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August 16, 2022

Welcome

Welcome to our third edition of *The Academic Advisor* - our e-newsletter focused on education law insights. As fall semester begins, your schools and campuses are no doubt bustling with orientation, move-in, training, and student activities. We wish you a successful start to the academic year, and hope that this publication can provide a source of relevant and useful information as you navigate the ongoing changes in education law.

Our third edition features articles discussing the College Athlete Bill of Rights reintroduced in Congress; possible expansion of the Clery Act to require disclosures of harmful accidents; new guidance from the U.S. Department of Education to support students with disabilities in student discipline processes; college affirmative action cases under review by the U.S. Supreme Court; Title IX guidance blocked by a recent federal court decision; a new FBI alert related to stolen academic credentials; and state law challenges to schools' use of facial recognition software. As always, please let us know if there are special topics you would like us to review.

In addition, we are very pleased to announce that partner [Eric E. Kinder](#) was selected as the 2022 recipient of the DRI Albert H. Parnell Outstanding Program Chair Award. DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. Eric is being recognized for his leadership role in development of the 45th Annual Labor & Employment Law Seminar hosted by DRI.

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.

Thank you.

[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*

Five Senators to Reintroduce Sweeping College Athlete Bill of Rights in Congress

"The reintroduction of the College Athlete Bill of Rights comes at a time of seismic change within college athletics, as name, image and likeness (NIL) enters its second year."

Why this is important: Senator Cory Booker and four other senators have recently reintroduced the "College Athlete Bill of Rights", which would further expand student athletes' rights to receive compensation for the use of their name, image and likeness ("NIL"). The bill is similar – but not identical – to unsuccessful legislation introduced in December 2020. The current legislative effort does not include the controversial revenue sharing provisions of the prior bill, which would have required schools to split athletic revenue with student athletes. However, this bill seeks to establish new reporting requirements for schools in compliance with Title IX requirements. The bill also authorizes any student athlete to institute a federal lawsuit if a school violates the act.

This version also includes a new section, titled "Right to Title IX Equity," that would establish a series of annual requirements for schools, including that they evaluate their compliance with the gender-equity law in athletics, "using all relevant measures," and publish this evaluation on the school's website.

The NCAA would be required to "permanently ban" from college sports anyone who "knowingly provides misleading information or causes omissions for the purpose of affecting" the required Title IX evaluation.

The new bill maintains a provision from the prior bill that would prevent a school from eliminating a sports team "unless all other options for reducing the expenses of the athletic program, including reducing coach salaries and administrative and facility expenses, are not feasible."

Other provisions of the bill include:

- Creating a fund (a medical trust) to help student athletes who are injured playing their sport.
- Laying out NIL endorsement parameters, including group licensing. The provisions would allow student athletes to enter into endorsement deals with a brand that conflicts with the school's institutional endorsement arrangements.
- Establishing a requirement that anyone who receives an athletic scholarship for an academic year generally be provided with a scholarship at that school until they receive an undergraduate degree from the school.
- Codifying a student athlete's right to transfer an unlimited amount of times with no requirement to sit out a year.

The bill creates a nine-member commission to ensure schools and conferences are complying with the law. The commission must include at least five former student athletes. The bill also requires schools to provide annual public reporting of their total revenues and expenditures, including compensation for athletic department personnel and booster donations as well as reporting on the number of hours athletes commit to athletic activities. --- [Kevin L. Carr](#)

Preventing Serious Accidents on Campus

"A new bill introduced in the House would require colleges to submit information to the federal government on serious injuries and deaths that occur from accidents."

Why this is important: As National Campus Safety Awareness Month (September) and the deadline for colleges and universities to publish their annual security reports draw near, a new bipartisan bill introduced in the House in July could expand schools' obligations under the Clery Act to require disclosure of campus accidents resulting in "serious harm or death," in addition to regular reporting of Clery Act crime and fire statistics.

The Clery Act is a federal consumer protection law that requires institutions of higher education to disclose campus crime and fire data, campus safety policies and procedures, and information about crime prevention and awareness programs to employees, students, and the public on an annual basis. By October 1st of each year, colleges and universities that receive federal financial assistance must publish their annual security report ("ASR") detailing campus crime statistics for the preceding three calendar years and efforts undertaken to enhance campus safety. Apart from additional reporting requirements

related to campus fires, the law does not presently require such data collection and disclosure for harmful accidents that fall outside covered Clery Act crimes.

As explained in this article, the College Operational Reporting of Emergencies Involving Teens and Young Adults Safety ("COREY") Act, modeled after a Connecticut law, would change that. Named for Corey Hausman, a freshman at the University of Colorado who died at the beginning of his freshman year following a skateboarding accident, the COREY Act would amend the Clery Act by requiring colleges to disclose instances of "serious harm or death" in their ASRs. If the COREY Act were to become law, examples of covered accidents requiring disclosure could include slip and falls, motor vehicle accidents, and instances of drug or alcohol overdose. Advocates contend this data is needed to show campuses where accident patterns exist for related prevention measures, to assist universities in preparing for medical emergencies, and to help manage and minimize preventable injuries.

Were this law to take effect, post-secondary institutions would need to consider the practical realities of its implementation such as how this could expand campus security authority designations; the training that would be needed to facilitate and encourage reporting; and how campuses would ensure accurate and complete collection of "accident" data when such incidents may be less likely to be reported to campus officials. In this regard, examining strategies employed by Connecticut colleges, where a similar law already exists, could be a good starting point. --- [Erin Jones Adams](#)

New Guidance Helps Schools Support Students with Disabilities and Avoid Discriminatory Use of Discipline

"The new resources reflect the concern, particularly in light of the prevalence of student mental health issues associated with the pandemic, that some students with disabilities are not receiving the supports and services necessary to address their educational needs, including their disability-based behavior."

Why this is important: On July 19, 2022, the United States Department of Education ("DoE") issued new resources for public elementary and secondary schools aimed at eliminating the "harsh and exclusionary disciplinary action" faced by students with disabilities, according to U.S. Secretary of Education Miguel Cardona. In particular, the guidance focuses on how Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits disability discrimination in programs or activities that receive federal financial assistance from the DoE, applies to student discipline when the behavior of a child with a disability impedes learning or violates school conduct codes. By implementing the positive behavioral interventions, supports, and other strategies explained in the guidance to address disability-based behavior, the DoE contends that schools do not have to choose between safety and legal compliance.

Student discipline, including investigations for alleged violations of school rules, use of surveillance technologies, conducting searches, making referrals to law enforcement, and carrying out threat or risk assessment of students with disabilities, is among schools' activities covered by Section 504. To avoid discriminatory practices, the guidance at hand explains: (1) when schools must identify and evaluate students with behavioral needs to determine if they are a student with a disability; (2) the requirements for evaluations and placement decisions; (3) how schools identify needed behavioral supports; (4) schools' responsibility to meet the needs of students with disabilities in an education setting with students without disabilities; and (5) the relevant procedural safeguards for providing students with a "free appropriate public education" required by Section 504.

Where individualized services, including behavioral supports, are required to meet students' needs in response to challenging disability-based behavior, examples highlighted by the DoE guidance include: regular group or individual counseling sessions, school social worker services, school-based mental health services, physical activities, and opportunities for students to leave class for behavioral coaching to support "cool down" and "self-regulation." Further, where students' disability-based behavior results in harassment of other students, the DoE guidance explains that more intensive school-based mental health counseling and a schedule adjustment to limit interaction with classmates subjected to harassment, as well as supportive measures and individualized services for students experiencing harassment, may be an appropriate remedy.

As the DoE guidance demonstrates, the process for managing student conduct arising from disability-based behavior requires an informed and individualized process by students' Section 504 teams. In appropriate circumstances, information obtained through a behavioral assessment can be used to develop and implement a behavioral intervention plan that is incorporated into a Section 504 plan. Disability support coordinators and other school officials charged with Section 504 oversight should carefully review the DoE guidance, which includes an explanatory memorandum, fact sheet, Q & A, guide

for stakeholders, and letter from Secretary Cardona, to ensure their schools' processes comply with the outlined expectations. --- [Erin Jones Adams](#)

Amazon Can't Pause Battle with Student Over Facial Recognition

"In a ruling, U.S. District Court Judge John Chun in Seattle said the student who sued the company can proceed with discovery, referring to the process of obtaining evidence from Amazon."

Why this is important: Amazon has been sued in federal court in Seattle, Washington in a putative class action related to an alleged violation of Illinois' strict Personal Information Protection Act ("PIPA"). Specifically, the representative plaintiff, an Illinois resident, alleges that Amazon violated PIPA when it allowed the online learning company Proctor U to use Rekognition facial recognition technology to verify students' identities. Rekognition is a product developed and sold by Amazon Web Services ("AWS"), and, pursuant to the AWS website, it offers pre-trained and customizable computer vision capabilities to extract information and insights from your images and videos. The plaintiff alleges that while she was a college student in Chicago, the use of this technology was required to take exams, and that she and fellow students did not give Proctor U authorization to collect and store their biometrical data. Amazon has moved to dismiss the case because, as the back-end service provider, it did not collect or possess the plaintiff's data. Amazon also seeks dismissal because it argues that PIPA does not apply to business activities engaged in outside of Illinois, and that the plaintiff has not alleged Amazon engaged in any conduct in Illinois. Notwithstanding, the District Court Judge has permitted discovery to progress pending his decision on Amazon's Motion to Dismiss because he "is not convinced that [Amazon's] motion to dismiss will prevail." The Court noted that other similar suits regarding the collection of biometrical data had been brought in this Court, and that arguments similar to Amazon's had been rejected.

Amazon is not the only organization being sued for the alleged improper use of biometrical data related to online monitoring of exams. Proctor U has also been sued in a separate action in Illinois for violations of the Illinois Biometric Information Privacy Act ("BIPA") related to unauthorized collection and storage of students' biometrical data. That case is related to online exams, including the Test of English as a Foreign Language, Graduate Record Examination, and the Law School Admission Test. Educational institutions, like the Illinois Institute of Technology and University of Illinois at Urbana-Champaign, also have been named in suits related to violations of BIPA.

Educational institutions, and the companies that provide them with educational services, need to be sure that they comply not only with FERPA, and properly protect students' educational records, but also with state privacy laws. Because the U.S. does not have a universal privacy law, educational organizations providing educational services must examine the privacy laws of each state in which they operate, because there is much variation between the states. This is especially true as remote learning continues to grow. While the educational services may be provided in a state with weaker privacy laws, the students being serviced may be located in states like California and Illinois that have strong privacy laws. The result is actions that are perfectly acceptable in one state may result in litigation in another because of where the student resides. From a practical standpoint, when developing institutional privacy policies that apply to all students, it would prudent for colleges to consider the most restrictive, consumer-friendly states' laws as their starting point. --- [Alexander L. Turner](#)

Georgetown Leads Catholic Colleges and Universities to File Supreme Court Brief Supporting Affirmative Action

"The two cases, which the Supreme Court will hear this fall, challenge the admissions policies and procedures at Harvard University and the University of North Carolina and call for the court to overturn the right of higher education institutions to consider race as a factor in college admissions."

Why this is important: On August 1, 2022, 57 Catholic universities, led by Georgetown University, filed an amicus brief with the U.S. Supreme Court in favor of upholding its affirmative action precedent. The brief argues that ensuring the universities achieve a diverse student body is critical in upholding the educational and religious missions, and so is the right to consider race as a part of the admissions process. In addition, the brief contends that universities have discretion during the admissions process to consider race as a factor under the Free Speech Clause, as well as the Free Exercise Clause of the First Amendment due to the universities' religious mission. The amicus brief is of particular importance because it may help to sway the Supreme Court in two cases it will hear this fall, both of which challenge

the 40-year-old precedent. The cases, which concern whether the admissions processes at Harvard and the University of North Carolina at Chapel Hill are discriminatory based on their consideration of race as a factor, will likely have a significant impact on college admissions processes throughout the country. ---

[Megan W. Mullins](#)

Federal Judge Blocks Education Department's Title IX Guidance that Protects Transgender Students

"The preliminary injunction essentially ties the department's hands when it comes to protecting transgender students from discrimination in 20 states."

Why this is important: In June 2021, the Department of Education ("DoE") published several Title IX guidance documents responsive to an Executive Order issued by the Biden administration months earlier. The Executive Order, which came after the U.S. Supreme Court opinion in *Bostock v. Clayton County*, provided that federal laws prohibiting sex discrimination should be interpreted as prohibiting discrimination "on the basis of gender identity or sexual orientation." In response, 20 states led by the Tennessee Attorney General argued that the guidance poses a threat to schools that could lose federal funding due to the states' laws on the issue. Eastern District of Tennessee Judge Charles Atchley agreed, temporarily blocking the Title IX guidance on the basis that it directly conflicts with the states' ability to enforce their own laws regarding transgender athletes, as well as laws that restrict transgender students from using restrooms that correspond to their gender identity.

As it currently stands, until the DoE finalizes its Title IX rule, the temporary injunction prevents the DoE from being able to protect trans athletes and students in states with laws (or states that are in the process of passing laws) that prevent them from participating on sports teams or using bathrooms that correspond to their gender identity. Because the newly proposed Title IX regulations were only recently issued on June 23, 2022, it is unlikely that they will be finalized for at least several more months, or perhaps longer, extending the impact of the preliminary injunction. --- [Megan W. Mullins](#)

FBI Issues New Alert about Stolen Academic Credentials Found Online

"The agency says colleges and universities should take steps to detect anomalies on their networks and prevent future attacks."

Why this is important: Advances in technology increase the potential risk exposure for private and public educational institutions. In a recent alert, the Federal Bureau of Investigations has detailed a practice called "credential harvesting," where cybercriminals obtain login information through a number of targeted cyberattacks. These credentials are used for "brute-force credential stuffing," which allows cybercriminals to input the stolen information into other website login forms to gain access to user accounts. The FBI urges educational institutions to implement and maintain cybersecurity training, multifactor authentication, and other necessary measures to protect personal data of anyone affiliated with the institution. As these cyberattacks become increasingly more common, institutions should consider installation of a third-party security software to monitor, detect, and block potential threats to their networks. --- [Kelsie A. Wiltse](#)

U.S. Department of Education Receives 8,934 Complaints of Discrimination in Schools and Colleges

"17% are sex-based and 11% age-based complaints."

Why this is important: The Department of Education Office of Civil Rights ("OCR") just issued its annual report for fiscal year 2021. OCR received 8,934 complaints and resolved 8,238 complaints in FY 2021. Complaints of race or national origin discrimination comprised 24 percent (2,399) of all complaints received in the year, up from 19 percent in FY 2020. Complaints involving discrimination based on disability comprised 48 percent (4,870) of all complaints this year, up from 45 percent in FY 2020; sex discrimination complaints comprised 17 percent (1,705), down from 23 percent in FY 2020; and age

discrimination complaints comprised 11 percent (1,149), the majority of which were filed by a single complainant, up from three percent in fiscal year 2020.

Notably, in its report, OCR anticipates an increase in complaints for fiscal year 2022 of 28,000. --- [Kevin L. Carr](#)



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Responsible Attorney: Michael J. Basile, 800-967-8251