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Welcome

Welcome to our fifth edition of *The Academic Advisor* - our e-newsletter focused on education law insights. As most schools enter midterm, we hope that fall break provides an opportunity for your campus to pause before the flurry of end-of-semester activities begin. If there are topics or focus areas that you would find helpful for us to cover at this time, please email us with your questions and requests. Our fifth edition features articles discussing bias in special education; the student loan debt forgiveness plan; impending Supreme Court decisions on race-conscious admissions; Title IX and trans athletes; ransomware, school systems and the risk of not paying; mass notification solutions; school surveys, FERPA and PPRA; and the deadline to spend federal funds.

In addition, we are pleased to sponsor the Annual Meeting of the Defense Research Institute (DRI) on October 25-28 in Philadelphia. Join DRI to connect with the most influential civil defense attorneys and in-house counsel from across the country, expand your knowledge base with cutting-edge education, engage with our passionate legal community, and celebrate past achievements and future goals with friends. You can learn more and register by clicking here.

Thank you for reading. As always, please feel free to share this publication with your colleagues. If others within your organization would like to register for our mailing list, please let us know by sending an email with THE ACADEMIC ADVISOR in the title.

Erin Jones Adams, Counsel, Co-Chair of the Education Practice Group, and Co-Editor of *The Academic Advisor*

and

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Legal Challenges Mount for Biden's Student Loan Debt Forgiveness Plan

"Six Republican-led states and a libertarian policy organization sued the Biden administration over its plan to cancel up to $20,000 in student loan debt."

Why this is important: Two lawsuits pending in Missouri and Indiana challenge the Biden administration's ability to cancel student loan debt. They argue that the plan to cancel debt violates federal law, the constitutional principle of separation of powers, and the Administrative Procedures Act, as well as improperly expands the scope of the HEROES Act (which gives the Education Secretary certain powers during national emergencies). At the heart of the challenge, is the position that wiping out

student loan debt really just transfers that debt from people who voluntarily assumed it to people who did not. The lawsuits further take advantage of House Speaker Nancy Pelosi's statement, "People think the president of the United States has the power for debt forgiveness. He does not." In addition to these arguments, another argument takes center stage in the Indiana lawsuit. The plaintiff in that lawsuit has been enrolled in the Public Service Loan Forgiveness plan, which cancels student loan debt when a borrower works in a public service career and makes 10 years of loan payments. The plaintiff in that lawsuit will be required to pay taxes on the amount of the debt forgiven if it is canceled through the new cancellation plan as opposed to the Public Service Loan Forgiveness plan. This article raises an issue that should be discussed more, that is, whether debt cancellation under the new proposed plan will result in a tax bill to the student loan borrower. If the new cancellation plan is aimed at student loan borrowers making below a certain income threshold, then those borrowers presumably do not have an excess amount of money lying around to pay an increased tax burden. The article lists a few states that tax debt forgiveness, but they aren't the only ones. At bottom, the prospect of a tax bill for debt forgiveness needs to be a larger part of the discussion of the new plan. --- Nicholas P. Mooney II

How Can Colleges Prepare for the Possibility the Supreme Court Will Strike Down Race-Conscious Admissions?

"Enrollment managers should work with other leaders to craft admissions and messaging strategies, experts said at an annual admissions conference."

Why this is important: Later this month, the Supreme Court of the United States ("SCOTUS") will begin hearing oral argument in two pivotal cases – *Students for Fair Admissions v. University of North Carolina* and *Students for Fair Admissions v. President & Fellows of Harvard College*, which have the power to reshape college admissions policies and practices for decades to come. SCOTUS will decide whether to permit the continued use of race-conscious admissions by institutions of higher education. While colleges and universities await these rulings, the National Association for College Admission Counseling ("NACAC"), a nonprofit education association that serves secondary school counselors, independent counselors, college admissions and financial aid officers, enrollment managers, and high school-to-college transition organizations, has asked if schools are prepared for the gravity of this decision and emphasized the time to prepare is now.

Beginning with *Bakke vs. Regents of the University of California* in 1978, SCOTUS has affirmed the consideration of race in college admissions for the enrollment of a diverse study body. Through its precedent, SCOTUS has upheld a review process that considers the totality of applicants' academic (e.g., class rank, core curriculum, grades and test scores, artistic talent), non-academic (e.g., geography, service and leadership, extracurricular activities, work experience, personal responsibility), and background (e.g., cultural diversity, first-generation status, membership in traditionally underrepresented minority group) characteristics and qualifications as a means of demonstrating their ability to contribute to and benefit from an educational program.

In the pending cases, Students for Fair Admissions ("SFA") has asked SCOTUS to overturn this precedent by prohibiting institutions of higher education from considering applicants' individual races or ethnic identities during the admissions review process. In doing so, SFA has aligned itself with the American majority. According to a recent Pew Research Center survey, the United States public continues to view grades and test scores as top factors in college admissions, with almost three-quarters of Americans contending gender, race, and ethnicity should not factor into admissions.

On the other hand, in coordination with the College Board, American Association of Collegiate Registrars and Admissions Officers, and Act, Inc., NACAC has filed a Brief of Amici Curiae in support of the responding colleges. NACAC, along with the other amici, assert that institutions cannot remove this piece of their admissions policies without extensive redesign, retraining, and reinvestment and eliminating the consideration of applicants' unique lived experiences and perspectives that are inherently associated with their race and ethnicity. Amici further contend that contrary to the argument proffered by SFA, standardized test scores and grades alone do not equate to merit in admissions. (NACAC has also scheduled a webinar on October 18 to discuss its position on the cases and 2023 plans in anticipation of the SCOTUS rulings.)

In response to legal experts' prediction that SCOTUS will end race-conscious admissions practices in deciding these cases, institutions of higher education that utilize this framework must be prepared to address both the resulting impact on their admissions policies, as well as campus members' reactions. In particular, higher education institutions with admissions policies grounded in *Bakke* and its progeny will need to consider other ways to mitigate admissions and enrollment barriers for underrepresented minorities. In addition to the possibility of a test-optional admissions approach, this article highlights the

importance of a public statement and plan of action that affirms schools' commitment to diversity despite a bar on race-conscious admissions. In any event, it is likely that the decisions issued by SCOTUS will impact schools' practices for many years to come, and college and universities must be prepared to respond accordingly. --- Erin Jones Adams

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A Battle Over Title IX: Can It be Used to Exclude Trans Athletes?

"An appeals court heard arguments on whether allowing trans athletes to participate in youth sports discriminates against their cisgender classmates."

Why this is important: This case likely will shape the Title IX landscape concerning the right to (and/or the requirement to allow) transgender athletes to participate in sports against their cisgender classmates. The plaintiffs in this case are cis student athletes who lost races and titles to transgender competitors in track. Plaintiffs argue that the Connecticut Interscholastic Athletic Conference's policy of permitting transgender student athletes to compete against their cis counterparts violates Title IX's requirement that schools provide, "equal athletic opportunity for members of both sexes." In response, the Conference argues that allowing student athletes to participate in sex-segregated sports in accordance with their gender identity does not violate Title IX and most courts that have examined the issue have found that transgender athletes should be allowed to participate against their cis classmates. If the Conference prevails — and it is expected to prevail — it would confirm that Title IX protects the right of transgender athletes to compete in classifications aligning with their gender identity and that conferences and schools may be required to permit such participation. --- Kevin L. Carr

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How Ransomware is Causing Chaos in American Schools

"The only way to stop attacks on the education sector is to make them unprofitable, and a big part of that requires bolstering security in schools so that they don't need to pay."

Why this is important: In 2021, 1,043 schools and colleges were hit by ransomware hackers. So far in 2022, there have been 1,735 schools hit by these attacks. The article states that attacks on schools and colleges are becoming more common because they are profitable. That likely is true, but commentators sometimes cite another reason. Schools often have outdated equipment and security procedures, making them an easier target for a threat actor. The article recounts the story of Sierra College, a college in Rocklin, California, when it was hit by a ransomware attack last year. The attack essentially left the college unable to fully function for about two weeks. Adding insult to injury, Sierra College was hit again this year, this time leaving it down for two days. The article discusses similar attacks experienced by other schools, including the attack on the Los Angeles Unified School District, the second largest school district in the U.S. Other schools and colleges fared better when faced with these attacks, mostly because some systems were cloud-based and others were frequently backed up. An issue often arises in the aftermath of these attacks: what, if any, information will the school or college share with outsiders (beyond what it is legally obligated to disclose). The article discusses at length the many FOIA requests its author made to school districts across the country to learn more about attacks they suffered. Some provided information, but many others refused to, arguing that the information could not be disclosed because of the attorney-client privilege, the fact that law enforcement was investigating, the existence of certain state law exceptions to disclosure, and the belief that the disclosure would help threat actors launch better attacks in the future. The article argues that only through disclosure of this information will schools and colleges be able to compile a complete framework of the types of threats they face. That may be true, and until that complete framework exists, schools and colleges need to realize they are a target and plan today for how they would respond to a ransomware attack. --- Nicholas P. Mooney II

Big Data Trove Dumped After LA Unified School District Says No to Ransomware Crooks

"Confidential incident reports, personnel records, and more are leaked online."

Why this is important: In the last issue of *The Academic Advisor*, we discussed the recent rise in cyberattacks against school districts and colleges. This discussion was focused on the recent cyberattack

on Los Angeles Unified School District ("LAUSD"). This attack affected 540,000 students and 70,000 district employees. The hackers were identified as the Vice Society, a Russian-speaking ransomware group that has previously focused on small and medium size companies as the targets of their attacks. In response to the attack, the LASUD followed the White House and National Security Council's recommendation that the district not pay the ransom. As a result of the LAUSD publicly refusing to pay the ransom, two weeks ago, the Vice Society published 284,000 files on its website. The information released included incident reports, social security numbers, attendance records, unredacted passports, and other sensitive information of school employees and contractors. --- Alexander L. Turner

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What Works (and What Doesn't) When Deploying Mass Notification Solutions

"Emergency communications are complex and require sophisticated tools to generate effective results."

Why this is important: Campus leaders and emergency response teams know that every second counts when responding to an emergency. Having a mass notification system that enables critical information and safety instructions to reach campus members in a fast, reliable, and accessible manner and catches recipients' attention is a critical aspect of emergency response. When examining mass notification systems that meet your duties of care and campus safety expectations, what should you consider? As highlighted by this article, despite campus nuances such as size of facilities and population, there are general guidelines that campuses should strive to meet in selecting mass notification systems.

As a general rule, campuses should not rely on one single method for communicating about emergencies such as SMS text messages or mass emails. While nonetheless important, these messages can lack urgency given the volume of text messages and emails campus members receive on a daily basis and the ability to place phones on silent mode. To overcome this obstacle, some campuses use separate notification systems such as loud speakers. However, separate systems may require multiple persons to participate in the activation process, increasing the possibility of inconsistent messages and the time it takes to issue them. Further, mass notification systems that require someone to be physically present at a console may not provide the flexibility needed to deploy emergency instructions in a timely manner. Whether a system allows for the advance preparation and storage of messages is another important consideration.

Campuses should consider mass notification solutions that offer integrations with and management of different systems through a single platform. Systems offering this functionality may allow for the distribution of texts, calls to mobile and desk phones, emails, alert banners on school devices, and loud speaker messages at the same time. Integrated systems also can extend beyond mass notifications and serve as important tools for activating other aspects of emergency response. For example, integration with electronic door locking systems could activate lockdown features in coordination with the issuance of lockdown messages. Regardless, the testing and reporting remain of mass notification systems remain essential tasks.

As technology evolves, colleges and universities should consider how integrated solutions may enhance their mass notification systems' capabilities and in turn allow schools to respond to emergencies in a safe and effective manner. --- Erin Jones Adams

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Huntsville Parents Furious After Assignment Asks Students About Sexual Orientation, Liberal Views

"Parents weren't given advanced notice about the survey or the kinds of questions it asked."

Why this is important: Recently, there was an uproar by parents of students in Challenger Middle School in the Huntsville City School District in Alabama regarding an unauthorized 48-question survey given by a civics teacher as homework. This survey contained questions regarding students' sexual orientation and the pollical beliefs of their parents. This survey was supplied by a third party vendor. Student privacy is protected by The Family Educational Rights and Privacy Act ("FERPA"). FERPA limits the disclosure of students' personal identifying information ("PII"). FERPA, and its amendments, only apply to students who attend schools that receive funding from the U.S. Department of Education. The survey distributed to students at Challenger Middle School appears to violate an amendment to FERPA, the Protection of Pupil Rights Amendment ("PPRA"). The PPRA provides certain rights to parents of minors with regard to the collection of sensitive information from students through surveys. The PPRA,

after the passage of No Child Left Behind Act, requires written parental consent prior to the administration of U.S. Department of Education funded surveys that contain questions that fall into the following categories:

1. Political affiliations;
2. Mental and psychological problems potentially embarrassing to the student and their family;
3. Sex behavior and attitudes;
4. Illegal, antisocial, self-incriminating, and demeaning behavior;
5. Critical appraisals of other individuals with whom respondents have close family relationships;
6. Legally recognized privileges or analogous relationships, such as those of lawyers, physicians, and ministers;
7. Religious practices, affiliations or beliefs of the student or student's parent; and
8. Income.

For surveys that are not funded by the U.S. Department of Education, schools are required to develop and adopt policies in conjunction with parents regarding:

1. The right of parents to inspect, upon request, a survey created by a third party before the survey is administered or distributed by a school to students;
2. Arrangements to protect student privacy in the event of the administration of a survey to students, including the right of parents to inspect, upon request, the survey, if the survey contains one or more of the same eight items of information noted above;
3. The right of parents to inspect, upon request, any instructional material used as part of the educational curriculum for students;
4. The administration of physical examinations or screenings that the school may administer to students;
5. The collection, disclosure, or use of personal information collected from students for the purpose of marketing or selling, or otherwise providing the information to others for that purpose; and
6. The right of parents to inspect, upon request, any instrument used in the collection of information, as described in number 5.

Schools receiving public funds from the U.S. Department of Education must notify parents if a survey will be administered to students, and give parents the ability to opt-out of having their child from participating in the following activities:

1. Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information, or otherwise providing that information to others for that purpose;
2. The administration of any third party (non-Department of Education funded) survey containing one or more of the above described eight items of information;
3. Any non-emergency, invasive physical examination or screening that is: 1) required as a condition of attendance; 2) administered by the school and scheduled by the school in advance; and not necessary to protect the immediate health and safety of the student, or of other students.

Parental notification, review, and the right to opt-out also applies to "anonymous" surveys given to students. Schools receiving funds from the U.S. Department of Education must make sure that their teaching staff comply with PPRA, and schools must review teachers' lessons plans and materials to ensure that they are not administering surveys in violation of the PPRA. Enforcement of the PPRA lies with the U.S. Department of Education. --- Alexander L. Turner

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Virginia Lawsuit Claims Bias in Special Education Rulings

"Parents suing districts in the state won less than 2% of 1,400 due process cases over the last 20 years, the complaint says."

Why this is important: Last month, parents of a disabled child in northern Virginia filed a class action lawsuit against one of the nation's largest school systems, Fairfax County Public Schools, and the Department of Education alleging violations of the Individuals with Disabilities Education Act ("IDEA") by denying parents and students a fair due process hearing before an impartial and unbiased hearing officer when they object to the student's individualized education program ("IEP"). The crux of the complaint is that the same group of 22 hearing officers have been used for two decades, and they are biased in favor of the school system. Premised upon information obtained through a Freedom of Information Act investigation, the plaintiffs contend that the statistics bear this out. 83 percent of the hearing officers have not ruled in favor of the student in 10 years of hearings, and only 2 percent of rulings overall favor the student. While the statistics are surprising, the plaintiffs will have a significant challenge to prevail in their litigation on statistics alone because of the nature of the due process hearings. In many ways, administrative hearings mirror civil litigation. Where a plaintiff has a strong case, a defendant is more likely to settle and the case never gets to a final hearing; where a plaintiff has a weaker case on the facts

or the law, a defendant is less likely to settle and those cases go to trial. The statistics may simply be bearing this out. This case could have significant implications for school systems if statistics alone are sufficient for the plaintiffs to prevail. Among the relief sought by the plaintiffs are the appointment of an independent board of hearing officers and an investigation into each ruling made by any hearing officers who ruled in favor of the school system more than 30 percent of the time. --- Lori D. Thompson

Virginia School Systems Face Deadline to Spend Federal Relief Funds

"Of that $30.75 billion, the Elementary and Secondary Emergency Education (ESSER) Fund received $13.5 billion."

Why this is important: At the outset of the pandemic in March 2020, Congress provided $13.5 billion to fund an Elementary and Secondary Emergency Education ("ESSER") Fund that was intended to provide emergency funding to schools to address the impact of COVID-19. That initial funding became known as ESSER 1, and was followed by ESSER 2 in December 2020, which included an additional $54.3 billion in funding, and then ESSER ARP in March 2021 with an additional $1.9 trillion in funding. The funding is intended to provide schools with money to address the impact of COVID-19 on America's schools. Initially, pandemic-related expenses covered by ESSER 1 included masks, cleaning products, shields, sanitation services, technology for virtual learning, improved air ventilation systems, and additional staff and substitute teacher pay. As the pandemic has progressed, the ESSER 2 and ESSER ARP funding continues to provide for the above expenses, but also increasingly the need is for mental health counseling and remedial education as we are only just beginning to appreciate the learning deficit created by the pandemic.

The deadline for spending ESSER 1 funds came to a close at the end of September with reporting due from school systems as to how the funds were spent by November 2022. ESSER 2 funds are available through September 30, 2023, and ESSER ARP funds are available through September 30, 2024. The question looming on the horizon is what happens in 2024? The pandemic is likely to cast a shadow over a generation of learners who had their formal education stalled for a period of time and then constrained for more than two years. Even those who had yet to enter the school system and were denied the benefit of a preschool education are likely to have some impact, and the divide between the haves and the have-nots may be exponentially increased depending on the at-home learning opportunities available to those young learners. --- Lori D. Thompson