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Welcome

Welcome to our fourth edition of *The Academic Advisor* - our e-newsletter focused on education law insights. As schools settle into the pace of fall semester/terms, we understand that you may be experiencing a variety of familiar but nonetheless difficult challenges – investigations, student conduct hearings, personnel reviews, data security questions, policy implementation, compliance audits, board inquiries, contract negotiations, campus safety initiatives, and myriad other operational issues.

Through this publication, we strive to provide you with the most up-to-date information on trending topics for navigating these challenges. Through our services, we aim to support our education clients' legal needs with creative solutions and full-service capabilities. If there are specific topics that you would like us to cover in *The Academic Advisor* or if we can support your legal needs, please [email us](#).

Our fourth edition features articles discussing the impact of recent case law on Title IX protections for LGBTQ students, USDA exemptions for religious schools, First Amendment questions regarding use of preferred pronouns, student loan forgiveness and federal student loan aid policy, Greek life and the dangers of disaffiliated chapters, and the latest data breaches and ransomware attacks impacting public school systems and colleges.

In addition, we are pleased to [announce](#) that 60 of the Firm's attorneys – many of whom service our education clients' needs - were recently selected by their peers for inclusion on the 2023 Best Lawyers list, 10 were selected as Best Lawyers "Lawyers of the Year," and nine others were selected as Best Lawyers "Ones to Watch." Recognition by Best Lawyers is designed to capture the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area.

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

[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*

ETSU Removes References that Title IX Law Protects LGBTQ Students at Lawmaker's Behest

"It points to a July federal court ruling that stopped Tennessee and several other states from implementing any actions related to Title IX and LGBTQ students."

Why this is important: Following a recent court ruling from the Eastern District of Tennessee, state representative John Ragan claims to have sent all (around a dozen) Tennessee state public universities an advisory letter directing them to remove any reference or implication that LGBTQ students are protected under Title IX. Colleges that received his letter were given a September 2 deadline to affirm that their policies had been altered to remove LGBTQ protections; and to date, at least a couple universities have acted in response to this directive, including Eastern Tennessee State University, which removed a reference to "sexual orientation" on its Title IX website, but has otherwise maintained separate non-discrimination policies.

Prior to the July ruling, colleges and universities were acting on a U.S. Department of Education guidance letter from 2021, which advised that Title IX does indeed include protections for LGBTQ students. According to Ragan, however, colleges and universities that maintain a Title IX policy that provides protections to LGBTQI+ students could now potentially violate the law in light of the District Court ruling, which enjoined the U.S. Department of Education from implementing the letter's guidance.

This is particularly important because it is unclear whether colleges will be acting in accordance with the law if they choose to keep LGBTQ protections in their Title IX policies or if they choose to comply with Ragan's advisory letter, and other states may soon be affected in a similar way. In any case, colleges and universities are nonetheless free to maintain their own campus-wide policies outside of Title IX that prohibit discrimination on the basis of sexual orientation and gender identity. --- [Megan W. Mullins](#)

USDA Says Religious Schools will be Granted Automatic Title IX Exemption

"Religious schools will continue to receive federal meal funding even if they do not adhere to new Title IX requirements, according to USDA guidance."

Why this is important: In May, the United States Department of Agriculture ("USDA") expanded its definition of prohibited sex-based discrimination to include discrimination based on sexual orientation and gender identity thereby placing religious schools' ability to receive USDA funding to subsidize school lunch programs for their students at risk. Last week, the USDA clarified that religious schools are automatically exempt from compliance if there is a conflict between Title IX of the Education Amendments of 1972 and a school's governing religious tenets without the need to submit a written request to USDA to claim an exemption. The guidance goes on to prescribe how an educational institution may request and obtain USDA assurance of religious exemption.

This administrative guidance is a strong indicator that the Biden administration will side with an institution's First Amendment right to exercise religious freedoms when such exercise conflicts with regulations that prohibit discrimination. This is consistent with recent trends in Supreme Court rulings that have provided greater protections for religious organizations. For example, in June, the Court issued a unanimous decision in *Fulton v. City of Philadelphia* that a Catholic social services agency could refuse to assist in adoptions by same-sex couples although violative of the city's nondiscrimination law. --- [Lori D. Thompson](#)

Preferred Pronouns Collide with the First Amendment at SUU

"Richard Bugg, a Southern Utah University tenured professor, is suing the university over a non-binary student's preferred they/them pronouns, claiming it infringes on his political beliefs and his First Amendment right to free speech."

Why this is important: A Southern Utah University professor has brought a lawsuit against his employer after being sanctioned three times for sexual harassment due to his refusal to address a student by their preferred non-binary pronouns -- "they/them." The sanctions came after two initial Title IX complaints stemming from this issue. The professor, who filed the lawsuit in the Utah District Court, alleges that by not agreeing to use the student's preferred pronouns, the professor "was expressing a legitimate political position on a matter of public concern and engaging in his First Amendment right against compelled expression." Among other causes of action, the lawsuit seeks declaratory relief that the professor's conduct did not violate Title IX.

While this is not the first lawsuit arising from a professor's refusal to use a student's preferred pronouns, and likely will not be the last, whether Title IX will be implicated in future cases of gender identity is unclear given the current state of the Title IX law and at least one ruling from the Eastern District of Tennessee, which enjoins the Department of Education from relying on its 2021 guidance letter that expressly included gender identity and sexual orientation within the ambit of Title IX protections. It will be particularly interesting to see how this lawsuit and others like it unfold in court, as the public comment period for the new proposed Title IX regulations ended Monday, and as of Sunday, the Department of Education had received more than 184,000 comments. --- [Megan W. Mullins](#)

Yeshiva University Seeks Supreme Court Protection for Its Religious Identity

"Yeshiva University has been fighting in New York State courts for over a year to defend its right to conduct its internal affairs in accordance with its religious beliefs."

Why this is important: On September 9, Supreme Court Justice Sonia Sotomayor entered an emergency order temporarily staying a New York State court's directive that Yeshiva University immediately recognize the YU Pride Alliance, a student group supporting LGBTQ students on campus. Yeshiva, an Orthodox Jewish university, asserted that recognizing the student group, which would empower the group to hold meetings in campus facilities, access university funding, and promote its events on campus, would conflict with the University's mission and core Torah values thus violating its First Amendment rights. The lower court held that Yeshiva did not qualify for the Religious Corporation exemption to New York City's Human Rights Law that prohibited discrimination because Yeshiva was chartered for educational purposes rather than religious.

This case is important because it presents another opportunity for the Supreme Court to provide guidance on the extent to which organizations and individuals holding religious beliefs can refuse to recognize or accommodate people espousing views in direct conflict with their core religious values. Decisions of the Supreme Court since 2020 have shown a trend towards expanding religious freedoms and limiting government's ability to mandate actions that conflict with religious tenets. The Court's ruling in this case is also likely to clarify the extent to which a university's charter is determinative of whether it is entitled to a religious exemption from laws and regulations that would otherwise govern its internal affairs. --- [Lori D. Thompson](#)

Will Biden's Debt Cancellation Jump-Start Talks to Rewrite Federal Student Aid Policy?

"A comprehensive rework of the Higher Education Act hasn't taken place since 2008."

Why this is important: In March 2020, the Office of Federal Student Aid announced it would provide borrowers with relief on federal student loans, which included suspension of loan payments, suspended collections on defaulted loans, and a zero percent interest rate. As the United States is settling into its "new normal" after the COVID-19 pandemic, discussions regarding student loan repayment has been hotly debated. On August 24, 2022, the U.S. Department of Education announced a final extension of the pause on student loan repayment through December 31, 2022. In a press release, President Biden stated that "pandemic-related relief should be phased out responsibly so that people do not suffer unnecessary financial harm."

As a part of this transition, the Biden administration announced that "the Department will provide targeted student debt cancellation to borrowers..." An eligible individual is a borrower with annual income during the pandemic under \$125,000 (for individuals) or under \$250,000 (for married couples or head of

households). Moreover, individuals that received a Pell Grant in college will be eligible for up to \$20,000 in debt cancellation. Individuals that did not receive a Pell Grant will only be eligible for up to \$10,000 in debt cancellation.

On August 23, 2022, the Office of the General Counsel for the Department issued a memorandum detailing its' legal authority for this targeted debt cancellation, citing to the Higher Education Relief Opportunities for Students ("HEROES") Act of 2003. The Department also announced that it will be "proposing a rule to create a new income-driven repayment plan that will substantially reduce future monthly payments for lower- and middle-income borrowers."

Congress has not considered comprehensive policy reform for postsecondary education since the Higher Education Act of 2003. Discussions surrounding the issues of the student loan borrowing/repayment system are hotly debated and highly partisan. The federal student loan borrowing and repayment system has almost tripled in the past decade causing bipartisan support for policy reform. On one hand, the Democratic Party has proposed policy reform regarding accountability to institutions for mitigating operating costs, increasing the size of the federal Pell Grant, simplified income-based repayment, and debt forgiveness for students whose colleges closed or misled them. On the other hand, the Republican Party has proposed the following reform options: limiting the number of loan repayment plans offered by the Department, ceasing the Public Service Loan Forgiveness program, caps on graduate borrowing programs, interest capitalization, and the allowance of Pell Grants to apply toward short-term academic programs.

Key actors in policymaking for institutions of higher education are calling for the federal government to incentivize states to channel more money to public colleges, effectively "reversing the privatization trend in higher education." Specifically, these policymakers cite the Leveraging Educational Assistance Partnership ("LEAP") initiative that funneled federal grants for need-based aid that states were required to match for guidance on potential steps moving toward policy reform. However, a major criticism of this proposed solution is the construction and implementation of a new federal-state partnership, which may be opted-out of by some conservative states.

President Biden's announcement regarding student loan repayment and subsequent student loan forgiveness highlighted major weaknesses in the federal student loan system. Institutions should anticipate a new proposed rule from the Department discussing the above-referenced changes. In addition, institutions should monitor the current status of the Department's guidance interpreting the new proposed rule to assist in providing full disclosure to the extent that students request federal student loan or other financial counseling. --- [Kelsie A. Wiltse](#)

Whitworth University Urges Patience After Data Breach, Reported Ransomware Attack: 'This Process does Take Time'

"Describing the incident as 'a very sophisticated security issue involving our network systems,' Whitworth officials said in a statement to the campus community that they first became aware July 29 that the university's information systems had been infiltrated by 'outside actors.'"

Why this is important: Recently, Whitworth University in Washington State suffered a debilitating ransomware attack that crippled the University's network. It is currently unknown whether student, alumni, and/or employees' private information was stolen. Because there is not a universal data security law in the United States, each educational institution should be familiar with the data security laws of the states where they provide services. The law in Washington State requires entities that collect and store personally identifiable information ("PII") to notify individuals whose information may have been breached within 30 days of the breach. If more than 500 Washington State residents must be notified of the breach of their PII, then the Washington State Attorney General's Office must also be notified. There is an exception to the notification requirements "if the breach of the security of the system is not reasonably likely to subject consumers to a risk of harm." This is determined on a case-by-case basis. The U.S. Department of Education, through the Privacy Technical Assistance Center, provides [information and tools](#) to assist educational institutions with protecting their data against a cyberattack, including a [Data Breach Response Checklist](#) that an educational institution can use to help prevent and respond to a data breach.

Lockbit took responsibility for the attack on Whitworth University. Lockbit ransomware has become the "the most prominent threat in several sectors" in 2022 because, in addition to stealing information, LockBit uses online publicity to extort a ransom from the victim in order to unlock the victim's data. With LockBit being responsible for a third of all ransomware attacks, this is a known threat that educational institutions' IT departments and data privacy professionals should be aware of and working to

counteract. Failure to put reasonable protections in place to prevent a known data security threat can result in liability for responsible IT department members and school administrators. --- [Alexander L. Turner](#)

Greek Life Chapters are Rejecting Their Colleges. Here's What It Means.

"These disconnected chapters present major administrative headaches as officials attempt to regulate organizations that help underpin campus culture and attract alumni interest and donors."

Why this is important: On-campus student organizations are a cornerstone of the university experience. For most colleges and universities, fraternity and sorority life is an intrinsic part of student involvement and campus culture. Generally, on-campus Greek-lettered organizations are subject to the rules and procedures set forth for other student organizations including, inter alia, requirements regarding recruitment, grade point average, community service hours, programming, and member training.

Recently, the University of Southern California ("USC") implemented policies focusing on the health and safety of students while at social gatherings hosted by University fraternities. As a result of these newly implemented policies, eight on-campus fraternity chapters disaffiliated from the University. An undergraduate chapter "disaffiliates" when it chooses to terminate its association with the university, which includes termination of formal recruitment through the institution's process, resources, and training provided to it by the university. Disaffiliation has commonly occurred after the implementation of restrictions on new member recruitment and on/off-campus parties.

Disaffiliated chapters are no longer recognized by the university and thus are unable to receive certain benefits reserved for student organizations, which includes privileges such as participation in professional development opportunities and use of the institution's logo or brand while advertising. Additionally, when in violation of the institution's policies, members of a disaffiliated organization are no longer afforded the protection of "group discipline", but are subject to punishment as an individual student, which may be more punitive than the former.

Moreover, institutions generally have the authority to place an affiliated chapter on "cease and desist" for school or chapter-specific social events when facing allegations of misconduct. Institutions play an important role in administrative oversight for on/off-campus activities. However, disaffiliated chapters are no longer subject to these rules and thus must implement and enforce their own safety protocols, which is particularly troublesome as a study by the Association of American Universities found that women commonly reported instances of sexual abuse occurring at fraternity houses.

Disaffiliating from an institution subsequent to the implementation of new policies focusing on students' health and safety applicable to recruitment and chapter-sponsored social gatherings seems to be an emerging new trend. While institutions may dissuade students from engaging with disaffiliated organizations, these chapters pose a heightened safety risk to campus culture and student involvement.

To the extent that discussions of disaffiliation are occurring on your campus, it is important for institutions to foster open dialogue with representatives of a chapter's national organization. Institutions also should consider implementing initial training before the commencement of the formal recruitment process in order to potentially eliminate individuals that do not uphold the values set forth by an institution's office for student involvement and fraternity and sorority life. --- [Kelsie A. Wiltse](#)

A Cyberattack Hits the Los Angeles School District, Raising Alarm Across the Country

"The attack on the Los Angeles Unified School District sounded alarms across the country, from urgent talks with the White House and the National Security Council after the first signs of ransomware were discovered to mandated password changes for 540,000 students and 70,000 district employees."

Why this is important: Public school districts are now becoming targets of ransomware attacks. On September 3, 2022, the Los Angeles Unified School District ("LAUSD"), the largest in the country, was the victim of the latest ransomware attack against the nation's public schools. The size of the attack on the LAUSD resulted in urgent discussions with the White House and National Security Council. This is

"consistent with the Biden administration's efforts to provide maximum assistance to critical industries affected by such breaches." It is reported that LAUSD followed the federal government's recommendations and it has not paid the ransom. In response to the attack, approximately 540,000 students and 70,000 district employees had to change their system passwords. Cyberattacks on school districts have increased since the beginning of the pandemic due to schools' increased reliance on remote learning and other technology. This year alone, 26 school districts and 24 colleges have suffered ransomware attacks (see our discussion of the ransomware attack on Whitworth University above). Thirty-one of these schools had data breaches resulting in student and employees' personal identifying information being released online. With school starting, the attacks are increasing at an alarming pace, with eight school districts having been hit since August 1, 2022. With the cost of ransomware attacks against large school districts being as high as \$18,000,000, smaller school districts who are less able to afford the cost of such attack must work closely with their IT and data security teams to fend off these attacks on their computer networks. --- [Alexander L. Turner](#)



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