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January 2023 | Higher Education Happenings

Back in (Affirmative) Action at the Supreme Court

By Frank B. Garrett III and Jared D. Michael

This past term, the Supreme Court heard oral argument in two separate cases addressing affirmative action admission policies in higher education. The cases, *Students for Fair Admissions, Inc. v University of North Carolina, et al*., and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, will either reaffirm the constitutional legitimacy of race-conscious admission decisions or alter the college admissions landscape in significant and material ways. The decisions in the two cases, which we anticipate will be issued in June, are likely to mirror one another.

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The pending cases date back to 2014, when the nonprofit group Students for Fair Admissions ("SFFA") filed lawsuits on behalf of students who had been rejected at either Harvard University or the University of North Carolina at Chapel Hill. SFFA's lawsuit against Harvard alleges that Asian American students were denied seats at Harvard as a result of the school's affirmative action policy, while its lawsuit against UNC claims that the University gives preferential treatment to underrepresented minorities when making admissions decisions. SFFA alleges that the holistic admissions processes at Harvard and UNC result in fewer students of certain races (Asian American in Harvard's case, and both Asian American and white in UNC's case) being admitted, despite their superior test scores and grade point averages, in violation of Title VI of the Civil Rights Act of 1964 (and, in the case of UNC, the Equal Protection Clause of the Fourteenth Amendment). SFFA is requesting that the Court overturn its decision in *Grutter v. Bollinger*, in which the Court validated the use of race as one of many criteria an institution could (but was not required to) consider as part of a holistic admissions process. 539 U.S. 306, 325 (2003).

In response, the universities and the United States government are asking the Court to uphold *Grutter*—specifically, its finding that universities have a compelling interest in having a diverse student body that justifies the consideration of race in admissions, so long as such consideration is "narrowly tailored." In the *Grutter* case, the Court concluded that the Fourteenth Amendment did not prohibit the use of race in the University of Michigan Law School's student admissions policy based upon the Law School's compelling interest in obtaining a diverse student body. Nevertheless, the *Grutter* Court cautioned that any race-conscious admissions policy must be both limited in time and narrowly tailored to achieve the compelling governmental interest.

In the Harvard and UNC cases, the universities and the United States point to several interests which they believe support

the continued need for affirmative action, in line with *Grutter*. Among such interests is the benefit that racial diversity provides in the classroom, which the universities and government argue is unlikely to be replicable by instruction or other means. The United States further argues that well-qualified and diverse graduates are necessary to ensure that the military's officer ranks—which are derived largely from ROTC programs and the miliary service academies—sufficiently reflect the diversity found in the enlisted ranks. The United States similarly argues, as the nation's largest employer, that its own employees—including those in leadership roles—need to reflect the populace for which they work to ensure that citizens continue to view government action as legitimate. That interest, the United States and universities claim, would be seriously undermined without the availability of race-conscious measures by which selective institutions can ensure racial diversity.

Should SFFA prevail, as some legal commentators are predicting, the landscape of college admissions is sure to change in significant ways. For one, selective colleges and universities will likely be barred from considering race as a factor in admission decisions. In addition, community colleges and educational institutions with generally open enrollment will need to ensure that any specialized, limited enrollment programs do not consider race as a factor in determining admission to those programs of study. Finally, a decision in favor of SFFA may have a broader impact on educational entities' use of race-based scholarships and other programs designed to promote a racially diverse student body. For more on the Harvard and UNC cases, check out Robbins Schwartz's recent publication, Race-Conscious Measures to Achieve Student Diversity Are in Jeopardy After Supreme Court Arguments.

The Comments Are In: What's Next for Title IX and Protections for LGBTQI+ Students?

By Emily P. Bothfeld and Eliza B. Kaye

As the public comment period for the U.S. Department of Education's Title IX regulatory proposal has now come to a close, educational institutions across the country are eager to know what comes next. What is likely to change? What will stay the same? And critically important—when can institutions expect any changes to go into effect?

If the nearly 240,000 public comments are any indication, one aspect of the proposed regulations that has received significant attention is the language expanding protections for LGBTQI+ individuals participating in educational programs and activities. Unlike the current 2020 regulations, which apply only to sexual harassment, the proposed regulations would require institutions to take certain prescribed steps in response to any instance of sex discrimination, including not only sexual harassment but also discrimination or harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender-related identity.

This proposed broadening of the Title IX regulations is consistent with President Biden's Executive Order, issued in 2021, which applied the Supreme Court's decision in *Bostock v. Clayton County*—holding that Title VII's prohibition on sex discrimination covers discrimination based on gender identity and sexual orientation—to all federal laws prohibiting sex discrimination, including Title IX. 140 S. C. 1731 (2020). The proposed regulations go a step further by expressly prohibiting the adoption or implementation of any policy or practice that prevents individuals from participating in an educational program or activity in a manner consistent with their gender identity, as such prohibition would unlawfully subject a person to more than *de minimis* harm. While discrimination based on sexual orientation and gender identity is already prohibited in Illinois under the Illinois Human Rights Act, the proposed Title IX regulations would formalize protections for LGBTQI+ individuals participating in education programs and activities at the federal level.

Another Title IX-related issue that has recently been in the spotlight is the intersection of gender identity and athletic participation. The proposed regulations do not address this issue specifically; rather, the Department of Education has indicated that it plans to issue a separate notice of proposed rulemaking to address the question of what criteria, if any, educational institutions should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team. For further reading on how federal courts are grappling with the issue of sports participation by transgender and non-binary athletes, check out our recent law alert, Second Circuit Affirms Transgender Student Athletic Participation Policy.

As to when institutions can expect any Title IX changes to go into effect, on January 5, 2023, the Department of Education released a new regulatory agenda, which indicates that the Department intends to publish its final Title IX regulations in May 2023. This self-imposed deadline is not required, however, and a Department representative already said in a statement that the May 2023 timeline for the final regulations is merely "suggested." Thus, it is unlikely that any regulatory changes will become effective before the end of the 2022-2023 academic year.

As institutions await the release of the Department of Education's final Title IX regulations, they should ensure that they remain in compliance with the existing 2020 regulations, including the regulations' requirement that any individual serving as a Title IX Coordinator, Investigator, Decision-Maker or Informal Resolution Facilitator be appropriately trained. For additional information on Robbins Schwartz's Title IX services and training opportunities, please contact the authors of this article or any Robbins Schwartz attorney.

New in 2023: Legislative and Other Updates

By Emily P. Bothfeld, Hilarie M. Carhill, Kathleen C. Ropka, Christopher J. Moberg, Kevin P. Noll, and Matthew M. Swift

Happy New Year! 2023 has already brought a multitude of legislative and other changes impacting colleges and universities. Highlights of these major developments follow below.

Public Act 102-0861 – Abused and Neglected Child Reporting
Effective January 1, 2023

Public Act 102-0861, which was signed into law on May 13, 2022, amends the Abused and Neglected Child Reporting Act ("ANCRA") to expand the categories of individuals who are required to report suspected child abuse or neglect to the Illinois Department of Children and Family Services ("DCFS"). ANCRA already includes employees of higher education institutions in its list of mandated reporters who must contact DCFS when they have reasonable cause to

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believe that a child they know in their professional or official capacities may be an abused or neglected child. P.A. 102-0861 expands ANCRA's list of mandated reporters to specifically include athletic trainers, physical therapists, physical therapy assistants, occupational therapists, and occupational therapy assistants. Institutions that contract with third-party agencies to fill athletic department or other positions should be aware that third-party contractors, even if they are not considered college or university employees, may nonetheless have mandatory DCFS reporting obligations while engaged in a professional capacity at an institution of higher education if they fall under one of the newly included categories of mandated reporters under ANCRA.

Public Act 102-1045 – Benefits Navigator
Effective January 1, 2023

Public Act 102-1045, which creates the Benefits Navigator Act ("Act"), was signed into law by Governor Pritzker on June 7, 2022. The Act, which took effect on January 1, 2023, requires each public university and community college in Illinois to designate a "benefits navigator" to assist students in identifying and applying for benefit programs and campus-wide and community assistance programs for which they are eligible. A "benefit program" is defined by the Act as "any federal, State, or local program that provides assistance or benefits to individuals on the basis of need."

Pursuant to the Act, each State university and community college must designate and provide training for a benefits navigator, whose role is to include guiding students to seek and apply for any federal, State or local program that provides assistance or benefits for which they are eligible. The Act also requires the benefits navigator to assist in coordinating and providing culturally specific resources, including resources for non-English speakers, to help support students. Additionally, under the Act, each public college and university is required to participate in a statewide consortium, to be overseen by the Illinois Board of Higher Education (for universities) and Illinois Community College Board (for community colleges), for the purpose of sharing information and best practices for helping students apply for and receive assistance from benefit programs.

While many institutions already maintain a centralized office or department to coordinate need-based assistance and benefits for students, the Benefits Navigator Act aims to ensure that all students have access to a designated on-campus point person to help them seek and apply for qualified benefits, which in turn will afford students the tools and resources they need to successfully reach their educational goals. Public institutions of higher education should be mindful of the new requirements of the Benefits Navigator Act, including the requirement that a benefits navigator for each institution be designated beginning January 1, 2023.

Public Act 102-1102 – CROWN Act
Effective January 1, 2023

On July 1, 2022, Governor Pritzker signed into law Public Act 102-1102, also known as the Create a Respectful and Open Workplace for Natural Hair ("CROWN") Act. The CROWN Act amends the definition of "race" in the Illinois Human Rights Act ("IHRA") to include "traits associated with race, including, but not limited to, hair texture and protective hairstyles such as braids, locks, and twists," thereby expanding the IHRA's prohibition on race-based discrimination to expressly include discrimination based on such traits.

In 2021, Illinois passed the Jett Hawkins Act (P.A. 102-0360), which aims to limit hairstyle discrimination in K-12 schools by prohibiting school districts from adopting hairstyle-based dress code requirements. The CROWN Act expands these protections by prohibiting trait-based discrimination in a variety of covered situations, including but not limited to employment and public accommodations.

As the CROWN Act goes into effect, colleges and universities should review their policies and procedures governing employee appearance and grooming, as well as any appearance-related guidelines for students participating in clinical and other specialty programs, to verify that they comply with the Act. Institutions should also review their internal grievance procedures for claims of discrimination to ensure that any reports or complaints of alleged discrimination based upon traits associated with race are appropriately addressed. Finally, institutions should consider providing supplemental training to employees, particularly those in supervisory/management roles and roles related to hiring, on the CROWN Act's prohibitions and on how to promote an inclusive and discrimination-free workplace.

Public Act 102-1102 –
Illinois Human Rights Act and Places of Education
Effective January 1, 2023

In addition to creating the CROWN Act, P.A. 102-1102 also modifies the IHRA's language conferring jurisdiction on the Illinois Department of Human Rights ("IDHR") to investigate and resolve discrimination charges brought against places of education, including public colleges and universities. The new language provides that IDHR has jurisdiction over the "denial or refusal of the full and equal enjoyment" of the facilities, goods, or services of a school (elementary, secondary, undergraduate, or postgraduate), non-sectarian nursery, day care center, or other place of education. Previously, the language reflected that IDHR's jurisdiction was limited to the "denial of access" to a place of education's facilities, goods, or services. With the passage of

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Legislative Updates

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P.A. 102-1102, the Illinois legislature has made clear that the IHRA recognizes a broad right to the full and equal enjoyment of educational institutions' facilities, goods, and services, which is consistent with the scope of rights recognized for other places of public accommodation. Robbins Schwartz will be monitoring this new legislation and its potential impact on the types and breadth of IDHR charges filed against educational entities.

ILCON Art. I, Sec. 25 – Workers' Rights Amendment
Effective November 30, 2022

On November 8, 2022, voters approved the Workers' Rights Amendment to the Illinois Constitution, which serves to guarantee Illinois workers expansive employee collective bargaining rights. The Amendment provides employees with the "fundamental right" to bargain over wages, hours, and working conditions which will not result in a practical change for higher education institutions, as educational employees already have the right to collectively bargain their wages, hours, and working conditions under existing State statutes.

The Amendment also provides employees with the fundamental right "to protect their economic welfare and safety at work." While colleges and universities have already been bargaining over topics covering economic welfare and safety (i.e., COVID-19 safety measures), higher education institutions may see unions push the limits of the Amendment in future negotiations with new contract proposals covering a wider range of subject areas.

Finally, the Amendment prohibits future State legislation from interfering with employees' union affiliations or diminishing employees' collecting bargaining rights. This effectively outlaws "right to work" laws, which some states have enacted to prohibit public employers and unions from agreeing that workers must be union members.

Overall, the Workers' Rights Amendment is unlikely to fundamentally change the legal landscape for higher education institutions in the short term. Robbins Schwartz will continue to monitor developments related to the Workers' Rights Amendment and its potential implications for colleges and universities.

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

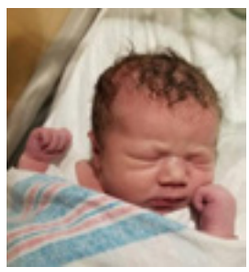
Purchasing and Construction Conference
Save the Date Coming Soon!

We are excited to offer our Purchasing and Construction Conference in the Spring of 2023. More information and topics to come soon, so keep an eye out for an email from us!

Community College Trustee Training
Save the Date Coming Soon!

We look forward to providing professional development leadership training to newly elected and returning community college trustees this summer. Be on the lookout on our social media pages and our website for the save the date and to register!

Let's Talk About Robbins Schwartz



Christmas came early for our family this year! Chloe joined her big brother Lucas (4.5) to become the second Swiftlet in our little brood.

- Matthew M. Swift

To close out 2022, my wife and I visited Quebec City over New Years. Some say we were crazy to vacation in a city that is colder and has more snow than Chicago, but the scenery made the trip worthwhile. The highlight from the trip was dog sledding through the forest. Happy New Year!

- Kevin P. Noll