] cars, get[s] the car that has the trap set up in it so that he could secure the money for the ride down to New York.

* * *

"Now, *this morning you hear about* the trip to New London, you hear about the ultimate trip to Massachusetts to the friend's relative's house, and you hear, *for the first time this morning*, the mention of this large quantity of drug money. The follow-up trip to Hartford *is the first time you heard about that this morning.* And common sense would show you that this information, closer to the time of the crime, might be important to direct the investigation." (Emphasis added.)

The prosecutor also argued that the defendant "can't really have it both ways"; he cannot criticize the police for their failure to investigate a robbery while at the same time refus[e] to disclose that a robbery occurred. "*If* [*the police*] *had information closer to the time of this incident that this was a robbery* involving a very large quantity, essentially more than most people's annual income was on this kitchen table, if you're to believe that, the police probably would have changed the tactics that they used to investigate this crime. We'll never know because they didn't know that because *the first time you heard about it was this morning.*" (Emphasis added.)

During his closing argument, defense counsel pointed out alleged deficiencies in the investigation of Y's murder and questioned the credibility of Jones' testimony, in part because she waited four months after the defendant threatened her with a gun to come forward and "finally [tell] her story." In response, the prosecutor stated in rebuttal argument that "there's an old saying, 'what's good for the goose is good for the gander.' Counsel commented about the four month . . . delay in . . . Jones' statement. That's just what it is . . . that's when the interview took place. *There was a much bigger delay in hearing* [*from the defendant*] *about the missing large quantity of money.*" (Emphasis added.)

Following closing argument and the excusal of the jury, defense counsel objected to the prosecutor's statements that the defendant's "silen[ce] can be used against him." The trial court overruled defense counsel's objection, concluding that, "as phrased—and I was cognizant of the twice that was done was not in the context of telling a certain story—it was refined. It was used once, and then again on rebuttal. That is noted." The court explained that commentary on a defendant's silence has "been deemed improper . . . [when] it was phrased in terms of what the defendant could have told the police, that sort of thing, and when. That was not the case here . . . ."

After the defendant was found guilty, defense counsel filed a motion for a new trial, claiming in relevant part that the prosecutor had violated the defendant's constitutional rights pursuant to *Doyle* v. *Ohio*, supra, 426 U.S. 610, by commenting on the defendant's post-*Miranda* silence and "highlighting that [the defendant's] exculpatory story was told for the first time at trial." The trial court denied the motion, concluding that the prosecutor's statements "did not specifically involve comment on the defendant's postarrest silence, as opposed to [his] prearrest silence, which is allowed . . . ."

On appeal, the defendant renews his claim that he was deprived of his due process right to a fair trial by the prosecutor's commentary on his post-*Miranda* silence. The state concedes that the prosecutor's rebuttal comment that "[t]here was a much bigger delay in hearing about the missing large quantity of money" was improper under *Doyle* because the context of that statement reveals that it referred both to the defendant's pre-*Miranda* and post-*Miranda* silence. The state maintains, however, that this improper comment was harmless beyond a reasonable doubt and contends that the prosecutor's other comments during initial closing argu-

ment did not violate *Doyle* because they focused solely on the defendant's pre-*Miranda* silence.

We begin our analysis with *Doyle* v. *Ohio*, supra, 426 U.S. 611, in which the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. As we have previously recognized, the holding in *Doyle* was based on two considerations: "First, [*Doyle*] noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that [although] it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[5] (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 523, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126

[5] "This court has recognized that it is also fundamentally unfair and a deprivation of due process for the state to use evidence of the defendant's post-*Miranda* silence as affirmative proof of guilt . . . ." (Citation omitted.) *State* v. *Lockhart*, 298 Conn. 537, 581, 4 A.3d 1176 (2010). It is unclear, however, whether pre-*Miranda* silence may be used as affirmative proof of guilt. See *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009) ("there is a division of authority as to whether the use of a defendant's prearrest silence as substantive evidence of his guilt is constitutionally permissible under the fifth amendment, an issue that we need not consider"); see also *Combs* v. *Coyle*, 205 F.3d 269, 282 (6th Cir.) ("The [federal courts of appeals] that have considered whether the government may comment on a defendant's prearrest silence in its [case-in-chief] are . . . divided. Three circuits have held that such use violates the privilege against self-incrimination found in the [f]ifth [a]mendment . . . . Three circuits, on the other hand, have reached the opposite conclusion." (Citations omitted; footnote omitted.)), cert. denied sub nom. *Bagley* v. *Combs*, 531 U.S. 1035, 121 S. Ct. 623, 148 L. Ed. 2d 533 (2000). We need not address this issue because the defendant's claim is limited to the prosecutor's commentary on the defendant's post-*Miranda* silence.

S. Ct. 773, 163 L. Ed. 2d 600 (2005). Use of a defendant's *pre-Miranda* silence, by contrast, does not raise the same constitutional concerns: "evidence of prearrest, and specifically pre-*Miranda*, silence is admissible to impeach the testimony of a defendant who testifies at trial, since the rule of *Doyle* v. *Ohio*, supra, [619], is predicated on the defendant's reliance on the implicit promise of *Miranda* warnings." *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009); see *Jenkins* v. *Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (if "[t]he failure to speak occurred before the [defendant] was taken into custody and given *Miranda* warnings . . . [then] the fundamental unfairness present in *Doyle* is not [implicated]," and "impeachment by use of prearrest silence does not violate the [f]ourteenth [a]mendment").[6]

To resolve the issue presented on appeal, we must determine whether the prosecutor permissibly com-

[6] As these cases suggest, a distinction exists between postarrest silence and post-*Miranda* silence. In *Fletcher* v. *Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the United States Supreme Court held that a defendant's due process rights are not violated when the government adduces evidence of the defendant's postarrest silence unless the record affirmatively "indicate[s] that [the defendant] received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." Id., 605. The court explained that, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a [s]tate to permit cross-examination as to postarrest silence when a defendant chooses to take the stand. A [s]tate is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony." Id., 607. But see *State* v. *Leecan*, 198 Conn. 517, 526, 504 A.2d 480 (holding "that postarrest silence is inadmissible under principles of the law of evidence . . . [b]ecause many persons, even in the absence of a *Miranda* warning, are aware of their right to remain silent and are frequently advised by counsel to exercise that right when arrested"), cert. denied, 476 U.S. 1184, 106 S. Ct. 2922, 91 L. Ed. 2d 550 (1986). In the present case, it is undisputed that the defendant received *Miranda* warnings at the time of his arrest, and, therefore, any reference to the defendant's postarrest silence also was a reference to his post-*Miranda* silence.

mented on the defendant's pre-*Miranda* silence or impermissibly and unconstitutionally commented on the defendant's post-*Miranda* silence. The defendant argues that the prosecutor's challenged remarks plainly referred to his post-*Miranda* silence because the prosecutor repeatedly emphasized that the defendant's in-court testimony, which occurred more than two years after his arrest, was the "first time" that he had disclosed his exculpatory story. The state disagrees and argues that the context of the prosecutor's challenged remarks reveal that they referred to the defendant's pre-*Miranda* silence because the prosecutor "focused on what the defendant could have told the police before he was arrested." We conclude that the prosecutor's references to the defendant's silence were ambiguous because they were not confined to a defined point in time within the pre-*Miranda* period but, instead, referred generally to the defendant's delay in disclosing his version of events without limitation. That delay, when referenced by the prosecutor in an unspecified and, therefore, unrestricted manner, could reasonably have been understood to include both the four days of pre-*Miranda* silence and the much lengthier period between the defendant's arrest and his trial. This fact makes the prosecutor's comments ambiguous. See, e.g., *State* v. *Courtney G.*, 339 Conn. 328, 345–46, 260 A.3d 1152 (2021) (recognizing that prosecutorial statements are ambiguous if their meaning is unclear and susceptible to more than one reasonable interpretation).

We have not previously addressed how to construe ambiguous prosecutorial remarks that reasonably can be interpreted to refer either to a defendant's pre-*Miranda* or post-*Miranda* silence. Some courts hold that "general references . . . to a defendant's silence" that encompass both "a pre-*Miranda* and post-*Miranda* [time frame]" necessarily violate a defendant's right to a fair trial, reasoning that prosecutors should not be

allowed "to sidestep the *Doyle* protections by skirting the edge of the law with vague and imprecise references to a defendant's silence." *State* v. *Lofquest*, 227 Neb. 567, 570, 418 N.W.2d 595 (1988); see *United States* v. *Lopez*, 500 F.3d 840, 844 (9th Cir. 2007) ("[a] prosecution closing argument that broadly condemn[s] [the defendant's] silence . . . pre-*Miranda* and post-*Miranda* violate[s] due process" (internal quotation marks omitted)), cert. denied, 552 U.S. 1129, 128 S. Ct. 950, 169 L. Ed. 2d 782 (2008); *United States ex rel. Allen* v. *Franzen*, 659 F.2d 745, 748 (7th Cir. 1981) ("the prosecutor's remarks were phrased broadly, without distinguishing between pre- and [postarrest] silence," and, "[t]herefore, the fact that the questions may have permissibly referred in part to the [prearrest] silence does not alter the conclusion that the references to [postarrest] silence were unconstitutional"), cert. denied sub nom. *Lane* v. *Allen*, 456 U.S. 928, 102 S. Ct. 1975, 72 L. Ed. 2d 444 (1982).

Other courts take a more contextualized approach, inquiring "whether the manifest intent was to comment on the defendant's [post-*Miranda*] silence or, alternatively, whether the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's [post-*Miranda*] silence." (Internal quotation marks omitted.) *United States* v. *Laury*, 985 F.2d 1293, 1303 (5th Cir. 1993); see *United States* v. *May*, 52 F.3d 885, 890 (10th Cir. 1995) ("[T]he test for determining if there has been an impermissible comment on a defendant's right to remain silent at the time of his arrest is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the defendant's right to remain silent. . . . The court must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and neces-

sary impact on the jury." (Internal quotation marks omitted.)); *United States* v. *Ramos*, 932 F.2d 611, 616 (7th Cir. 1991) (to establish *Doyle* violation, defendant must prove that "it was the prosecutor's manifest intention to refer to the defendant's silence" or that "the remark was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's silence" (internal quotation marks omitted)); *United States* v. *Rosenthal*, 793 F.2d 1214, 1243 (11th Cir. 1986) ("[a] comment is deemed to be a reference to a defendant's silence if either . . . (1) it was the prosecutor's manifest intention to refer to the defendant's silence; or (2) the remark was of such a character that the jury would 'naturally and necessarily' take it to be a comment on [the] defendant's silence"), cert. denied, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987), and cert. denied sub nom. *Stewart* v. *United States*, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987), and cert. denied sub nom. *Junker* v. *United States*, 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987). Under this approach, "[b]oth the intent of the prosecutor and the character of the remarks are determined by reviewing the context in which they occur, and the burden of proving such intent is on the defendant." (Internal quotation marks omitted.) *United States* v. *Laury*, supra, 1303. "The standard is strict; virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." *United States* v. *Rosenthal*, supra, 1243.

We adopt the contextualized approach for two reasons. First, this approach is consistent with our case law, which evaluates a prosecutor's remarks or questions in context to determine whether a *Doyle* violation occurred. See, e.g., *State* v. *Jeffrey*, 220 Conn. 698, 721, 601 A.2d 993 (1991) (concluding that no *Doyle* violation occurred because "[t]he state's line of inquiry leading up to [the challenged] question concerned the defendant's

conduct when the police arrived at his home *before they placed him under arrest*" (emphasis in original)), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992); *State* v. *Devito*, 159 Conn. App. 560, 572, 124 A.3d 14 (concluding that no *Doyle* violation occurred because, "[g]iven the context in which the question was asked . . . it is more probable that it would have been understood to refer to the defendant's prearrest silence"), cert. denied, 319 Conn. 947, 125 A.3d 1012 (2015).

Second, we consistently have applied the naturally and necessarily test to determine whether a prosecutor's ambiguous references to a defendant's failure to testify violate a criminal defendant's constitutional right against self-incrimination. See, e.g., *State* v. *Jose R.*, 338 Conn. 375, 389, 258 A.3d 50 (2021) ("[w]hen it is unclear whether the prosecutor's comments at issue referred to the defendant's failure to testify, a reviewing court appl[ies] what is known as the naturally and necessarily test to determine whether a fifth amendment violation occurred" (internal quotation marks omitted)); *State* v. *A. M.*, 324 Conn. 190, 202, 152 A.3d 49 (2016) ("[t]he 'naturally and necessarily' standard applies only when it is unclear whether the prosecutor's comments at issue referred to the defendant's failure to testify"); *State* v. *Lemon*, 248 Conn. 652, 660, 731 A.2d 271 (1999) ("we consistently have applied the 'naturally and necessarily' test in resolving claims of improper prosecutorial comment on the defendant's failure to testify"). We can perceive no reason to treat ambiguous references to a defendant's post-*Miranda* silence differently from ambiguous references to a defendant's silence at trial. See, e.g., *United States* v. *Mora*, 845 F.2d 233, 235 (10th Cir.) (observing that naturally and necessarily test "is the same test employed for the analogous situation of prosecutorial commentary on a defendant's failure to testify at trial"), cert. denied, 488 U.S. 995, 109 S. Ct.

562, 102 L. Ed. 2d 587 (1988); *United States ex rel. Smith* v. *Rowe*, 618 F.2d 1204, 1210 (7th Cir.) ("we see no reason why the same standard should not be equally applicable" to determine "when ambiguous prosecutorial comments will constitute an invasion of the defendant's right to remain silent after his arrest" and when they will "constitute impermissible comment [on] the defendant's failure to testify at trial"), vacated on other grounds sub nom. *Franzen* v. *Smith*, 449 U.S. 810, 101 S. Ct. 57, 66 L. Ed. 2d 13 (1980).

Accordingly, to determine whether a *Doyle* violation occurred in the present case, we must analyze "whether the language used [by the prosecutor was] manifestly intended to be, or was . . . of such a character that the jury would *naturally and necessarily* take it to be a comment on the [defendant's post-*Miranda* silence]. . . . [I]n applying this test, we must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and necessary impact [on] the jury." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Jose R.*, supra, 338 Conn. 389. The defendant bears the burden of proving that a *Doyle* violation occurred. See, e.g., *United States* v. *Laury*, supra, 985 F.2d 1303; see also *State* v. *Reddick*, 174 Conn. App. 536, 556, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018). If the defendant fulfills his burden, then "the state assumes the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt." *State* v. *Reddick*, supra, 556.

We need not decide whether the prosecutor's ambiguous remarks were manifestly intended to refer to the defendant's post-*Miranda* silence because, viewing the remarks in the context in which they were made, we conclude that the jury naturally and necessarily would

have construed them to refer *both* to the defendant's pre-*Miranda and* post-*Miranda* silence. To be sure, some of the prosecutor's challenged remarks focused on the defendant's conduct during the four day time period between the commission of the crimes and the defendant's arrest, namely, the defendant's flight to New York with P, subsequent trip to New London, and ultimate journey to Massachusetts. The prosecutor argued that the defendant's pre-*Miranda* conduct was indicative of his consciousness of guilt and asked the jury to infer, on the basis of its common sense, that an innocent person would not have fled but, instead, would have notified his family and the authorities of Y's death to "make sure that [it] was properly investigated." To the extent that the natural and necessary meaning of these remarks was directed at the defendant's pre-*Miranda* silence, they were permissible.

But some of the prosecutor's comments, specifically the ones that emphasized that "today" or "this morning" was the "first time" that the defendant told his story, naturally and necessarily would have been construed by the jury as commentary on the defendant's post-*Miranda* silence. This conclusion is compelled by the repeated, unmistakable emphasis that the prosecutor placed on the recency of the defendant's disclosure of his exculpatory version of events. The prosecutor emphasized that the defendant failed to disclose his exculpatory story until the time of trial, repeatedly pointing out that "today" or "this morning," during the defendant's in-court testimony, was "the *first time* we're hearing anything about this sequence of events . . . ." See, e.g., *State* v. *Brunetti*, 279 Conn. 39, 83, 86, 901 A.2d 1 (2006) (*Doyle* violation occurred when prosecutor asked defendant, " 'when is the first time that you told someone in authority, like a judge, a prosecutor or a police officer, this story about your sweatpants being dipped in blood,' " and "the defendant

responded that he had provided that version of the events for the first time 'in this courtroom' "), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007); *State* v. *Boone*, 15 Conn. App. 34, 44, 544 A.2d 217 (*Doyle* violation occurred when prosecutor asked "the defendant, '[y]ou never told anyone what happened until today in court,' " and commented during closing argument that " '[the defendant] never gave a statement' "), cert. denied, 209 Conn. 811, 550 A.2d 1084 (1988). The prosecutor emphasized the recent nature of the defendant's disclosure, arguing that "common sense would show you that this information, *closer to the time of the crime*, might be important to direct the investigation." (Emphasis added.) The prosecutor highlighted that, "[i]f [the police] had information *closer to the time of this incident* that this was a robbery involving a very large quantity, essentially more than most people's annual income was on this kitchen table, if you're to believe that, the police probably would have changed the tactics that they used to investigate this crime. We'll never know because *they didn't know that because the first time you heard about it was this morning*." (Emphasis added.) Thus, the prosecutor informed the jury that the police had not investigated Y's death as a robbery gone wrong because at no time between the date of Y's death and the date on which the defendant testified did the defendant inform the police that a robbery had occurred. The prosecutor's remarks were not confined to the pre-*Miranda* or post-*Miranda* context but, instead, encompassed the full continuum of the defendant's silence.

The natural and necessary impact of the prosecutor's statements on the jury, moreover, was reinforced by the statement on rebuttal that the state admits violated *Doyle*. During rebuttal argument, the prosecutor reminded the jury that "[t]here was a much bigger delay [than four months] in hearing about the missing large quantity

of money." If there had been uncertainty about the time period referenced by the prosecutor's repeated reminder that the defendant's in-court testimony was the "first time" the defendant told his exculpatory story, that doubt was removed when the prosecutor explained that the defendant's silence far exceeded four months. The prosecutor's repeated rhetorical emphasis on the fact that the defendant remained silent until trial, the frequency of those references, and the explicit statement that the silence lasted much longer than four months lead us to conclude that the defendant's post-*Miranda* silence was used against him, in violation of *Doyle*.[7] We therefore conclude that the prosecutor's

[7] The state does not claim that the defendant opened the door to commentary on his post-*Miranda* silence by offering an explanation for that silence other than his reliance on the implicit promise of the *Miranda* warnings. See, e.g., *United States ex rel. Saulsbury* v. *Greer*, 702 F.2d 651, 656 (7th Cir.) (The court concluded that there was no *Doyle* violation because, on direct examination, the defendant "assign[ed] a reason for [his] silence immediately after arrest" and, by doing so, "chose to indicate to the jury that silence had probative weight and removed that subject from the realm of insoluble ambiguity about which there could be no comment. Having ventured that far, the defense could not erect a constitutional barrier against the state exploring the soundness of that explanation . . . ."), cert. denied, 461 U.S. 935, 103 S. Ct. 2104, 77 L. Ed. 2d 310 (1983); *State* v. *Anglin*, 751 A.2d 1007, 1010 (Me. 2000) (there was no *Doyle* violation because "[d]efense counsel opened the door for the [s]tate's questions and the court did not err in allowing the answer [into] evidence"); *State* v. *Cockrell*, 306 Wis. 2d 52, 69–70, 741 N.W.2d 267 (App.) (There was no *Doyle* violation because the defendant "chose to volunteer what he did and did not say to the police and why. In these circumstances it is not fundamentally unfair to permit the [s]tate to explor[e] the soundness" of the defendant's explanation.), review denied, 306 Wis. 2d 46, 744 N.W.2d 295 (2007). Nor does the state argue that the prosecutor's commentary on the defendant's post-*Miranda* silence was a " 'fair response' " to the defendant's testimony or the arguments of defense counsel criticizing the adequacy of the police investigation. See *State* v. *Anglin*, supra, 1010; cf. *United States* v. *Robinson*, 485 U.S. 25, 32, 108 S. Ct. 864, 99 L. Ed. 2d 23 (1988) ("[When] the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* [v. *California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)] holds that the privilege against compulsory self-incrimination is violated. But [when] . . . the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by [the] defendant or his counsel, we think there is no violation of the privilege."). We therefore do not address these issues.

remarks were "fundamentally unfair," in violation of the defendant's fourteenth amendment right to due process. *State* v. *Montgomery*, 254 Conn. 694, 716, 759 A.2d 995 (2000).

Our inquiry does not end there, however, because *Doyle* violations are subject to harmless error analysis. See id., 717. Whether an error is harmful, as always, depends on its impact on the trier of fact and the result of the case. When the error involves a *Doyle* violation, "[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. . . . That determination must be made in light of the entire record [including the strength of the state's case without the *Doyle* violation]. . . .

"A *Doyle* violation may, in a particular case, be so insignificant that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible question or comment [on] a defendant's silence following a *Miranda* warning. Under such circumstances, the state's use of a defendant's [post-*Miranda*] silence does not constitute reversible error. . . . The [error] has similarly been [found to be harmless when] a prosecutor does not focus [on] or highlight the defendant's silence in his cross-examination and closing remarks and [when] the prosecutor's comments do not strike at the jugular of the defendant's story. . . . The cases [in which] the error has been found to be prejudicial disclose repetitive references to the defendant's silence, reemphasis of the fact [during] closing argument, and extensive, [strongly worded] argument suggesting a connection between the defendant's silence and his guilt." (Internal quotation marks omitted.) Id., 718.

The state's harmless error argument erroneously focuses exclusively on the rebuttal argument and fails to consider the impact of the similar remarks the prose-

cutor made during his initial argument. It argues that the "single *Doyle* violation during rebuttal argument was harmless" but does not explain how the prosecutor's repeated emphasis on the defendant's post-*Miranda* silence during initial closing argument, which struck at the jugular of the defendant's exculpatory story that Y was killed during the course of a robbery, was harmless beyond a reasonable doubt. We therefore conclude that the state has failed to fulfill its burden of demonstrating harmlessness.[8] See, e.g., *State* v. *Tomlinson*, 340 Conn. 533, 548–64, 264 A.3d 950 (2021); *State* v. *Jacques*, 332 Conn. 271, 294, 210 A.3d 533 (2019). Accordingly, we

[8] Although the evidence was sufficient to support the defendant's conviction; see part I of this opinion; we disagree with the state that it was overwhelming. As we previously noted, there was no direct, physical, or forensic evidence implicating the defendant in Y's murder; instead, the state's case against the defendant was largely circumstantial, resting on the defendant's motive, means, and opportunity to commit the crime and his flight from the scene. At trial, the defendant testified that his flight was motivated by fear, rather than guilt, because someone else killed Y during the course of a robbery in which a large quantity of money and illicit drugs was stolen. As to the identity of the perpetrator, the defendant raised a third-party culpability defense, arguing that Thomas also had the motive, means, and opportunity to murder Y. Defense counsel pointed out that, after the murder, Thomas was in possession of the defendant's cell phone and the gray Chevrolet Malibu captured on video leaving the scene of the crime. Defense counsel argued that Thomas was motivated by greed because he knew that the defendant had money and drugs stashed away inside the apartment. Thus, the defendant raised a plausible, alternative theory of culpability. On the present evidentiary record, we cannot conclude that the evidence of the defendant's guilt was overwhelming or that the defendant's exculpatory story was transparently frivolous. See *State* v. *Brunetti*, supra, 279 Conn. 82–86 (*Doyle* violation was harmless beyond reasonable doubt because defendant confessed to crime, police found clothing soaked in victim's blood in defendant's home, and defendant's exculpatory story that he removed his clothing and that someone else dipped it in victim's blood "was 'transparently frivolous' "); *State* v. *Montgomery*, supra, 254 Conn. 718–20 (*Doyle* violation was harmless beyond reasonable doubt, in part because of overwhelming evidence of defendant's guilt, which consisted of eyewitness testimony identifying him as perpetrator with " '100 percent' " certainty, his purchase of murder weapon, his confession to his cellmate, and discovery of "other incriminating evidence in [his] car, including a knife, a can of Mace, latex gloves, duct tape, and an ice pick").

reverse the defendant's conviction and remand for a new trial.

III

Although our analysis in part II of this opinion is dispositive of the defendant's appeal, we nonetheless address the defendant's evidentiary claim because it is likely to arise on remand. The following additional facts and procedural history are relevant to this claim. Prior to trial, the state filed notice of its intent to present evidence of the defendant's prior uncharged misconduct for the purpose of demonstrating the defendant's intent and identity, pursuant to § 4-5 (c) of the Connecticut Code of Evidence. In particular, the state intended to elicit testimony from Jones "that she was romantically involved with [Y]" and that, "in early 2017, at a funeral, [the] defendant threatened her with a small black firearm." The defendant filed a motion in limine seeking to exclude this evidence, arguing in relevant part that it was irrelevant and more prejudicial than probative.

The trial court deferred ruling on the defendant's motion until trial, at which time it heard an offer of proof, outside the presence of the jury, with respect to the content of Jones' proposed testimony. During the offer of proof, Jones testified that she dated Y from June, 2011, until July, 2012. After they broke up, Jones and Y "remained friends, even though [they] were not together," until they rekindled their romantic relationship "around the end of 2016" while Y was married to the defendant. In early 2017, Jones attended a funeral on Barber Street in Hartford. After the funeral, she and her siblings were standing outside talking when the defendant "pulled up in . . . a Pepsi blue, BMW two door . . . driving really fast . . . ." The defendant "almost hit the cur[b], and he jumped out" of the car, saying, "let me . . . talk to you, let me talk to you."

Jones refused to talk to the defendant, who then drove away.

The defendant later returned while Jones and her siblings were still standing around talking. Jones did not see the defendant approach, but, when she turned around, the defendant was approximately one and one-half feet away, fumbling in his jacket. The defendant pulled out a gun and said, "I told you I wasn't no punk. I told you I wasn't no punk." After threatening Jones, the defendant left. The incident was not reported to the police.

The trial court determined that Jones' testimony was relevant and material to the defendant's motive to commit the crimes with which he was charged. Balancing the probative value of the evidence against its prejudicial effect, the court concluded that "there is no unfair surprise" and that neither the admission of the evidence nor any counterproof would "consume an undue amount of time . . . ." Additionally, the court found "that no side issue [would be] created and that, with the appropriate limit[ing] instruction, the facts offered would not unduly arouse the jurors' emotions, hostility or sympathy . . . ." The court further found that the uncharged misconduct was not remote in time, that it was "substantially less shocking than the crimes charged, [and] that the evidence [was] important to the case if the jury credit[ed] it. It is not cumulative in that there isn't in the evidence so far . . . similar evidence before the jury. And, although motive is not a factor in the crime charged, the court will likely charge the jury as to the importance of motive if [the jurors] believe it." On this basis, the court determined that the evidence was not unduly prejudicial.

Jones subsequently testified in front of the jury in substantial conformance with the testimony elicited

during the offer of proof.[9] Jones also testified about another incident that occurred on March 26, 2017, in which the defendant abruptly entered her apartment unannounced to find her, Y, and P lying in bed. The defendant started yelling, "y'all doing this dyke shit in front of my daughter? This what y'all doing?" As the defendant approached the bed, Y called 911, and the defendant fled.[10]

After the close of evidence and closing arguments, the trial court instructed the jury that it could consider Jones' testimony regarding the funeral incident "solely to show or establish . . . the motive for the commission of the crime alleged." The court warned the jury that it "may not consider such evidence as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity. You may consider such evidence, if you believe it, and further find [that] it logically, rationally, and conclusively supports the issues for which it is being offered by the state but only as it may bear on the [issue] of . . . motive on the part of the defendant."

On appeal, the defendant claims that Jones' testimony about the funeral incident improperly was admitted because it was irrelevant to the issue of motive. The defendant argues that his threatening conduct toward Jones did not reflect his animosity toward Y and, therefore, was not probative of his motive for committing the crimes charged. Alternatively, the defendant contends that the probative value of the evidence was outweighed

[9] In front of the jury, Jones testified that the funeral incident occurred in late 2016, whereas, during the offer of proof, she testified that it occurred in early 2017. Her description of the defendant's threatening conduct, however, was the same.

[10] Defense counsel moved to exclude Jones' testimony about the bedroom incident, but the trial court overruled counsel's objection, concluding that the evidence was relevant to prove the defendant's malice and motive and was not unduly prejudicial. The defendant does not challenge the admission of this evidence on appeal.

by its prejudicial effect because it "portrayed the defendant as an aggressive, impulsive, out of control man who easily flew into a rage and who had access to a gun."[11] We disagree.

Although "[e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime," such evidence is admissible if it "is offered to prove intent, identity, malice, motive, a system of criminal activity or the elements of a crime." (Internal quotation marks omitted.) *State* v. *Kalil*, 314 Conn. 529, 539–40, 107 A.3d 343 (2014). To determine whether evidence of prior uncharged misconduct is admissible for a proper purpose, we have adopted a two-pronged test: "First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Internal quotation marks omitted.) Id., 540; see Conn. Code Evid. § 4-5 (a) and (c) ("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person" but is admissible for other purposes, "such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an

[11] The defendant also claims that, even if the evidence of uncharged misconduct was probative of his motive to commit the crimes of conviction, the trial court should have redacted Jones' reference to the defendant's use of a gun. The defense did not seek redaction in the trial court and, therefore, failed to preserve this claim for our review. See, e.g., *State* v. *Tomlinson*, supra, 340 Conn. 571 (declining to review unpreserved claim "that the trial court should have redacted portions of the rap music video or allowed only limited screenshots of the video into evidence" because defense counsel "did not preserve a request for redaction"); *State* v. *Komisarjevsky*, 338 Conn. 526, 616 n.65, 258 A.3d 1166 (declining to review unpreserved claim regarding redaction), cert. denied, U.S. , 142 S. Ct. 617, 211 L. Ed. 2d 384 (2021).

element of the crime, or to corroborate crucial prosecution testimony").

"Our standard of review on such matters is well established. The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court. . . . [E]very reasonable presumption should be given in favor of the trial court's ruling. . . . [T]he trial court's decision will be reversed only [when] abuse of discretion is manifest or [when] an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 517, 180 A.3d 882 (2018).

The evidence of uncharged misconduct clearly was relevant to the issue of motive. Although motive is not an essential element of the crimes with which the defendant was charged, "[w]e previously have recognized the significance that proof of motive may have in a criminal case. . . . [S]uch evidence is both desirable and important. . . . It strengthens the state's case when an adequate motive can be shown. . . . Evidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant. . . . This factor is to be weighed by the jury along with other evidence in the case." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 430, 64 A.3d 91 (2013). "Evidence of prior misconduct that tends to show that the defendant harbored hostility toward the intended victim of a violent crime is admissible to establish motive." *State* v. *Lopez*, 280 Conn. 779, 795, 911 A.2d 1099 (2007). Of course, evidence of uncharged misconduct involving the same victim is especially relevant to demonstrate motive; see *State* v. *Gonzalez*, 167 Conn. App. 298, 310, 142 A.3d 1227, cert. denied, 323 Conn. 929, 149 A.3d 500 (2016); but evidence involving a different victim may be relevant if it has a logical tendency to explain the defendant's motive for the commission of the crime

charged. See, e.g., *State* v. *Lopez*, supra, 793–97 (evidence that defendant threatened certain individual with gun was admissible to prove defendant's motive for crimes of murder and attempted murder because jury reasonably could have inferred that that individual was intended target); *State* v. *Hoyeson*, 154 Conn. 302, 304, 307, 224 A.2d 735 (1966) (evidence of defendant's rape of and threat to " 'get' . . . a girl named Lucy" was admissible to demonstrate motive for "a vicious assault on [the victim]" because "the jury could infer that the defendant, in the darkness of the bedroom, mistook [the victim] for Lucy and committed the assault because of that mistake in identity"); *State* v. *Marrero-Alejandro*, 159 Conn. App. 376, 387, 122 A.3d 272 (2015) (evidence of defendant's threats toward victim's girlfriend and of "a love triangle" among victim, defendant, and victim's girlfriend was admissible to prove defendant's motive to murder victim), appeal dismissed, 324 Conn. 780, 154 A.3d 1005 (2017).

Evidence of Jones' romantic relationship with Y and the defendant's threatening conduct was relevant to explain to the jury the defendant's motive to kill Y. On the basis of Jones' testimony, the jury reasonably could have found that the defendant blamed the breakdown of his marriage on Y's romantic relationship with Jones, at least in part. Jones testified that Y had "left [the defendant]" and was "living together [with Jones] pretty much by" March, 2017. The demise of the defendant's marriage was corroborated by text messages exchanged between the defendant and Y on the day of her death, in which the defendant pleaded with Y to "change [her] mind" about their relationship and to give him one more chance.

Jones' testimony that the defendant had threatened her with a gun supported a reasonable inference that the defendant was willing to resort to violence to end Y's relationship with Jones. The jury also could have

inferred that this willingness to use violence extended to Y herself, in light of evidence that the defendant had threatened to kill Y and that Y had called the police after the defendant burst in on her in bed with Jones. We therefore conclude that the defendant's threatening conduct toward Jones was relevant and admissible for the purpose of establishing the defendant's motive to commit the crimes of conviction. See, e.g., *State* v. *Collins*, 299 Conn. 567, 587 n.19, 10 A.3d 1005 ("Evidence is relevant if it has *any* tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . All that is required is that the evidence tend to support a relevant fact *even to a slight degree*, [as] long as it is not prejudicial or merely cumulative." (Emphasis in original; internal quotation marks omitted.)), cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

We next address whether the evidence was unduly prejudicial. To determine whether the prejudicial effect of evidence outweighs its probative value, a trial court is required to consider whether the evidence may (1) "unduly arouse the jury's emotions, hostility or sympathy," (2) "create a side issue that will unduly distract the jury from the main issues," (3) "consume an undue amount of time," or (4) unfairly surprise the defendant, who, "having no reasonable ground to anticipate the evidence, is . . . unprepared to meet it." (Internal quotation marks omitted.) Id., 587. We defer to the ruling of the trial court because of its "unique position to [observe] the context in which particular evidentiary issues arise" and its preeminent "position to weigh the potential benefits and harms accompanying the admission of particular evidence." (Internal quotation marks omitted.) Id., 593 n.24.

The defendant's claim focuses on the first consideration, namely, whether the evidence of uncharged mis-

conduct unduly aroused the emotions, hostility or sympathy of the jurors.[12] "This court has repeatedly held that [t]he prejudicial impact of uncharged misconduct evidence is assessed in light of its relative viciousness in comparison with the charged conduct." (Internal quotation marks omitted.) *State* v. *Raynor*, 337 Conn. 527, 562, 254 A.3d 874 (2020); see also *State* v. *Collins*, supra, 299 Conn. 588. The reasoning underlying this comparative analysis "is that the jurors' emotions are already aroused by the more severe crime of murder, for which the defendant is charged, and, thus, a less severe, uncharged crime is unlikely to arouse their emotions beyond that point." *State* v. *Raynor*, supra, 563.

The defendant's threatening conduct toward Jones was less severe than the charged crime of murder and, therefore, was unlikely to unduly arouse the emotions of the jurors. See, e.g., *State* v. *Campbell*, supra, 328 Conn. 523 ("It is beyond debate that, by comparison, shooting at the home where the defendant believed [the mother of his son] to be staying is less vicious than shooting the three victims in the head at close range.

[12] The defendant also claims that this evidence was cumulative of other evidence of the defendant's motive and, therefore, should have been excluded. See, e.g., *State* v. *Onofrio*, 179 Conn. 23, 29–30, 425 A.2d 560 (1979) ("if the issue to be proved is competent *but can just as well be demonstrated by other evidence*, or if the evidence is of but slight weight or importance [on] that point, a trial judge is justified in excluding the evidence entirely, if its probative value is marginal and its prejudicial tendencies clear" (emphasis added)). Specifically, the defendant argues that Jones' testimony regarding the bedroom incident—in which the defendant broke down the door to Jones' apartment and, upon finding Jones and Y in bed, yelled, "[y]'all doing this dyke shit in front of my daughter? This what y'all doing?"—was sufficient "to prove that the defendant was unhappy about the relationship between . . . Jones and [Y] . . . ." We reject this claim because the defendant's threatening conduct during the funeral incident was different, both in nature and degree, from his threatening conduct during the bedroom incident. Therefore, the challenged evidence "was not cumulative because it . . . presented the jury with *new* material, not heard from any other witness . . . ." (Emphasis in original.) *State* v. *Fernando V.*, 331 Conn. 201, 219, 202 A.3d 350 (2019).

. . . Accordingly, the trial court acted within its discretion in admitting the prior misconduct evidence."); *State* v. *Beavers*, 290 Conn. 386, 405, 963 A.2d 956 (2009) ("it is significant that the prior misconduct evidence admitted involved only the defendant's actual, claimed or threatened damage of property for personal gain, as compared to the charged crime . . . [of] killing . . . a person for financial reasons"); *State* v. *Mooney*, 218 Conn. 85, 131, 588 A.2d 145 ("the seriousness of the subsequent crime, a larceny, pales in comparison to the robbery and felony murder charges for which the defendant was standing trial"), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991). Additionally, the trial court issued a limiting instruction, which "minimize[d] any prejudicial effect that [the uncharged misconduct] evidence otherwise may have had . . . ." (Internal quotation marks omitted.) *State* v. *Smith*, 313 Conn. 325, 342, 96 A.3d 1238 (2014). Considering the record as a whole, we cannot conclude that the trial court abused its discretion in determining that the probative value of this evidence outweighed its prejudicial effect.[13]

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

[13] The trial court has "some degree of choice" in balancing the probative value of uncharged misconduct evidence against its prejudicial effect; (internal quotation marks omitted) *State* v. *Collins*, supra, 299 Conn. 593 n.24; and, on remand, a different trial court might arrive at a different conclusion. We hold only that, on the present record, the trial court's decision to admit the challenged evidence was not arbitrary or unreasonable. See, e.g., *State* v. *Smith*, supra, 313 Conn. 336 ("[T]he question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Internal quotation marks omitted.)).

BOARD OF EDUCATION OF THE CITY OF NEW HAVEN *v.* COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES ET AL.

(SC 20696)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

Pursuant to statute (§ 46a-58 (a)), "[i]t shall be a discriminatory practice . . . for any person to subject . . . any other person to the deprivation of any rights, privileges or immunities, secured or protected by the . . . laws of this state or of the United States, on account of . . . mental disability [or] physical disability . . . ."

Pursuant further to statute (§ 46a-64 (a) (1)), "[i]t shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation . . . because of . . . intellectual disability [or] mental disability . . . ."

The defendant M filed a complaint with the named defendant, the Commission on Human Rights and Opportunities, on behalf of his minor child, A, alleging that the plaintiff board of education had discriminated against A on the basis of A's mental disability. A, who had been diagnosed with several mental and cognitive disorders, attended a public magnet school, where he initially was enrolled as a special education student who was entitled to an individualized education plan and special accommodation services under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.). The school subsequently determined, against the wishes of A's parents, that A would no longer be designated as a special education student under the IDEA. Thereafter, A sustained a concussion during an incident at school, and A's parents kept A out of school until he was symptom free on the basis of the recommendation of A's physician. During A's absence, the board sent a habitual truancy notice to A's parents and held a planning and placement team meeting, which was attended by M and various representatives of the board, among other individuals, to discuss A's eligibility for special education services. At that meeting, M attempted to offer a letter from A's physician regarding A's post-concussion syndrome, but the board declined to accept it because it was purportedly illegible and undated. Immediately thereafter, a representative of the board initiated A's withdrawal from the magnet school. M alleged in his complaint that the board had discriminated against A in violation of § 46a-64 (a) (1) and the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), as enforced by § 46a-58 (a). After a hearing before the commission, a human rights

referee concluded, inter alia, that a public school is a place of public accommodation for purposes of § 46a-64 and that the board unlawfully had discriminated against A by withdrawing him from school on the basis of his disability. The board filed an administrative appeal with the trial court, which remanded the case for a determination of whether the board had violated the ADA. On remand, the board claimed that the complaint was actually seeking relief for the denial of a free and appropriate public education under the IDEA and that M had failed to exhaust his administrative remedies for an IDEA violation before seeking relief pursuant to the ADA. The referee noted that the board had not raised that claim previously but concluded that M's complaint did not raise a free and appropriate education claim. The referee also concluded that A was physically disabled under the ADA due to his post-concussion syndrome and that the board had violated § 46a-58 (a) by unilaterally withdrawing him from school on the basis of that disability. The trial court upheld the decision of the referee. The court rejected the board's claims that the commission lacked subject matter jurisdiction to adjudicate claims brought pursuant to the ADA and that it lacked jurisdiction over M's complaint on the ground that M failed to exhaust his remedies pursuant to the IDEA. The court also declined to consider the board's claim that the referee incorrectly determined that a public school is a place of public accommodation because the board did not raise that issue before the referee. The trial court rendered judgment dismissing the board's appeal, from which the board appealed. *Held*:

1. The board could not prevail on its claim that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA and to identify ADA violations for purposes of determining whether § 46a-58 (a) had been violated; the board conceded at oral argument before this court that its claim was controlled by this court's recent conclusion in *Connecticut Judicial Branch* v. *Gilbert* (343 Conn. 90), made in the context of a discrimination claim predicated on a violation of Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991 (42 U.S.C. § 2000e et seq.), that the language of § 46a-58 (a) unambiguously confers on the commission the authority to identify violations of federal civil rights laws for the purpose of determining whether state law has been violated and that, when the commission finds a violation of federal antidiscrimination law as a factual predicate to a violation of § 46a-58 (a), it does so as a matter of state law.
2. The trial court correctly determined that M was not required to exhaust his administrative remedies before filing the complaint with the commission on A's behalf: although the board failed to raise the exhaustion issue in the proceedings before the referee, that claim implicated the commission's subject matter jurisdiction, an issue that could be raised at any time, and, therefore, that issue properly was before the trial court and this court; moreover, although a party is required to exhaust his or

her available administrative remedies provided by state law (§ 10-76h) before he or she may file a civil action seeking relief for the denial of a free and appropriate public education, M's complaint did not seek such relief, as the claims therein could have been brought outside of the school setting, and the fact that A was unable to take advantage of the educational services at the magnet school as a result of the board's unilateral actions did not convert M's claim for discrimination on the basis of A's disability into a claim for a denial of a free and appropriate education; furthermore, the history of the proceedings in the present case bolstered this court's conclusion that the complaint did not seek relief for the denial of a free and appropriate education, as A's parents never invoked formal procedures pursuant to § 10-76h, they did not ask the referee during the proceedings on the complaint to order the board to reenroll A at the magnet school, to designate him as a special education student, or to provide him with appropriate educational services, and there was no reason to believe that they wanted or would be entitled to such relief in light of the fact that A had since been enrolled in a school in another district, where he was receiving a free and appropriate education.

3. The board's claim that the referee incorrectly determined that a public school is a place of public accommodation pursuant to § 46a-64 did not implicate the commission's subject matter jurisdiction and, therefore, was not reviewable: contrary to the board's contention that its claim could be raised at any time because it implicated the board's subject matter jurisdiction, the claim regarding the proper interpretation of the phrase "place of public accommodation" alleged that the commission had failed to establish an element of a statutory remedy, which implicated the commission's statutory authority and the legal sufficiency of the complaint, not the commission's jurisdiction, and, in the present case, the claim that M raised in his complaint, that the board had violated § 46a-64 by discriminating against A on the basis of his disabilities in a place of public accommodation, was within the class of claims that the commission has authority or competence to decide.

Argued April 27—officially released September 6, 2022

Procedural History

Appeal from the decision of the human rights referee for the named defendant, the Commission on Human Rights and Opportunities, awarding damages to the claimant in an action alleging discrimination by the plaintiff, brought to the Superior Court in the judicial district of New Britain, where the court, *Cohn, J.*, rendered judgment dismissing the appeal, from which the plaintiff appealed. *Affirmed.*

Proloy K. Das, with whom was *Emily McDonough Souza*, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, with whom was *Megan K. Grant*, human rights attorney, for the appellee (named defendant).

Opinion

KAHN, J. A was a student with disabilities enrolled in the John C. Daniels Interdistrict Magnet School of International Communication (John Daniels), a public school located in New Haven. His father, M, filed a complaint with the named defendant, the Commission on Human Rights and Opportunities (commission), alleging that the plaintiff, the Board of Education of the City of New Haven (board), had discriminated against A on the basis of his disabilities by unilaterally withdrawing him from the school. A human rights referee concluded that the board had discriminated against A on the basis of his disabilities and awarded damages of $25,000. The board appealed to the trial court, which dismissed the appeal. The board then filed this appeal,[1] claiming that the trial court incorrectly determined that (1) the commission had subject matter jurisdiction to adjudicate A's claim, pursuant to General Statutes § 46a-58 (a),[2] that the board had violated the Americans with

[1] The board appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[2] General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability or status as a veteran."

Although § 46a-58 (a) was the subject of amendments in 2017; see Public Acts 2017, No. 17-127, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-58.

Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq.; (2) the commission had subject matter jurisdiction over A's claims when M failed to exhaust his administrative remedies pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.; and (3) the issue of whether the referee had incorrectly concluded that a public school is a place of public accommodation for purposes of General Statutes § 46a-64 (a)[3] was not reviewable. We reject the first two claims and conclude that the third claim is not reviewable. Accordingly, we affirm the trial court's judgment.

The record reveals the following facts that were found by the commission or that are undisputed. In February, 2010, M submitted an application for A to attend kindergarten at John Daniels. John Daniels is open to all state residents, and admission is determined by a lottery system. See General Statutes § 10-66bb (d) (8) (D) ("if there is not space available for all students seeking enrollment" in public charter school, "the school may give preference to siblings but shall otherwise determine enrollment by a lottery").

A was diagnosed with several mental and cognitive disorders, including Asperger's syndrome, childhood disintegrative disorder, attention deficit and hyperactivity disorder and "anxiety [disorder not otherwise speci-

[3] General Statutes § 46a-64 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran, of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons . . . ."

Although § 46a-64 (a) was the subject of amendments in 2017; see Public Acts 2017, No. 17-127, § 5; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of § 46a-64.

fied].'' As the result of these disorders, A had difficulty coping with large groups of children and with overstimulating or chaotic environments. His symptoms included ''inconsistent regression in normal development, poor social skills, sensory issues, difficulty managing feelings, auditory and visual hallucinations, challenges with concentration and focus, poor processing skills and difficulty with transitions.'' A also physically manifested these disorders in a variety of ways, including shaking his hands up and down, making unusual facial expressions and using distorted speech.

A was accepted as a student at John Daniels and began attending in September, 2010. Because of his various disorders, A was enrolled as a special education student entitled under the IDEA to an individualized education plan and special accommodation services. Between September, 2010, and March, 2011, A's parents sought and received a number of accommodations for him, including transportation to and from school on a smaller school bus and an additional snack during the school day.

On September 16, 2010, M sent an email to the principal of John Daniels, Gina Wells, in which he thanked her for informing him about the ''buddy'' who had been assigned to A and indicating that, if Wells had provided the information earlier, much confusion and misunderstanding could have been avoided. Wells forwarded the email to the assistant principal, Marlene Baldizon, with the comment, ''I will not be able to contain myself much longer—you may have to take over, Marlene.'' In November, 2010, the school determined, against the wishes of A's parents, that A would no longer be designated as a special education student but would be subject to a ''§ 504'' plan.[4]

[4] Section 504 of the Rehabilitation Act of 1973; see Pub. L. No. 93-112, § 504, 87 Stat. 355, 394; as amended, provides in relevant part: ''No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be

On March 29, 2011, A was injured at school when another child pulled on his clothing and he fell. A's mother took him to the emergency department at Yale New Haven Hospital, where it was determined that he had suffered a concussion. Upon his discharge, A's parents were given a "return to school certificate," indicating that he could return to school when he was symptom free for twenty-four hours. In the days following his injury, A continued to have symptoms, including disorientation, malaise and headaches. A's parents spoke to his primary care physician, who recommended that he stay at home until he was symptom free.

When A failed to return to school, Wells and the board's truancy department made several phone calls to his parents. On April 8, 2011, the board requested a "student absence inquiry" report, which indicated that, during the school year, A had had sixteen excused absences and ten unexcused absences. Eight of the unexcused absences occurred after A's injury. After obtaining the report, the board sent a habitual truancy notice to A's parents, which indicated that a copy of the notice would be sent to court. M retained an attorney, Patricia Kaplan, to represent him in the truancy proceeding.

Meanwhile, A's parents had requested a planning and placement team meeting to discuss whether A was eligible for special education services. On April 8, 2011, Lou

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794 (a) (2018).

For students with special disabilities that require special instruction, the IDEA controls the procedural requirements, and an individualized educational plan is developed. See *K.E.* v. *Northern Highlands Regional Board of Education*, Docket No. CV-18-12617 (KM) (SCM), 2019 WL 5617788, *2–3 (D.N.J. October 30, 2019), vacated on other grounds, 840 F. Appx. 705 (3d Cir. 2020). For students with disabilities who do not require specialized instruction, a "§ 504 plan" may be created to outline specific accessibility requirements. See id., *2 n.2.

Faiella, a certified legal intern with the Quinnipiac Law School legal clinic, which represented A and his parents, sent an email to Kathleen Cassell, a board administrator, requesting that the meeting be cancelled because A's parents had decided that "this [was] not the route that they would like to take at this time."[5] On April 13, 2011, Amy Vatner, an advocate with African Caribbean American Parents of Children with Disabilities, sent an email to Wells and Maralyn Klatzkin, a special education teacher, indicating that A's parents would be filing a request for mediation with the state Department of Education. Wells forwarded the email to Baldizon, stating in her email that "this is the student who lives in West Haven and went to the mayor. The mayor has never heard about the student. Anyway, who responds to this? He is a magnet student from West Haven who has been absent over [thirty] days this year. Quite honestly, I think that we should withdraw him from New Haven schools." On April 14, 2011, a request for a mediation to discuss A's eligibility for special education and for an alternative educational placement in light of his concussion was submitted to the state Department of Education's Bureau of Special Education.

A planning and placement team meeting took place at the office of the board's superintendent on May 5, 2011. M, Cassell, Klatzkin, Lorna Link, a school psychologist, Kasey Masa, a teacher, Donna Kosiorowski, a nurse and § 504 coordinator, Michelle Laubin, attorney for the board, Wells, Virginia Bauer, assistant director

[5] Although Faiella's note used the word "cancel," M testified at the hearing before the human rights referee that he had asked for a postponement of the planning and placement team meeting so that the meeting could take place at the board's office instead of at John Daniels. He also testified that he had not asked that the meeting be cancelled, and he and A's mother were still interested in having A designated as a special education student. The respective roles of Kaplan and Faiella with respect to providing legal representation to A and his family are not entirely clear from the record.

of West Haven[6] pupil services, Typhanie Jackson, the board's director of student services, and Vatner attended the meeting. M indicated that he was concerned that A was no longer designated as a special education student and, therefore, was no longer entitled to an individualized education plan. He also stated that A would not be returning to school until he was cleared to do so by his physicians and expressed an interest in obtaining homebound services for A. When M was questioned about A's continued absence from school, he attempted to present a handwritten letter from A's physician regarding his medical status and his diagnosis of post-concussion syndrome. The board declined to accept the letter because, according to the planning and placement team, it was illegible, undated, and not on the physician's letterhead. Upon leaving the meeting, M understood that he needed to obtain another letter from A's physician and that A would return to John Daniels as soon as his physicians medically cleared him.

Immediately after the meeting, however, Jackson, acting on behalf of the New Haven board, obtained a form for withdrawal from John Daniels, filled it out with A's information and signed it. Although the form had signature lines for the parents of the withdrawing student, neither of A's parents was asked to sign it. The board did not notify A's parents that he had been withdrawn.

On May 16, 2011, A's physician prepared a typewritten note indicating that A was still having symptoms from his concussion and recommending that he return to school at the beginning of the next school year. M faxed

[6] A and his parents lived in West Haven up until May, 2011, at which time they moved to New Haven. The board's superintendent testified at the hearing before the human rights referee that, when a special education student from a district other than New Haven attends John Daniels, the district in which the student resides coordinates the student's special educational services.

the note to Kaplan, who forwarded it to John Daniels on or about June 2, 2011.

Later in June, 2011, M learned that A had been withdrawn from John Daniels when he stopped by the board's office and an unidentified woman informed him of the withdrawal. He also was shown a copy of the withdrawal form at that time. After speaking to Jackson about the withdrawal and questioning her about its legality, it appeared to him that the board was not going to allow A to return to John Daniels. Because A's parents believed that A would not be allowed to return to John Daniels, and because they were uncertain at the time whether they would still be living in New Haven; see footnote 6 of this opinion; or, instead, would be living in West Haven during the following school year, they requested a residency hearing to determine what school A would be attending. It was ultimately determined that A was a West Haven resident and would attend Edith E. Mackrill Elementary School (Mackrill School) in West Haven.[7] A started attending first grade at Mackrill School that fall.

On November 1, 2011, M filed a complaint with the commission alleging that the board had engaged in unlawful discrimination on the basis of mental disability when it withdrew A from John Daniels. On October 4, 2013, M filed an amended complaint, alleging, inter alia, that the board had discriminated against A in violation of § 46a-64 and the ADA, as "enforced through . . . § 46a-58 (a)." After assessing the complaint pursuant to General Statutes § 46a-83 (c) (2), the commission ordered a public hearing before a human rights referee.

Will Clark, the board's chief operating officer, testified at the hearing before the human rights referee that the board did not have a policy in 2011 of withdrawing

[7] The human rights referee did not indicate the basis for the finding that A was a West Haven resident.

students for habitual truancy. Jackson testified that a child never would be withdrawn from school on the basis of a medical condition. She further testified that a child who was receiving homebound services would not be withdrawn.[8]

The human rights referee concluded that a public school is a place of public accommodation for purposes of § 46a-64, that A suffered from a mental disability, as defined in General Statutes § 46a-51 (20), and that his post-concussion symptoms were either a physical disability as defined in § 46a-51 (15), or were perceived to be one. She further concluded that the board unlawfully had discriminated against A when it unilaterally withdrew him from John Daniels. She ordered the board to pay damages for emotional distress in the amount of $25,000, to remove the notation of habitual truancy from A's school records, to cease and desist from all acts of discrimination, and to ensure that the board and its employees would not retaliate against A or his family.

The board appealed from the referee's ruling to the trial court. After hearing oral arguments, the trial court remanded the matter to the human rights referee for a determination of whether the board had violated the ADA.[9] On remand, the board claimed that, because the complaint was actually seeking relief for the denial of a free and appropriate education (FAPE) under the IDEA, M was required to exhaust his remedies for an IDEA violation before he could seek relief pursuant to

[8] Jackson also testified that M specifically had requested at the planning and placement team meeting that A be withdrawn from school. The human rights referee discredited that testimony, stating that it "was not corroborated; nor did it comport with facts and circumstances leading up to the withdrawal."

[9] The trial court noted in the remand order that the parties agreed at oral argument that the human rights referee had determined that the board violated § 46a-64 by discriminating against A in a place of public accommodation but that she had made no specific ruling as to whether the board violated the ADA for purposes of A's claim pursuant to § 46a-58.

the ADA. In her articulation, the human rights referee noted that the board had not raised that claim previously, and the trial court had not requested that she address the issue in the remand order. Nevertheless, the referee concluded that the complaint did not raise "a FAPE claim." The referee further noted that, to the extent that the claim was properly before her, the exhaustion requirement was excused because the board had not advised A of his rights under the IDEA.[10] The referee then concluded that A was physically disabled under the ADA as a result of his post-concussion syndrome and that the board had unilaterally withdrawn him from John Daniels on the basis of that disability, in violation of § 46a-58 (a). Accordingly, A was entitled to damages pursuant to General Statutes § 46a-86 (c).

The trial court upheld the decision of the human rights referee. With respect to the board's claim that the commission had no jurisdiction over A's claim because he failed to exhaust his remedies pursuant to the IDEA, the court concluded that there was no exhaustion requirement because the claim raised in the complaint was properly characterized as a claim of discrimination on the basis of physical disability, not a claim for a FAPE. The court also rejected the board's claim that the commission had no jurisdiction to adjudicate claims pursuant to the ADA. The court declined to consider the board's claim that that the human rights referee had incorrectly determined that a public school is a place of public accommodation because the board did not raise that issue in the proceedings before the referee. After considering the board's other claims, the

[10] The human rights referee cited *Quackenbush* v. *Johnson City School District*, 716 F.2d 141, 147 (2d Cir. 1983), cert. denied, 465 U.S. 1071, 104 S. Ct. 1426, 79 L. Ed. 2d 750 (1984), in support of this proposition. We express no opinion as to whether this reading of *Quackenbush* is correct, as it has no bearing on our analysis.

trial court concluded that they were without merit and dismissed the appeal.[11]

This appeal followed. The board claims on appeal that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA and that M was not required to exhaust his administrative remedies pursuant to the IDEA before he could bring his claims pursuant to §§ 46a-58 (a) and 46a-64 (a). The board further contends that the trial court should have addressed its unpreserved claim that a public school is not a place of public accommodation for purposes of § 46a-64 (a) because the claim implicates the commission's subject matter jurisdiction, and the human rights referee incorrectly determined that John Daniels is a place of public accommodation.

I

We first address the board's claim that the trial court incorrectly determined that the commission had subject matter jurisdiction to adjudicate the claim that the board violated the ADA. In support of this claim, the board makes two arguments. First, it contends that, to the extent that the commission has been designated as a "deferral agency" under federal law with the authority to adjudicate ADA claims, its authority is coextensive with the authority of the federal Equal Employment Opportunity Commission (EEOC).[12] According to the

[11] After the trial court issued its decision, the commission filed a motion for reconsideration, contending that the court improperly relied on federal case law holding that compensatory damages are available for a violation of the ADA to support its conclusion that the human rights referee properly had awarded damages for emotional distress. The commission contended that the court should modify its decision to reflect the fact that the referee determined that the board had violated § 46a-58 (a), not that it had violated the ADA, and, therefore, damages properly were awarded pursuant to § 46a-86 (c). The trial court denied the motion.

[12] "The [commission] is a deferral agency under which it has a work-sharing arrangement with the EEOC, whereby it is authorized to accept charges for the EEOC. [When] both the EEOC and [the commission] have jurisdiction, two charges are taken so that the matter may be dual-filed,

board, in a proceeding under Title II of the ADA (Title II), § 42 U.S.C. § 12131 et seq., governing discrimination in the provision of public services, the EEOC has authority only to conduct an investigation, to reach a voluntary resolution, or to file a lawsuit; see *Mach Mining, LLC* v. *Equal Employment Opportunity Commission*, 575 U.S. 480, 483–84, 135 S. Ct. 1645, 191 L. Ed.

thus preserving both the state and federal rights of the charging party." (Internal quotation marks omitted.) *Ortiz* v. *Prudential Ins. Co.*, 94 F. Supp. 2d 225, 231 (D. Conn. 2000).

The board contends that the EEOC is charged with enforcement of the rights established by Title II of the ADA (Title II), § 42 U.S.C. § 12131 et seq., governing discrimination in the provision of public services, because "such enforcement is coextensive with the enforcement of rights available in a private cause of action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5b . . . ." See 42 U.S.C. § 12133 (2018) (incorporating rights and remedies set forth in 29 U.S.C. § 794a for violation of Title II); see also 29 U.S.C. § 794a (a) (1) (2018) (incorporating rights and remedies set forth in 42 U.S.C. 2000e-16, which is contained in Title VII of Civil Rights Act of 1964 and governs employment discrimination). The commission does not dispute this assertion but claims only that, regardless of the scope of the EEOC's authority, the commission has authority under state law to identify ADA violations. We note, however, that 29 U.S.C § 794a (a) (2) provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) [governing discrimination on the basis of race, color or national origin in federally assisted programs] (and in subsection (e) (3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." A number of courts have held that subsection (a) (2) of 29 U.S.C. § 794a applies to violations of Title II of the ADA, not subsection (a) (1), which applies to violations of Title I of the ADA, governing discrimination in the employment setting. See *Ability Center of Greater Toledo* v. *Sandusky*, 385 F.3d 901, 905 (6th Cir. 2004) ("the remedies, procedures, and rights available under Title II of the ADA parallel those available under Title VI of the Civil Rights Act of 1964"); id., 905 n.7 ("the remedies enumerated [in] § 794a (a) (2) apply in Title II cases"); *Davoll* v. *Webb*, 943 F. Supp. 1289, 1296 n.3 (D. Colo. 1996) ("Title II of the ADA adopts the enforcement procedures of [§] 505 of the Rehabilitation Act of 1973, i.e., Title VI"), aff'd, 194 F.3d 1116 (10th Cir. 1999). We need not resolve this issue, however, because, regardless of what federal procedures and remedies are available for a violation of Title II of the ADA, and regardless of whether the EEOC has authority to enforce Title II or, if it does, the scope of any such authority, we conclude that the commission has authority to identify ADA violations as the basis for finding a violation of § 46a-58 (a).

2d 607 (2015);[13] but not to adjudicate a claim pursuant to the ADA. Therefore, the board contends, the commission also has no such authority. Second, and derivatively, the board claims that, to the extent that the commission contends that, even if it does not have the authority to directly adjudicate an ADA claim, it has the authority to determine whether a violation of *§ 46a-58 (a)* occurred as the result of an ADA violation, that contention is also incorrect because the commission has no authority to adjudicate whether the ADA was violated in the first instance.[14]

[13] *Mach Mining, LLC*, involved a claim pursuant to Title VII of the Civil Rights Act of 1964. See *Mach Mining, LLC* v. *Equal Opportunity Employment Commission*, supra, 575 U.S. 483. As we explained, the procedures governing a claim pursuant to Title VII do not appear to apply to a claim made pursuant to Title II of the ADA. See footnote 12 of this opinion. As we also explained, this fact has no bearing on our analysis. See id.

[14] The board contends that the trial court's judgment upholding the human rights referee's decision was "based exclusively on [the court's] conclusion that the [commission] had the authority to adjudicate claims brought under the ADA," and the court did not address the issue of whether the board violated § 46a-58 (a). We disagree. The trial court cited *Connecticut Judicial Branch* v. *Gilbert*, Superior Court, judicial district of New Britain, Docket No. HHB-CV-18-6048927 (October 15, 2019) (69 Conn. L. Rptr. 229), rev'd and vacated in part, 343 Conn. 90, 272 A.3d 603 (2022), for the proposition that the commission "could consider a [federal discrimination] claim as a predicate to [a] claim under § 46a-58 (a)." As we discuss subsequently in this opinion, we recently affirmed in relevant part the judgment of the trial court in *Gilbert*; see *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 150, and the board concedes that this decision is controlling in the present case. Because our decision in *Gilbert* was released after the commission filed its primary appellate brief, it requested permission to file a notice of supplemental authority addressing this decision, which we granted.

We recognize that, even though the trial court recognized that the referee had found a violation of *§ 46a-58 (a)*, it apparently based its conclusion that the human rights referee properly awarded damages for emotional distress exclusively on federal cases holding that such damages are proper for a violation of the *ADA*. See footnote 11 of this opinion. The board does not dispute on appeal that, if this court concludes that the referee properly found that the board had violated § 46a-58 on the basis of conduct that would constitute a violation of the ADA, the damages award would be proper under § 46a-86 (c). Accordingly, any error by the trial court in this respect was harmless.

Whether the commission has the authority to identify violations of the ADA presents a legal question subject to plenary review. See, e.g., *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 101, 272 A.3d 603 (2022). "To the extent that the issue requires us to interpret the commission's enabling statutes and the state antidiscrimination laws that the commission is responsible for enforcing, we accord deference to the agency's formally articulated interpretation of those statutes when that interpretation is both time-tested and reasonable." Id., 101–102.

At oral argument before this court, the board conceded that this court's recent decision in *Gilbert* is controlling in the present case. In *Gilbert*, the plaintiff, the Connecticut Judicial Branch (branch), contended that the commission had no authority under § 46a-58 (a) to adjudicate claims pursuant to Title VII of the federal Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991 (Title VII), 42. U.S.C. § 2000e et seq.[15] Id., 105. This court concluded that the language of § 46a-58 (a) providing that "[i]t shall be a discriminatory practice . . . for any person to subject . . . any other person to the deprivation of any rights . . . secured or protected by the . . . laws . . . of the United States"; (emphasis omitted; internal quotation marks omitted) id., 102; unambiguously "conferred on the commission the authority to identify violations of federal civil rights laws . . . ." Id., 103. With respect to the branch's contention that, because the relevant federal statute authorized only federal courts to formally resolve Title VII claims, the EEOC had no such authority and, in turn, the commission had no such authority; see id., 105–106; this court concluded that "the branch [relied] on a non sequitur insofar as the commission has never purported to adjudicate Title VII

[15] *Gilbert* involved a claim of sexual discrimination. See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 97.

claims . . . .'' Id., 107. Rather, ''§ 46a-58 (a) . . . deems a violation of Title VII to be a violation of *state* antidiscrimination law . . . .'' (Emphasis in original.) Id. This court further concluded that nothing in the federal statutes or legislative history of Title VII evinced ''an intention to bar *state* agencies from identifying Title VII violations for purposes of determining whether *state* law has been violated.''[16] (Emphasis in original.) Id., 109. Accordingly, the court concluded that, ''when the commission finds a Title VII violation as the factual predicate to a violation of § 46a-58 (a), it does so as a matter of Connecticut state law . . . .'' Id., 114.

As we indicated, the board concedes in the present case that our reasoning in *Gilbert* with respect to Title VII claims applies equally to the board's claim that the commission has no authority to adjudicate claims pursuant to Title II of the ADA. Accordingly, we conclude that the trial court correctly determined that the commission has the authority to identify ADA violations for purposes of determining whether § 46a-58 (a) has been violated.

II

We next address the board's contention that the commission lacked jurisdiction over the ADA claim because the substance of the claim is that A was denied a FAPE under the IDEA, and, therefore, M was required by 20

[16] Thus, in addition to relying on the plain and unambiguous language of § 46a-58 (a), the court in *Gilbert* relied on cases construing Title VII and the legislative history of that statutory scheme to support its conclusion that the commission had the authority to identify Title VII violations as a basis for finding a violation of § 46a-58 (a). See *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 109–15. Neither the board nor the commission has referred us to comparable case law and legislative history regarding Congressional intent with respect to the ADA. As we indicated, however, the board has conceded that its claim is indistinguishable from the claim that we rejected in *Gilbert* and does not contend that Congress intended to bar state agencies from identifying violations of Title II of the ADA for purposes of providing a state remedy.

U.S.C. § 1415 (*l*)[17] to exhaust his administrative remedies under the IDEA before filing a complaint with the commission on A's behalf, and he failed to do so. We disagree.

As a preliminary matter, we consider whether this issue is properly before us when the board failed to raise the issue in the proceedings before the human rights referee.[18] See, e.g., *Ferraro* v. *Ridgefield European Motors, Inc.*, 313 Conn. 735, 759, 99 A.3d 1114 (2014) (rule that reviewing court is not required to consider claim unless it was distinctly raised before initial decision maker applies to appeals from administrative proceedings). Because the board claims that M failed

[17] Title 20 of the 2018 edition of the United States Code, § 1415 (*l*), provides: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

[18] As we explained, after the trial court remanded the matter to the human rights referee to address the question of whether the board had violated the ADA, the referee observed that the board had not raised the exhaustion claim at the initial public hearing on the complaint and that the trial court had not requested that the referee address the issue in its remand order. Nevertheless, after receiving the referee's articulation, the trial court addressed the issue and concluded that M was not required to exhaust his remedies under the IDEA because the claim did not involve a request for a FAPE. For reasons that are unclear to us, the commission makes no claim that this issue is not reviewable because the board failed to exhaust its administrative remedies by raising the issue in the initial proceedings before the human rights referee, even though it does raise that claim with respect to the board's claim that a public school is not a place of public accommodation. Although the commission has not raised the issue of whether the board's exhaustion claim is reviewable on appeal, the parties have briefed the issue of the reviewability of unpreserved jurisdictional claims in administrative appeals in their briefs relating to the place of public accommodation claim. We address the issue in order to clarify the legal principles governing the review of unpreserved jurisdictional claims in administrative appeals and because addressing that issue will not prejudice the board or the commission.

to exhaust his remedies under the IDEA before filing his complaint with the commission, the claim implicates the commission's subject matter jurisdiction. Cf., e.g., *Garcia* v. *Hartford*, 292 Conn. 334, 338–39, 972 A.2d 706 (2009) (failure to exhaust administrative remedies implicates trial court's subject matter jurisdiction). A claim that an agency lacked subject matter jurisdiction may be raised at any time. E.g., *Ross* v. *Planning & Zoning Commission*, 118 Conn. App. 55, 60, 982 A.2d 1084 (2009). We conclude, therefore, that the issue was properly before the trial court and is properly before this court.

In reaching this conclusion, we are mindful that, as the commission points out, this court has held that an agency is competent, and must be given the opportunity, to determine its own jurisdiction before a party can challenge the agency's jurisdiction in court.[19] See *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 622, 577 A.2d 1017 (1990). In *Cannata*, the named defendant, the Department of Environmental Protection (department), ordered the plaintiffs to cease and desist from cutting down trees in an area subject to certain environmental regulations because they had failed to obtain a permit. Id., 619–20. The plaintiffs appealed from the order to the trial court, which dismissed the appeal because they had failed to exhaust

[19] The board cites *Aaron* v. *Conservation Commission*, 178 Conn. 173, 179, 422 A.2d 290 (1979), for the proposition that "resort to administrative agency procedures will not be required when the claims sought to be litigated are jurisdictional." In *Cannata* v. *Dept. of Environmental Protection*, 215 Conn. 616, 621 n.7, 577 A.2d 1017 (1990), the court expressly stated that this court's decision in *Greater Bridgeport Transit District* v. *Local Union 1336, Amalgamated Transit Union*, 211 Conn. 436, 559 A.2d 1113 (1989), had overruled this holding in *Aaron*. See id., 439; see also *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 483 n.3, 938 A.2d 1233 (2008) (*Greater Bridgeport Transit District* overruled *Aaron* as applied in cases in which adequate administrative remedy is available, but plaintiff need not exhaust administrative remedy if there is no mechanism for judicial review of agency's jurisdictional ruling).

their administrative remedies by applying for a permit. Id., 620. The plaintiffs then appealed to this court, claiming that the department had no jurisdiction over their activities. We observed that, "[w]hen a particular statute authorizes an administrative agency to act in a particular situation it necessarily confers [on] such agency authority to determine whether the situation is such as to authorize the agency to act—that is, to determine the coverage of the statute—and this question need not, and in fact cannot, be initially decided by a court." (Internal quotation marks omitted.) Id., 623. Accordingly, we affirmed the judgment of the trial court. Id., 633.

We conclude that *Cannata* is distinguishable from the present case. First, unlike the plaintiffs in *Cannata*, the board did not deliberately bypass an *administrative proceeding* that could have provided adequate administrative relief when it raised the exhaustion claim in the trial court.[20] Rather, its failure to raise the claim before the human rights referee appears to have been the result of an oversight during the course of the only administrative procedure in which the board could have raised the claim, which itself was pursued to its conclusion. In other words, we conclude that there is a difference between bypassing an administrative procedure on the ground that the agency has no jurisdiction over the matter, which raises an exhaustion issue, and failing, within the context of an administrative proceeding, to

[20] In other cases in which this court or the Appellate Court has concluded that an agency must determine its own jurisdiction in the first instance, the plaintiffs also bypassed available administrative procedures. See *O & G Industries, Inc.* v. *Planning & Zoning Commission*, 232 Conn. 419, 425, 655 A.2d 1121 (1995); *Greater Bridgeport Transit District* v. *Local Union 1336, Amalgamated Transit Union*, 211 Conn. 436, 439, 559 A.2d 1113 (1989); *Metropolitan District* v. *Commission on Human Rights & Opportunities*, 180 Conn. App. 478, 511, 184 A.3d 287, cert. denied, 328 Conn. 937, 184 A.3d 267 (2018); *Sastrom* v. *Psychiatric Security Review Board*, 105 Conn. App. 477, 482, 938 A.2d 1233 (2008).

preserve for review a claim that the agency has no jurisdiction. When a party has failed to preserve a claim before an administrative agency, the exhaustion doctrine does not apply; instead, we apply the ordinary rules governing appellate review of unpreserved claims.

Second, we emphasized in *Cannata* that the jurisdictional issue in that case involved "factual determinations best left to the [department]. This is precisely the type of situation that calls for agency expertise. Relegating these determinations to the [department] in the first instance will provide a complete record containing the [department's] interpretation of the relevant statutory provisions for judicial review." Id., 627. In the present case, the jurisdictional claim involves the proper interpretation of state and federal statutory schemes that are not administered by the commission and that this court is equally competent to interpret.[21] Moreover, there is no claim that the record is inadequate for review of the issue. Accordingly, we conclude that we may review the claim.

We turn, therefore, to the merits of the board's claim that the commission lacked jurisdiction to entertain the complaint because M was required by 20 U.S.C. § 1415 (*l*) to exhaust his administrative remedies under the IDEA before filing a complaint with the commission. A determination as to an agency's subject matter jurisdiction is a question of law subject to plenary review. E.g., *Ross* v. *Planning & Zoning Commission*, supra, 118 Conn. App. 58.[22] "In this regard, a court must take

[21] Specifically, as we discuss more fully hereinafter, we must determine the applicability of the requirement that parties claiming that they were denied a FAPE exhaust their remedies under General Statutes § 10-76h, which is administered by the commissioner of education. In making this determination, we are guided by case law construing the IDEA exhaustion requirement.

[22] We stated in *Gilbert* that, "[t]o the extent that the issue requires us to interpret the commission's enabling statutes and the state antidiscrimination laws that the commission is responsible for enforcing, we accord deference to the agency's formally articulated interpretation of those statutes when

the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether . . . subject matter jurisdiction [exists], every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Graham* v. *Friedlander*, 334 Conn. 564, 571, 223 A.3d 796 (2020).

The IDEA requires that, "before the filing of a civil action under such laws seeking relief that is also available under this subchapter [of the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415 (*l*) (2018). The board contends that this court held in *Graham* v. *Friedlander*, supra, 334 Conn. 564, that "the IDEA's exhaustion rule applies to state law causes of action." To the contrary, this court concluded in *Graham* that the plain language of 20 U.S.C. § 1415 (*l*) provides that exhaustion of IDEA remedies is required *only* when a civil action seeking relief for the denial of a FAPE is brought under "the United States [c]onstitution, the [ADA] . . . [T]itle V of the Rehabilitation Act of 1973, and the [IDEA] itself," *not* when a party has raised state law claims. (Internal quotation marks omitted.) *Graham* v. *Friedlander*, supra, 573. We also concluded in *Graham* that, although the IDEA's exhaustion rule did not apply, "our state legislature created an exhaustion requirement for state law claims that seek relief from the denial of a FAPE." Id., 574. Specifically,

that interpretation is both time-tested and reasonable." *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 101–102. In the present case, our determination is guided by the implicit exhaustion requirement contained in General Statutes § 10-76h and by the United States Supreme Court's interpretation of the IDEA's exhaustion requirement. Because the commission is not responsible for implementing § 10-76h or the IDEA, its interpretation is entitled to no deference.

persons who raise such claims must exhaust the remedies provided by General Statutes § 10-76h.[23] Id., 574–75. Accordingly, we agree with the board to the extent that it claims that M would be required to exhaust the available state remedies provided by § 10-76h before he could file the complaint, *if* the complaint to the commission actually sought relief for the denial of a FAPE.

We must determine, therefore, whether the complaint filed with the commission, in fact, sought relief for the denial of a FAPE. "To make this determination, we look to the recent decision of the United States Supreme Court in *Fry* v. *Napoleon Community Schools*, [580 U.S. 154, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017)], for guidance . . . ." *Graham* v. *Friedlander*, supra, 334 Conn. 580. Under *Fry*, courts making this determination should consider two factors. Id. "The first factor requires consideration of whether the claim could have been

[23] "Under § 10-76h (a) (1), a parent of a child requiring special education and related services 'may request a hearing of the local or regional board of education or the unified school district responsible for providing such services whenever such board or district proposes or refuses to initiate or change the identification, evaluation or educational placement of or provision of a free appropriate public education to such child or pupil.' The request must be made in writing, contain a statement of the specific issues in dispute, and be requested within two years of the board's proposal or refusal to initiate a change in the child's education plan. General Statutes § 10-76h (a) (1) through (4).

"Upon receipt of the written request, 'the Department of Education shall appoint an impartial hearing officer who shall schedule a hearing . . . pursuant to the [IDEA] . . . .' General Statutes § 10-76h (b). Section 10-76h requires the Department of Education to provide training to hearing officers, delineates who may act as hearing officers and members of hearing boards, identifies the parties that shall participate in a prehearing conference to attempt to resolve the dispute, and describes the authority that the hearing officer or board of education shall have. See General Statutes § 10-76h (c) and (d). Section 10-76h also establishes the processes for appealing from decisions of the hearing officer or the board of education. Section 10-76h (d) (4) provides in relevant part: 'Appeals from the decision of the hearing officer or board shall be taken in the manner set forth in section 4-183 . . . .' " *Graham* v. *Friedlander*, supra, 334 Conn. 574–75.

brought outside the school setting. . . . The second factor requires consideration of the history of the proceedings prior to the filing of the complaint." (Citation omitted.) Id., 580–81.

"The first factor—whether the claim could have been brought outside the school setting—can be evaluated in the form of two hypothetical questions: First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? . . . If the answer to both questions is yes, then it is unlikely that the complaint is about the denial of a FAPE." (Citation omitted; internal quotation marks omitted.) Id., 581.

Applying these factors in the present case, we conclude that M's complaint did not, in fact, seek relief for the denial of a FAPE. We acknowledge at the outset that our analysis is somewhat hampered by the informal and nontechnical pleading requirements in discrimination proceedings before the commission. We note, for example, that M was not required to, and did not, specify the relief that he was seeking in the complaint that he filed on A's behalf. Nevertheless, viewing the complaint and the proceedings before the commission in their entirety and in the light most favorable to a finding of jurisdiction, we are persuaded that M was not required to exhaust his remedies under § 10-76h before filing the complaint.

In reaching this conclusion, our decision in *Graham* v. *Friedlander*, supra, 334 Conn. 564, is instructive. In *Graham*, we concluded that the plaintiffs' complaint alleging that the defendants, including the Norwalk Board of Education, had engaged in negligent hiring and supervision of various persons and entities that

had provided autism related services to the plaintiffs' children, was not, in fact, a claim for the denial of a FAPE; id., 566–67; because "the plaintiffs could have brought essentially the same claim if they attended a municipal summer camp that touted a unique special needs program . . . [but] was run by uncertified and unqualified staff." Id., 581. Similarly, in the present case, M could have filed a complaint with the commission containing the same claim if a municipal summer camp for children with special needs had unilaterally dismissed A on the basis of his post-concussion syndrome.

We further concluded in *Graham* that "an adult participating in a municipally funded behavioral therapy treatment program offered in the evenings at a school could also bring the same claim for regression resulting from services provided by an uncertified and unqualified behavior therapist." Id., 582. Similarly, in the present case, an adult could bring the same claim if he or she were unilaterally dismissed from such a program on the basis of a physical disability.

The board disputes these conclusions and contends that, because the gravamen of M's complaint was that A was deprived of special education services, M was seeking relief for the denial of a FAPE. Specifically, the board contends that, "[b]ecause this case ultimately involves [A's] disenrollment from the school immediately after a [planning and placement team] meeting was held to discuss [A's] designation as a special education student, the alleged conduct is limited to the school setting. No other public facility can designate a student as 'special education' or provide a student with access to special education services, and, conversely, no other public facility can withdraw a student from those services." We disagree. In *Graham*, the defendants similarly claimed that, because the plaintiffs' complaint focused on the children's receipt of inadequate special education services, they were seeking relief for the

denial of a FAPE. *Graham* v. *Friedlander*, supra, 334 Conn. 584. We rejected this claim, concluding that "[t]he fact that the plaintiffs used the words inability to provide adequate services, does not automatically transform the claim into one alleging the denial of a FAPE or automatically subject the claim to an exhaustion requirement. The court in *Fry* warned against this kind of magic word approach. . . . The use (or [nonuse]) of particular labels and terms is not what matters. . . . What matters is the substance of the complaint." (Citations omitted; internal quotation marks omitted.) Id., 586.

We used the following hypothetical to illustrate this point: "If a teacher hits a special education student over the head and the student misses school for two weeks due to a concussion, the child could still bring an assault claim against the teacher, even though one of the harms alleged in the complaint could be that the child did not receive special education services for two weeks while recovering from the injury. The mere acknowledgment that the child received inadequate services for two weeks would not [however] make the claim one for the denial of a FAPE. The claim would remain one for assault." Id., 586–87. Similarly, in the present case, the fact that A was unable to take advantage of the educational services offered at John Daniels when the board unilaterally withdrew him from the school because of his post-concussion syndrome does not convert his claim for discrimination on the basis of disability into a claim for a denial of a FAPE. The former claim "implicate[s] those . . . intangible consequences of discrimination . . . such as stigmatization and deprivation of opportunities for enriching interaction with [his former] fellow students"; (internal quotation marks omitted) *Lawton v. Success Academy Charter School, Inc.*, 323 F. Supp. 3d 353, 362 (E.D.N.Y. 2018); whereas the latter claim implicates a loss of educational services.

The second *Fry* factor—the history of the proceedings—bolsters our conclusion. Although A's parents were undoubtedly seeking a FAPE while A was enrolled at John Daniels, including filing a request for a mediation with the state Board of Education to restore A's designation as a special education student, they never invoked the formal procedures for filing a due process complaint or requesting a hearing pursuant to § 10-76h. See *Graham* v. *Friedlander*, supra, 334 Conn. 588 (fact that plaintiffs never invoked formal procedures for seeking relief for denial of FAPE supported court's conclusion that they were seeking relief for something else). Moreover, M never asked the human rights referee during the proceedings on the complaint to order the board to reenroll A at John Daniels, to designate him as a special education student, or to provide him with appropriate educational services. Indeed, there is no reason to believe that they wanted or would be entitled to such relief because, before the beginning of the school year immediately following his withdrawal from John Daniels, A's parents enrolled him in another school where, as far as the record shows, he received a FAPE.[24]

[24] The complaint does allege that the board "failed to readmit" A, and it is arguable that, if the matter had been adjudicated promptly, A's parents could have sought readmission. It is also arguable that A's parents could have asked for educational services to compensate for the fact that A did not receive homebound educational services for the several weeks of the 2010–11 school year following his withdrawal from John Daniels. See, e.g., *Branham* v. *District of Columbia*, 427 F.3d 7, 9 (D.C. Cir. 2005) (compensatory education awards, such as tutoring to compensate for past failure to provide FAPE, may be available for IDEA violations if "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place" (internal quotation marks omitted)). There is no indication in the record, however, that A's parents had any intention to seek such remedies, and the *Fry* inquiry is designed to determine "whether a lawsuit in fact seeks relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit *could have* sought relief available under the IDEA (or, what is much the same, whether any remedies are available under that law)." (Emphasis added; internal quotation marks omitted.) *Fry* v. *Napoleon Community Schools*, supra, 580 U.S. 169. The board makes no claim that a different standard applies to the requirement under state law

We further note that, for reasons that are unclear from the record, the human rights referee did not hold a hearing on the complaint until March, 2016, almost five years after A was withdrawn from John Daniels. The board has not explained precisely what relief would have been available under § 10-76h to remedy the harm done as a result of A's withdrawal at that time, much less when and how such relief was actually requested. We conclude, therefore, that M was not required to exhaust his administrative remedies before he filed the complaint with the commission on A's behalf.

To support its claim to the contrary, the board relies on the Appellate Court's recent decision in *Phillips* v. *Hebron*, 201 Conn. App. 810, 244 A.3d 964 (2020).[25] In *Phillips*, the minor plaintiff, who had been diagnosed with Down syndrome and was without functional speech, attended kindergarten in an elementary school in the town of Hebron. Id., 812. During a visit to the school, the plaintiff's father discovered that the plaintiff's desk and chair were located in the coatroom of the kindergarten classroom. Id., 813. Subsequent inquiries revealed that the plaintiff slept 2.5 hours per day in the

that remedies pursuant to § 10-76h must be exhausted before seeking relief in other state forums.

We are mindful that "a disabled student claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages." *Polera* v. *Board of Education*, 288 F.3d 478, 488 (2d Cir. 2002). This simply means, however, that the student may not ignore the administrative process for the denial of a FAPE and later sue for damages *for that specific harm*; it does not mean that a disabled student may not seek damages outside of the administrative process *for some other harm* that happened to also result in the denial of a FAPE. See *Graham* v. *Friedlander*, supra, 334 Conn. 586–87 (student who is deprived of FAPE as result of physical assault by teacher may seek damages for injuries caused by assault without exhausting remedies for denial of FAPE, even if assault resulted in deprivation of FAPE).

[25] Because the Appellate Court's decision in *Phillips* was released after the commission filed its primary appellate brief, the commission requested permission to file a supplemental brief addressing the decision, which we granted.

coatroom and spent 40 minutes per day on average working on classwork or projects in that space. Id., 813–14. The plaintiff's father submitted a special education complaint form (state complaint) and a request for a due process hearing to the Bureau of Special Education. Id., 815. The state complaint sought, among other things, modifications to the plaintiff's individualized education plan. Id. After the defendant Hebron Board of Education filed a motion to dismiss the request for a due process hearing, the plaintiff's father withdrew the request and asked the department to investigate the state complaint. Id., 816. Upon concluding its investigation, the department issued a report in which it found that the plaintiff had not been denied a FAPE and stated that the parties were entitled to request a due process hearing if they disagreed with the report's conclusions. Id. The plaintiff's father did not file a request for a hearing but, instead, brought an action against the Hebron Board of Education and certain of its employees, alleging, among other things, that they had discriminated against him on the basis of his disability in violation of § 46a-58 (a) and General Statutes § 46a-75 (a) and (b). Id., 819. The defendants filed a motion to dismiss the complaint on the ground that the plaintiff's father had failed to exhaust his administrative remedies for the denial of a FAPE, which the trial court granted. Id., 822–24.[26]

On appeal, the Appellate Court concluded that, read in the context of the core allegations of the complaint;

[26] The defendants in *Phillips* contended that the plaintiff was required to exhaust his remedies pursuant to the IDEA, and trial court agreed. *Phillips* v. *Hebron*, supra, 201 Conn. App. 823–84. Thereafter, this court released its decision in *Graham* v. *Friedlander*, supra, 334 Conn. 564, which held that the IDEA's exhaustion requirement did not apply to claims made pursuant to state law but, instead, that plaintiffs raising state law claims alleging the denial of a FAPE are required to exhaust the remedies provided by § 10-76h. During oral argument before the Appellate Court, the plaintiff in *Phillips* conceded that there is a state exhaustion requirement for state claims seeking a remedy for the denial of a FAPE. *Phillips* v. *Hebron*, supra, 829 n.16.

namely, that the defendants had violated the plaintiff's rights under the IDEA; id., 835; the plaintiff's purported discrimination claims, in fact, sought "redress for the defendants' failure to provide a FAPE . . . ." (Footnote omitted.) Id., 839. The court reasoned that, under the first *Fry* factor, "the plaintiff could not sue a public facility for failing to educate him in the least restrictive environment; nor could an adult sue the school on such a basis." Id. Applying the second *Fry* factor, the history of the proceedings, the court observed that, before the plaintiff's father filed the complaint, he sought a due process hearing on the ground that the plaintiff had been denied a FAPE. Id., 841. Accordingly, the Appellate Court affirmed the trial court's judgment with respect to the exhaustion issue. Id., 845.

We are not persuaded by the board's contention that the Appellate Court's decision in *Phillips* supports its position. As we explained, unlike the complaint in *Phillips*, the complaint in the present case did not allege that the board had violated A's rights under the IDEA or, indeed, make any reference to the IDEA or to A's right to a FAPE, and, unlike the plaintiff in *Phillips*, neither A nor his parents ever invoked the administrative proceedings designed to remedy the denial of a FAPE. We conclude, therefore, that the trial court correctly determined that M was not required to exhaust his remedies pursuant to § 10-76h before he filed the complaint with the commission on A's behalf.

III

Finally, we address the board's claim that the commission lacked jurisdiction over M's claim pursuant to § 46a-64 because a public school is not a place of public accommodation. The board concedes that it did not raise this claim before the human rights referee but contends that the trial court improperly declined to address the claim because it was jurisdictional, and a

jurisdictional claim may be raised at any time. See, e.g., *Ross* v. *Planning & Zoning Commission*, supra, 118 Conn. App. 60. The commission contends that, to the contrary, the board's claim does not implicate its subject matter jurisdiction and the claim is, therefore, unreviewable. See *Ferraro* v. *Ridgefield European Motors, Inc.*, supra, 313 Conn. 759 (rule that reviewing court is not required to consider claim unless it was distinctly raised before initial decision maker applies to appeals from administrative proceedings). We agree with the commission that the claim is not reviewable.

This court previously has had occasion to discuss the "ongoing confusion as to whether the failure to plead or prove an essential fact [for purposes of invoking a statutory remedy] implicates the [tribunal's] subject matter jurisdiction or its statutory authority." *In re Jose B.*, 303 Conn. 569, 572, 34 A.3d 975 (2012). We noted in *In re Jose B.* that, "[o]nce it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Internal quotation marks omitted.) Id. 574. We further noted that the question of whether the action belongs to the class of cases that the tribunal has authority to decide is "[s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act." (Internal quotation marks omitted.) Id., 574–75. A challenge to the tribunal's statutory authority "raises a claim of statutory construction that is not jurisdictional." (Internal quotation marks omitted.) Id., 573. After discussing a number of cases in which this court and the Appellate Court applied these principles with disparate results, we concluded that a claim that a party has failed to allege or to establish an element of a statutory remedy implicates the tribunal's statutory authority and the legal suffi-

ciency of the complaint, not the tribunal's subject matter jurisdiction.[27] Id., 579.

In the present case, the complaint alleged that the board had violated § 46a-64 by discriminating against A on the basis of his disabilities in a place of public accommodation. Such a claim is within the class of cases that the commission has authority or competence to decide. We conclude, therefore, that the commission had subject matter jurisdiction to entertain the complaint. See id., 574.

In support of its claim to the contrary, the board essentially contends that, because a public school is *not* a place of public accommodation *as a matter of law*, the commission lacked subject matter jurisdiction. We disagree. In the cases that we cited in our discussion in *In re Jose B.* regarding the distinction between statutory authority and subject matter jurisdiction, the alleged jurisdictional deficiencies also involved questions of law.[28] We concluded that the trial court's juris-

[27] Thus, we implicitly overruled the cases that had reached a contrary conclusion on that point, namely, *Amore* v. *Frankel*, 228 Conn. 358, 636 A.2d 786 (1994), and *Kennedy* v. *Kennedy*, 177 Conn. 47, 411 A.2d 25 (1979). See *In re Jose B.*, supra, 303 Conn. 575–76 (discussing *Kennedy*); id., 577–79 (discussing *Amore*); id., 579 ("to the extent that the cases are inconstant, the better rule is set forth in" cases holding that failure to allege essential facts under particular statute goes to legal sufficiency of complaint, not to subject matter jurisdiction (internal quotation marks omitted)).

[28] See *In re Jose B.*, supra, 303 Conn. 574 (citing *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999), in which court considered whether Appellate Court correctly determined, sua sponte, that trial court did not have jurisdiction to modify support order pursuant to General Statutes § 46b-86 (a) because support agreement precluded modification unless defendant's weekly income exceeded $900); *In re Jose B.*, supra, 575 (citing *New England Retail Properties, Inc.* v. *Maturo*, 102 Conn. App. 476, 482, 925 A.2d 1151, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007), in which court considered whether, under statute prohibiting commencement of action against estate unless legal claim has been rejected by estate, claim that estate had not rejected legal claim implicated court's subject matter jurisdiction); *In re Jose B.*, supra, 575 (citing *Kennedy* v. *Kennedy*, 177 Conn. 47, 49, 411 A.2d 25 (1979), in which trial court concluded that it lacked jurisdiction to issue support orders pertaining to children over age of eighteen when legislature had lowered age of majority from twenty-one years of age to eighteen); *In*

diction was not implicated in any of these cases, but, instead, the claims implicated the trial court's statutory authority and the legal sufficiency of the complaints. Id., 579. We conclude, therefore, that the board's claim that the trial referee incorrectly determined that a public school is a place of public accommodation is not reviewable because it does not implicate the commission's subject matter jurisdiction.[29]

In summary, we conclude that the trial court correctly determined that the commission had jurisdiction to

re Jose B., supra, 576 (citing *Gurliacci* v. *Mayer*, 218 Conn. 531, 543–44, 590 A.2d 914 (1991), in which defendant claimed that trial court lacked subject matter jurisdiction over claim because plaintiff had not alleged statutory exception to Workers' Compensation Commission's exclusive jurisdiction over intraworkplace claims); *In re Jose B.*, supra, 577–79 (citing *Amore* v. *Frankel*, 228 Conn. 358, 362, 636 A.2d 786 (1994), in which defendant claimed that trial court lacked jurisdiction over claim because it did not fall with statutory exception to sovereign immunity).

[29] We note, for the benefit of future litigants, that, regardless of whether a public school is a place of public accommodation for purposes of § 46a-64, students who claim that they were discriminated against in a public school on the basis of a protected characteristic, including a disability, may seek the remedies provided by § 46a-86 by filing a complaint pursuant to § 46a-58 alleging that they have been discriminated against in violation of General Statutes § 10-15c. See *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 701, 706, 855 A.2d 212 (2004) (student who claimed that he was discriminated against on basis of race in public school in violation of § 10-15c could file complaint with commission pursuant to § 46a-58 and seek remedies provided by § 46a-86); see also General Statutes § 10-15c (a) ("[t]he public schools shall be open to all children five years of age and over . . . and each such child shall have . . . an equal opportunity to participate in the activities, programs and courses of study offered in such public schools . . . without discrimination on account of race, as defined in section 46a-51, color, sex, gender identity or expression, religion, national origin, sexual orientation or disability"); General Statutes § 46a-58 (a) (it is discriminatory practice to deprive person of right protected by law of this state on basis of protected status); General Statutes § 46a-86 (providing remedies for violation of § 46a-58).

The provision of § 10-15c prohibiting discrimination in public schools on the basis of a disability was added to the statute in 2021; see Public Acts, Spec. Sess. June, 2021, No. 21-2, § 405; and, therefore, a claim pursuant to that statute was not available in the present case but would be for claims after the 2021 amendment.

identify violations of the ADA for the purpose of determining whether the board violated § 46a-58 (a) and that it correctly determined that M was not required to exhaust the remedies provided by § 10-76h before filing his discrimination complaint with the commission. We further conclude that the board's claim that the human rights referee incorrectly determined that a public school is not a place of public accommodation for purposes of § 46a-64 (a) is not reviewable.

The judgment is affirmed.

In this opinion the other justices concurred.