Robbins Schwartz

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Higher Education Happenings

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Freedom of Religion on Campus: Recent Supreme Court Decision Changes the Landscape for Public Institutions

By Frank B. Garrett III and Jared D. Michael

On June 27, 2022, the United States Supreme Court altered the ability of public employers to regulate religious expression in the workplace. The decision in *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022), upheld a high school football coach's right to on-field prayer immediately following the ending of football games. The Court held that this act of prayer was constitutional and could not be prohibited by the football coach's employer.

The plaintiff, Joe Kennedy, sued Bremerton School District when it suspended him and ultimately declined to rehire him following the 2015 school year. According to the Court, the District's decision was based on Kennedy's act of continuing to pray at the 50-yard line of the football stadium after the school's football games, after being told to stop this conduct.

Kennedy's practice of on-field praying following the conclusion of games had not been without some controversy. While Kennedy had initially begun his prayer alone, most of his players and eventually even the opposing teams' players joined the coach.

Upon learning of Kennedy's practice, the District immediately instructed Kennedy to cease his public prayer, as well as any locker-room prayers and other religious motivating speeches that Kennedy had been known to give. The District expressed concern that Kennedy's activities could be viewed as a religious endorsement by the District, in violation of the First

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Legislative Updates

By Emily P. Bothfeld, Frank B. Garrett III, Christopher R. Gorman, Christopher J. Moberg, and Kevin P. Noll

The first half of 2022 brought a multitude of new laws and amendments to existing laws that will significantly impact higher education institutions in Illinois in the coming months. Highlights of these major legislative developments follow below.

Public Act 102-0764 – Clarification on Exclusion to SURS 6% Limitation
Effective May 13, 2022

The Illinois Pension Code requires employers to pay the present value of the increase in benefits resulting from the portion of any salary increase in excess of 6% during an employee's final rate of earnings period. In June 2021, in the wake of the COVID-19 pandemic, the legislature enacted Public Act 102-0016, which created an exemption to the 6% limitation for overload work performed in an academic year following an academic year when the employer could not offer overload work because of an emergency declaration.

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Freedom of Religion on Campus

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Amendment's prohibition against state endorsement of particular religious points of view. The District was also concerned that students on the football team would feel coerced or compelled to join in the prayers.

Notwithstanding the District's directives, on three separate occasions, Kennedy continued to pray on the 50-yard line at the conclusion of football games. Kennedy also rejected the District's offer to permit Kennedy to pray privately, in a non-public setting, at the conclusion of games. Kennedy, through his attorney, stated he would accept nothing less than the right to pray publicly and demonstratively at the 50-yard line.

Thereafter, the District suspended and later declined to rehire Kennedy as its football coach. The District determined that Kennedy's actions had been in contravention of District policy and his duties as a football coach. Thereafter, Kennedy filed suit against the District, alleging that his First Amendment rights had been violated. The District Court and Court of Appeals ruled in favor of the District.

By a 6-3 majority, the Supreme Court reversed the decision of the Court of Appeals, stating that Kennedy should have been permitted to exercise his constitutional right to freedom of religion. In reaching its decision, the Court relied upon the two-part test set forth in *Pickering v. Board of Education* to address whether religious expression was permissible, even though it was conducted by a public employee in a public setting.

The *Pickering* test first involves an inquiry into the nature of the speech at issue. Where an employee is speaking pursuant to his "official duties," the First Amendment generally will not shield the employee from an employer's control and discipline—the rationale being that the employee is speaking as a conduit of the public entity. In contrast, when an employee is speaking "as a citizen addressing an issue of public concern," First Amendment rights may be implicated, and courts will then proceed to the second step of the *Pickering* test. At the second step, courts "should attempt to engage in a 'delicate balancing' of the competing interests surrounding the speech and its consequences." Courts must decide whether an employee's speech interest is outweighed by the employer's interest in promoting the efficiency of the public services it performs.

Here, the Court noted that even the District agreed that Kennedy was speaking on a matter of public concern. In finding that Kennedy was also "speaking" as a private citizen, the Court noted that at the time Kennedy conducted his on-field prayer, the game was over, and coaching staff were free to attend to other personal matters, including checking their phones and acknowledging friends and family in the stands. The Court also noted that the speech at issue—in this instance, a prayer—was not the sort of speech that ordinarily would fall within the scope of duties Kennedy undertook as a coach. The Court rejected the District's argument that Kennedy's role as a coach and role model meant he was still acting under his official coaching duties post-game, noting that public entities cannot exert extreme control over their employees simply by creating over-inclusive job descriptions.

Because Kennedy was acting as a "citizen addressing an issue of public concern," the District had the burden to show that its restrictions on Kennedy's speech served a "compelling interest and [were] narrowly tailored to that end."

On this point, the District argued that it had to suspend Kennedy from continuing to pray to avoid violating the Establishment Clause of the First Amendment. The Court dismissed the District's argument, stating that the Establishment Clause does not require the state "to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." The Court stated that a public school or other government entity is not required to censor private religious speech.

The Court also disagreed with the District's assertion that it had to suspend Kennedy to avoid students feeling compelled or coerced to join in the coach's prayer. While not expressly stating that a concern with avoiding student coercion and pressure to pray could be considered compelling government interest in some instances, the Court stated that in this case, the record was devoid of any evidence of coercion or pressure. Additionally, the Court opined that high school students were mature enough to understand that the school does not endorse, let alone coerce them, to participate in speech that it merely presents. Finally, the Court, in a relatively brief fashion, rebuffed the District's argument that any visible religious conduct by a teacher or coach, given their position of authority, be deemed impermissibly coercive on students. The Court declared that if this were true, "[n]ot only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school or for offering a midday prayer during a break before practice, a school would be required to do so." According to the Court's ruling, permitting private speech in a public setting is not the same as coercing others to participate.

As colleges and universities grapple with interpreting and acting in a manner not inconsistent with the Court's ruling, they would be wise to review existing policies and practices regarding employee religious speech or expression. As this case makes clear, it is much easier to regulate employee speech when an employee is speaking pursuant to their official duties, rather than in a more private capacity. Determining what constitutes "official duties" and private speech requires a fact-intensive inquiry. Institutions may consider revising their definition of "free-time" or supervisory responsibilities for certain employees. Additionally, institutions should be cautious in relying on a student pressure or coercion rationale or on concerns that the public may view the institution as endorsing religion, unless the institution can present concrete evidence supporting those concerns. We invite you to attend our August 3, 2022 webinar and September 22, 2022 Annual Conference for Higher Education Institutions, at which we will review this decision in greater detail. More information on these events can be found in the "Upcoming Higher Education Events" section of *Higher Ed Happenings*.

Legislative Updates

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On May 13, 2022, Governor Pritzker signed Public Act 102-0764 into law, which amends the exemption created by P.A. 102-0016 by clarifying that the exemption applies to earnings increases paid in an academic year beginning on or after July 1, 2020 for overload work performed following an academic year when the employer could not offer overload work because of an emergency declaration.

Public Act 102-0892 – Student-Athlete Endorsement Rights
Effective May 20, 2022

2021 saw the introduction of the Student-Athlete Endorsement Rights Act ("Act"), a law allowing student-athletes to sign endorsement deals while enrolled at a postsecondary educational institution in Illinois, thereby helping relieve the burden on student-athletes in having to decide whether to finish their degree or earn a salary as a professional athlete. On May 20, 2022, Governor Pritzker signed into law Public Act 102-0892, which amends the Act in several respects.

First, although the Act generally prohibits a postsecondary educational institution from upholding any requirement preventing enrolled student-athletes from earning compensation as a result of the use of their name, image, likeness, or voice ("NIL"), P.A. 102-0892 clarifies that "nothing in [the] Act shall require [an] institution to directly or indirectly identify, create, facilitate, arrange, negotiate, or otherwise enable opportunities for a prospective or current student-athlete to enter into a publicity rights agreement with a third party." P.A. 102-0892 also clarifies various definitions contained in the Act, including "booster," "enrolled," and "likeness," and it incorporates a new provision encouraging (but not requiring) postsecondary educational institutions to provide financial literacy, brand management, and life skills programming designed for student-athletes.

Most notably, P.A. 102-0892 eliminates the requirement that a student-athlete provide their institution with notice and a copy of any professional representation agreement within seven days of entering into the agreement, instead requiring that the student-athlete provide the institution with notice and a copy of the agreement "in the manner and at a time prescribed by the institution." Similarly, the Act requires that a student-athlete disclose to their institution the existence and substance of all publicity rights agreements, to include providing the institution with a copy of any written publicity rights agreement valued at $500 or greater, "in the manner and at a time prescribed by the institution."

In light of this change, and given that the Act affords colleges and universities fairly wide discretion to adopt reasonable regulations and procedures related to NIL activities, institutions should review their athletic handbooks or other

documents outlining the rules and expectations for student-athletes and consider incorporating specific language governing institutional expectations and procedures associated with student-athletes engaging in NIL activities.

Public Act 102-0998 – Student Debt Assistance
Effective May 27, 2022

Public Act 102-0998, which creates the Student Debt Assistance Act ("Act"), was signed into law on May 27, 2022. The Act, which took effect immediately, prohibits public and private institutions of higher education from conditioning the release of a student's official or unofficial transcript on the payment of a debt owed to the institution. A comprehensive summary of the Act can be found in our recent Law Alert on P.A. 102-0998.

Public Act 102-1046 – Student Equity Plan and Practices
Effective June 7, 2022

On June 7, 2022, Governor Pritzker signed Public Act 102-1046, which amends the Board of Higher Education Act, into law. Among of other changes, P.A. 102-1046 prescribes new requirements on public and private higher education institutions in Illinois regarding the development and submission of student equity plans and practices. For a summary of these new requirements, check out our recent Law Alert on P.A. 102-1046.

Public Act 102-1050 – Family Bereavement Leave
Effective January 1, 2023

Public Act 102-1050, which Governor Pritzker signed into law on June 9, 2022, amends the Child Bereavement Leave Act (now titled the Family Bereavement Leave Act) to expand the circumstances under which eligible employees are entitled to unpaid bereavement leave. A summary of the amendments can be found in our recent Law Alert on P.A. 102-1050

Public Act 102-1077 – Dual Credit
Effective January 1, 2023

On June 10, 2022, Governor Pritzker signed Public Act 102-1077, which amends the Dual Credit Quality Act ("Act"),

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into law. The amendments go into effect on January 1, 2023.

Arguably the most significant change under P.A. 102-1077 is the new requirement that any dual credit partnership agreement between a community college district and high school district that is entered into, amended, renewed, or extended after January 1, 2023, must allow a high school student who does not otherwise meet the community college district's course eligibility requirements to enroll in a dual credit course taught at the high school, for high school credit only. The partnership agreement must include the expectations for maintaining the rigor of dual credit courses taught at the high school which include students not deemed ready for college-level coursework according to the standards of the community college.

For courses that include students who have an have not met the criteria for dual credit coursework, the instructor may differentiate instruction by course section. Irrespective of such differentiation, the school district must, prior to the first day of class, notify all individual high school students enrolled in a mixed enrollment dual credit course that includes students who have and have not met the criteria for dual credit coursework of whether they are eligible to earn college credit for the course.

Other key changes under P.A. 102-1077 include a new requirement that a partnering school district and community college annually assess disaggregated data pertaining to dual credit course enrollments, completions, and subsequent postsecondary enrollment and performance to the extent feasible, and a requirement that, within 15 days after entering into or renewing a partnership agreement, a community college must notify its faculty of the agreement and provide access to copies of the agreement upon request.

Reauthorization of Federal Violence Against Women Act
Effective October 1, 2022

In March 2022, President Biden signed into law the Violence Against Women Act Reauthorization Act of 2022 ("VAWA"). VAWA was originally drafted and spearheaded by President Biden in 1994, when he served as a U.S. Senator. Since VAWA was enacted in 1994, Congress has reauthorized and strengthened the law four times – in 2000, 2005, 2013, and now in 2022. The 2022 reauthorization takes effect on October 1, 2022 and extends VAWA programs through 2027. The 2022 reauthorization includes several components, discussed below, relevant to higher education institutions:

- Campus Climate Survey. VAWA now requires higher education institutions receiving federal financial assistance to administer a campus climate survey developed by the U.S. Department of Education ("Department") no later than one year after the Department makes the survey available. Thereafter, institutions must administer the survey every two years. The survey will include questions concerning experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking. Institutions will be required to publish their campus-level results of the survey in a biennial report on their website.

- Task Force on Sexual Violence in Education. The 2022 reauthorization charges the U.S. Secretary of Education, Secretary of Health and Human Services, and Attorney General with establishing a task force focusing on sexual violence in education. The task force will be responsible for analyzing educational institutions' efforts to prevent and respond to sexual assault, domestic violence, and dating violence. The task force will also prepare an annual report to Congress outlining best practices for training and educational programs, survivor support and prevention of sexual assault, domestic violence, and dating violence, and will assess the Department of Education's ability to issue fines and other remedies against educational institutions for noncompliance with Title IX. Currently, fines cannot be issued against educational institutions for noncompliance with Title IX.

- Expanded Grants for Educational Institutions. The 2022 reauthorization expands grants for prevention programs at colleges and universities. Further, the 2022 reauthorization creates a pilot program to provide grant funding to various entities, including higher education institutions, to develop and implement a restorative practices program or to assess restorative best practices related to preventing or addressing domestic violence, dating violence, sexual assault, or stalking.

- Federal Report on Student Loans. The federal government will now be required to prepare a report that examines the implications of domestic violence, dating violence, sexual assault, or stalking on a student borrower's ability to repay federal student loans. The report will also examine the adequacy of higher education institutional policies and practices regarding retention or transfer of credits when a survivor suspends enrollment due to domestic violence, dating violence, sexual assault, or stalking.

- Amended Definitions Impacting Title IX Policies and Procedures. Finally, the 2022 reauthorization amends the definition of several terms, including the definition of domestic violence, which are incorporated in the 2020 Title IX regulations. Therefore, institutions should update their Title IX policies and/or procedures to align with the current definitions before the reauthorization's October 1, 2022 effective date.

A Fact Sheet on the VAWA reauthorization issued by the White House can be found here.

Higher Education Law at Robbins Schwartz

With five decades of experience representing Illinois higher education institutions, the attorneys in Robbins Schwartz's Higher Education practice group are well positioned to provide specialized counsel to colleges and universities. Our team of approximately 20 Higher Education attorneys use their knowledge and experience to provide expert advice and counsel to institutions in an array of legal areas, including but not limited to student and employee rights, campus safety, Title IX, constitutional issues such as free speech and expression and due process, collective bargaining and labor relations, student and employee discipline, Board governance, and commercial and finance matters. We provide sound guidance and advocacy that is rooted in experience and tailored to serve each institution's core mission and values.

Higher Ed Happenings is a complimentary newsletter published by our team of attorneys to provide Illinois colleges and universities with the latest legal news, updates and trends impacting higher education institutions.

Upcoming Higher Education Events

Religious Expression on Campus: Supreme Court Establishes New Parameters for Higher Education Institutions Webinar

August 3, 2022 from 10:00 am – 11:30 am | To register, click here.

Join Robbins Schwartz for a complimentary webinar discussing the recent Supreme Court ruling in *Kennedy v. Bremerton School District* and examining its potential impact on public educational institutions' ability to regulate employee and student religious speech on campus.

Title IX Role-Specific Refresher Series

Robbins Schwartz is pleased to offer a refresher series of our role-specific Title IX webinars for higher education institutions' Title IX team members. There's still time to register for our Decision-Maker/Hearing Officer Webinar, Appellate Decision-Maker Webinar, and Title IX Coordinator Webinar. The cost for each webinar is $60 per person. Dates and registration information can be found below.

- **Title IX Decision-Maker/Hearing Officer Webinar**
  Tuesday, August 2, 2022 | 9:00 am – 10:30 am | Register here
- **Title IX Appellate Decision-Maker Webinar**
  Tuesday, August 9, 2022 | 9:00 am – 10:30 am | Register here
- **Title IX Coordinator Webinar**
  Monday, August 15, 2022 | 9:00 am – 10:30 am | Register here

Annual Legal Update for Higher Education Institutions Conference

Thursday, September, 22 2022 | Hyatt Lodge, Oak Brook, IL

Save the date for Robbins Schwartz's Annual Legal Update for Higher Education Institutions Conference, which is being held in person for the first time since 2019. This year's topics include highlights from the Supreme Court's 2021 term, legal considerations related to DEI initiatives, managing employee use of PTO, student activism and the role of the institution, addressing employee staffing shortages, best practices for safeguarding data in an increasingly digital universe, Title IX changes on the horizon, dealing with supply chain issues, and more!

www.robbins-schwartz.com/events

Let's Talk About Robbins Schwartz

A summer highlight was taking our kids, Brown (4.5) and Hunter (1) to the Cubs game over the 4th of July. They (we) were more interested in the hot dogs and ice cream helmets than the game, but we all had fun!

- Emily P. Bothfeld

Rain or shine, we enjoyed our Summer Outing at the Wrigley field Rooftops. Post-Pandemic outings have been a cornerstone of keeping our company culture alive and well. From exhilarating games of golf (card game) to reconnecting conversations, it is safe to say that our team won the game that day!