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July 19, 2022

Welcome

Welcome to our second edition of *The Academic Advisor* - our e-newsletter focused on education law insights. We hope you enjoyed our first issue and found it helpful. Our aim is to support the work that you do by bringing newsworthy issues to your attention and explaining their legal significance.

As predicted in our first edition, on June 23, 2022, the 50th anniversary of Title IX, the United States Department of Education released newly proposed Title IX regulations that would substantially amend key features of the 2020 regulations issued under former Education Secretary Betsy DeVos. On July 12, 2022, the Biden administration published the proposed Title IX regulations in the Federal Register, commencing a 60-day public comment period. Due to the significance of these actions, we have highlighted Title IX in our second edition with several articles covering this topic. While the status quo remains until the newly proposed regulations are finalized and take effect, we encourage you to be thinking ahead about the ways your policies and procedures may need to change, and how your campus would launch a mid-academic year rollout, should that become necessary.

In addition to Title IX insights, our second edition features articles discussing online learning, campus safety, free speech and the First Amendment, the limits of a college-focused antitrust exemption, loan servicing and the Public Service Loan Forgiveness program, and campus use of facial recognition technology. As always, please let us know if there are special topics you would like us to review.

Finally, we would like to introduce you to a new attorney to the firm - Joshua Jarrell. Josh is a Member and Chair of the Public Finance Practice Group. As such, Josh supports firm clients with organizational governance documents, commercial transactions, and public and private project finance, including the issuance of taxable and tax exempt bonds, among other services. Josh is a great addition to the firm and looks forward to assisting our education clients with any related needs.

Thank you for reading, and 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

Kevin L. Carr, Member, Co-Chair of the Education Practice Group, Co-Chair of the Labor and Employment Practice Group, and Co-Editor of *The Academic Advisor*

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5 Proposed Title IX Rule Changes Colleges Should Know

"The draft regulation would broaden the scope of cases colleges must investigate and expand the definition of sexual harassment."

Why this is important: Title IX, signed into law on June 23, 1972, has been the subject of numerous recent articles in light of its 50-year anniversary date and newly proposed regulations. Although most notably associated with collegiate sport gender equity for women's sports programs, Title IX does not mention athletics and was enacted to address discrimination against students and employees based upon sex at higher education institutions. Like other federal laws, the regulations interpreting the Act have been revised and updated over time.

The United States Department of Education recently issued a draft regulation for comment relating to how colleges must investigate sexual harassment on campus. On August 14, 2020, a prior regulation "created a courtroom-style setting for evaluating reports of sexual violence" and was applauded by some for its due-process style rights. The proposed changes drastically revamp the current process. According to the Department, "[t]he purpose of the proposed regulations is to better align the Title IX regulatory requirements with Title IX's nondiscrimination mandate, and to clarify the scope and application of Title IX and the obligation of all schools, including elementary schools, secondary schools, postsecondary institutions, and other recipients that receive federal financial assistance from the Department...to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination." Recognizing the vast differences between educational institutions, the proposed Title IX regulation provides more discretion and flexibility while still complying with the mandates of investigation under Title IX. --- Angela L. Beblo

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Security Uncertainties: What's Worrying Students

"Eight safety concerns, in students' own words, and what colleges can do to address them."

Why this is important: In the wake of ongoing mass gun violence across the country, coupled with students' return to campus life after months of fully remote and hybrid learning, it is not surprising that campus safety is top of mind for college students. According to a recent survey of college students highlighted by this article, eight common campus safety concerns emerged, including lack of presence by security officers or adequate staffing, delayed incident response times, lack of sexual assault awareness and prevention, and need for improved facility access restrictions, among others. For many institutions, costs associated with security enhancements and lack of funds pose a significant challenge. In striking the appropriate balance based on campus size, student population, and community crime rates, it is also helpful to consider colleges' legal duty of care to protect against harm.

In actions involving omissions – a failure to protect from harm – negligence may arise where a "special relationship" exists between the parties that imposes an affirmative duty to act. Generally, there is no duty to protect others from the conduct of third parties absent a "special relationship" that establishes a duty of care. In the college and university context, whether a "special relationship" exists between students and their postsecondary institution is a question of law driven by state precedent.

Under North Carolina law, the student-university relationship, standing alone, does not establish a "special relationship" giving rise to a duty of care. Whereas mutual dependence of the parties and the degree of control exercised in college athletics, for example, has created this special relationship in certain circumstances. North Carolina courts have held that the duty to safeguard college students from criminal acts of third parties depends on the foreseeability of a criminal assault.

By comparison, the Supreme Court of California has held that postsecondary schools have a "special relationship" with students while they are engaged in activities that are part of the school curriculum or closely related to the delivery of services. Students' dependence on colleges to provide structure, guidance, and a safe learning environment, combined with educational institutions' control over the environment through rules and restrictions, has militated in favor of this finding. As a consequence,

California colleges generally owe a duty to use reasonable care to protect their students from foreseeable acts of violence in the classroom or during curricular activities.

Whether criminal acts are foreseeable is fact-driven and depends on factors such as the location of the incident and types and amount of prior crimes, among others. Often the question is whether a repeated course of conduct should have put the college on notice that it was reasonably foreseeable an attack might occur, or whether a college should have foreseen that its failure to control or warn of a potentially violent situation could result in harm to others. With these considerations in mind, in addition to addressing students' concerns such as those shared in this article, colleges should monitor for patterns of behavior, repeat offenses, and recurring criminal activity in structuring the appropriate scope and scale of their campus safety measures. --- Erin Jones Adams

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New Title IX Regulatory Plan Broadens Sexual Violence Cases Colleges Must Investigate, Firms Up LGBTQ Protections

"The proposed rule unravels many of the processes present in the current federal rule, created by former Education Secretary Betsy DeVos."

Why this is important: Although the newly proposed Title IX regulations are be subject to a 60-day public comment period, followed by any necessary revisions before being finalized, it is important for schools to be aware of the changes that could be coming. The most glaring differences, which retract a great deal of the changes established during the Trump administration, broaden the definition of sex-based discrimination and no longer require live hearings.

The 2020 regulations, promulgated under former Education Secretary Betsy DeVos, were criticized, among other reasons, due to the strict requirement for schools to hold live hearings to adjudicate claims of sexual violence. Many argued that forcing a claimant to participate in a live hearing with the respondent is often traumatizing for survivors of sexual assault, and that the same should not be required even under the guise of due process because it would make survivors less likely to make a report. From a practical standpoint, smaller schools with fewer resources have had difficulty complying with this requirement. Under the proposed Title IX rule, institutions would instead retain the option to choose whether to use the live hearing process to adjudicate Title IX claims.

The proposed Title IX rule also expands the definition of discrimination based on sex to now include sexual orientation, gender identity, and sex characteristics, which provides Title IX protections for transgender students. (However, as noted elsewhere in this newsletter, the rule does not address how the proposed rule would apply to transgender athletes.)

In addition, the new rule would broaden schools' jurisdiction over claims to include incidents that occurred off campus or on educational trips outside of the United States. Under the DeVos rule, these types of incidents did not fall under the ambit of Title IX.

While we do not yet know what the final rule will include, we can be sure that it will substantially alter the current regulations. Until then, schools should remain compliant with the procedures required under the 2020 Title IX rule, which apply until the new rule is finalized, and consider how these proposed changes would alter their structure. --- Megan W. Mullins

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Navigating the World of Online Learning in Higher Ed

"Students want continued access to online learning options, and instructors are, for the most part, more amenable to teaching online after having the requirement thrust upon them as a safety measure in the spring of 2020."

Why this is important: In the spring of 2020, educational institutions across the country were newly faced with transitioning their students to remote learning, in compliance with state and local "Stay-at-Home" and social distancing orders. At that time, instructors heavily relied on learning management systems and video conferencing platforms, such as Canvas and Zoom, to disseminate educational materials to the students. Although this transition was difficult on both instructors and students, online learning became increasingly more popular throughout the pandemic.

While some institutions have reverted to solely in-person learning with COVID-19 prevention protocols in place, the "new normal" for other institutions incorporates in-person, online, and hybrid learning options for students. Where these options exist, schools have either given each department the autonomy and discretion to determine what learning option they will use or retained this decision at the administrative level.

Another consideration when allowing students the option of online instruction is ensuring compliance with federal statues like the Family Educational Rights and Privacy Act ("FERPA") and the Children's Online Privacy Protection Act ("COPPA"). FERPA, *inter alia*, requires consent to disclose any personal identifiable information included in a student's education record, subject to limited exceptions. *Protecting Student Privacy While Using Online Educational Services: Requirements and Best Practices*, a resource published by the United States Department of Education, continues to provide important guidance on this subject. Additionally, COPPA imposes obligations on websites and online services to protect the privacy of and encourage online safety for children under 13. Although COPPA does not directly apply to educational institutions, schools that rely on online learning systems for instruction may be required to provide consent for their students to use the services in lieu of parental consent.

As a result of the COVID-19 pandemic, institutions were forced to adapt to a new era that encourages the use of technology in the classroom. More than two years later, society is still learning how to legally maneuver through online learning and video conferencing systems while encouraging student participation and a sense of community. Institutions implementing any form of online learning should ensure compliance with federal, state, and local laws in order to protect their students and the students' personal information. --- Kelsie A. Wiltse

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Biden Administration Expands Title IX Protections—but Sidesteps Trans Athlete Question

"The regulations will now enter a 60-day public comment period and could still be revised before becoming final."

Why this is important: The new Title IX proposed regulations, which were released last month, expand the definition of discrimination based on sex to include sexual orientation, gender identity, and sex characteristics. This expanded definition protects transgender students participating in school programs and activities; however, the United States Department of Education has stated that a separate rulemaking process will take place with the purpose of determining how Title IX applies to athletics, and whether transgender athletes will be eligible to participate in the sports team consistent with their gender identity.

The issue surrounding transgender athletes has been at the center of political discussion and controversy for quite some time now, and states have implemented their own laws and policies to address the topic. Just this year, West Virginia Governor Jim Justice signed into law HB 3293, which provides that athletes who were assigned male at birth are prohibited from participating in girls' and women's sports in the K-12 and higher education settings. North Carolina likewise determines eligibility by a student's birth certificate, but allows transgender athletes to submit a request form to the North Carolina High School Athletic Association, along with other required documentation, to affirm the student's gender. Virginia's High School League currently has a similar review process, where specific documentation must be submitted before a transgender student is granted eligibility to participate on the team that aligns with their gender identity. By comparison, Pennsylvania's Athletic Association vaguely states that individual principals may decide when a student's gender "is questioned or uncertain."

We are not yet certain how the Department will choose to apply Title IX in this context, but institutions should keep in mind that as a federal law, Title IX will preempt current state laws and policies. --- Megan W. Mullins

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Supreme Court Sides with Praying Football Coach in First Amendment Case

"In a 6-3 ruling on ideological lines, the justices held that the coach had a constitutional right to pray after his team's games."

Why this is important: On June 27, 2022, the Supreme Court of the United States decided *Kennedy v. Bremerton School District*, a first amendment case between a former public high school football coach ("Mr. Kennedy") and the school district ("District") in which he was employed. Mr. Kennedy had been terminated for engaging in prayer along the sidelines after football games. Mr. Kennedy then sued the District for constitutional violations of his rights to free speech and free exercise of religion. Both the district court and the United States Court of Appeals for the Ninth Circuit ruled against Mr. Kennedy. The Supreme Court granted certiorari and reversed the decision of the lower courts.

The District's primary argument was that "Mr. Kennedy's right to religious exercise and free speech must yield to the District's interest in avoid[ing] an Establishment Clause violation." However, the Supreme Court rejected this argument and expressly held that "enduring others' speech is 'part of learning how to live in a pluralistic society.'" In rejecting the District's argument, the Supreme Court opposed use of the *Lemon* test and held "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" with only "some exceptions" to this general rule.

With regard to Mr. Kennedy's free speech claim, the Supreme Court relied on *Pickering*, which involves a two-step inquiry into the following: (1) the nature of the speech at issue; and (2) an attempt to engage in a "delicate balancing of the competing interests surrounding the speech and its consequences." Through this analysis, the Supreme Court held that the speech in question was private speech and Mr. Kennedy "was not engaged in speech 'ordinarily within the scope' of his duties as a coach."

In addition, *Kennedy* implicitly rejects other well-established precedent like the *Lee* and *Santa Fe* cases, which presume the likelihood of coercion without direct evidence because of the nature of student-teacher relationships. Critics believe that *Kennedy* "significantly erodes the separation of church and state in public schools." To the afore-referenced point, in her dissent, Justice Sotomayor states that the "[Supreme Court] consistently has recognized that school officials leading prayer is constitutionally impermissible." This decision has the potential to inflate instructors' freedom to exercise their religion over the interests or constitutional rights of their students.

Kennedy has sparked a lot of debate on both sides of the argument. As demonstrated by *Kennedy*, institutions should be mindful of the manner in which free speech protections have been extended to religious practices under the First Amendment. Where questions or concerns related to religious speech arise, schools should consult with their legal counsel. Further, at institutions where employees exercise their religious practices while at work, cultural sensitivity and/or inclusivity training may be needed, in addition to encouraging individuals to report incidents of religious discrimination and religious coercion. --- Kelsie A. Wiltse

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New Virginia Law Lets Local, Campus Police Use Facial Recognition Technology. How Can They Use It?

"There are 14 circumstances in which state, local and campus police will be allowed to use the technology."

Why this is important: In Virginia, campuses now have access to a new tool to assist them in conducting investigations. On July 1, 2022, amendments to two Virginia statutes took effect that now permit local and campus police to use facial recognition technology without the need for a warrant. This tool was previously only available to the Virginia State Police. Pursuant to the new statute, campus police may use facial recognition technology to:

- Help identify an individual where there is a reasonable suspicion the individual has committed a crime;
- Help identify a crime victim, including a victim of online sexual abuse material;
- Help identify a person who may be a missing person or witness to criminal activity;
- Help identify a victim of human trafficking or an individual involved in the trafficking of humans, weapons, drugs, or wildlife;
- Help identify an online recruiter of criminal activity, including but not limited to human, weapon, drug, and wildlife trafficking;
- Help a person who is suffering from a mental or physical disability impairing his ability to communicate and be understood;
- Help identify a deceased person;
- Help identify a person who is incapacitated or otherwise unable to identify himself;
- Help identify a person who is reasonably believed to be a danger to himself or others;
- Help identify an individual lawfully detained;

- Help mitigate an imminent threat to public safety, a significant threat to life, or a threat to national security, including acts of terrorism;
- Ensure officer safety as part of the vetting of undercover law enforcement;
- Determine whether an individual may have unlawfully obtained one or more state driver's licenses, financial instruments, or other official forms of identification using information that is fictitious or associated with a victim of identity theft; and
- Help identify a person who an officer reasonably believes is concealing his true identity and about whom the officer has a reasonable suspicion has committed a crime other than concealing his identity.

While the technology can be used as a "lead generator," it cannot be used in order to establish probable cause as a basis for a search warrant. The statute also contains escalating criminal penalties for misuse of this technology.

Despite these safeguards, privacy concerns remain. One of those concerns is misidentification. While the statute requires that the technology used be 98 percent accurate as determined by the National Institute of Standards and Technology, the technology is not infallible. The accuracy of the facial recognition technology is usually tested in a controlled environment and not in the real world. Privacy advocates are concerned that use of this technology in the real world where variables are not controlled will disproportionally impact individuals with darker skin. The use of this technology by local and campus police will have to be studied to determine its overall effectiveness. Critics are also concerned that the use of this technology without a warrant would constitute a violation of an individual's Fourth Amendment rights insofar as individuals did not consent to have their image used by this technology just because they posted a picture to social media or walked past a CCTV camera. Only time and anticipated court challenges will determine if access to this new investigatory tool will continue to be permitted. --- Alexander L. Turner

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US Backs Student Antitrust Suit Over Elite College Financial Aid

"The lawsuit filed by the students in January alleges that 16 elite colleges, including Columbia University, the University of Chicago and Duke University, agreed on a calculation for how much a student's family must contribute before they will award financial aid -- an agreement that has raised the price that students pay to attend college."

Why this is important: Although rare that universities find themselves enmeshed in antitrust litigation, the United States Department of Justice ("DOJ") has underscored related concerns in its recent filing highlighted by this article. The Sherman Act, 15 U.S.C. § 1, prohibits contracts that unreasonably restrain trade. Notwithstanding, some agreements between postsecondary institutions that admit students on a need-blind basis – without regard to the financial circumstances of students or their families – are exempt from antitrust laws under what is known at the "568 Exemption." In a recent antitrust lawsuit filed against 16 colleges, the DOJ has clarified that the 568 Exemption does not apply unless each of the schools involved utilizes a need-blind admission standard for all students.

In relevant part, where all students are admitted to institutions of higher education on a need-blind basis, the 568 Exemption allows schools to agree on common principles of analysis for determining need, provided the independent professional judgment of financial aid officers offering need-based packages to applicants is not otherwise restricted. In this manner, the 568 Exemption still allows for competition among schools to reduce the prices students pay and to make college more affordable, according to the DOJ. At issue in the underlying litigation is concern that the schools' "consensus methodology" for calculating applicants' expected family contribution for need-based financial aid awards effectively eliminated competition between the schools in this area.

In addition, the plaintiffs have argued that not all schools operated using a need-blind standard and that the offending schools were aware of this fact. On this point, the DOJ has cautioned that schools' lack of actual knowledge regarding other institutions' need-blind admissions policies is irrelevant in defending against a Sherman Act violation. An agreement to price-fix is all that is needed to establish violation of the Sherman Act, according to the DOJ. Further, non-profit status does not shield schools from compliance with antitrust laws.

As highlighted by this article and the underlying litigation, schools should be wary of methodology agreements that are used to calculate need-based financial aid offers. The protections afforded by the 568 Exemption are limited to agreements on common principles of analysis in determining need and only among institutions that admit all students on a need-blind basis. --- Erin Jones Adams

A New Student Loan Company is Now Taking Over the Accounts of Public Servants Seeking Debt Cancellation

"This also comes as borrowers have 4 months left to apply for extended student-loan relief."

Why this is important: Over the past several months, numerous student loan servicers have announced that they will cease servicing at the end of 2022, including loans serviced by FedLoan. Student loans serviced by FedLoan will be transferred to MOHELA between July and December 2022. These changes will affect those borrowers who have signed up for the Public Service Loan Forgiveness ("PSLF") program. According to a recent article, there are three main items that borrowers enrolled in PSLF need to know about the transfer. First, all borrowers will receive notice of a transfer at least 15 days before any transfer occurs. Second, anyone qualifying for loan forgiveness between July and December will not have their loan transferred as the discharge will occur. Third, all applications for PSLF completed after May 1, 2022, will be processed by MOHELA and not FedLoan. "There's a lot of uncertainty surrounding what's in store for student-loan borrowers in the coming months, but with millions of account transfers, potential student-loan relief, and resumption of payments," borrowers who will have their loans transferred should remain vigilant about the terms of their account and its PSLF status in order to immediately discuss any issues with the new servicer. --- Angela L. Beblo