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May 2023 | Higher Education Happenings

Public Comment Period for Proposed Title IX Athletic Eligibility Rule Ends—Now What?

By Emily P. Bothfeld

After much anticipation, on April 6, 2023, the U.S. Department of Education issued a Notice of Proposed Rulemaking ("NPRM") concerning gender identity and athletic eligibility under Title IX. The one-sentence proposed Rule provides that, if an educational agency or institution receiving federal funding "adopts sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective; and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be denied or limited."

If finalized in its current form, the proposed Rule would restrict federally funded educational institutions from adopting a categorical ban on students participating on athletic teams consistent with their gender identity. Rather, institutions seeking to impose sex-related criteria that impact students' ability to participate in athletics consistent with their gender identity would be required to use a tailored approach that considers each sport, level of competition, and grade level on an individualized basis.

Although the NPRM does not detail which types of sex-related criteria would be permissible under the proposed Rule, it points to criteria adopted by the NCAA and other athletic governing bodies as being informative—with the caveat that any reference to specific governing bodies within the NPRM "is not an endorsement by the Department [of Education] of any policy or practice, nor does it indicate whether the policy or practice would comply with the standard proposed in [the] NPRM."

The public comment period for the NPRM ended on May 15, 2023 and resulted in over 150,000 public comments. Although there is no set timeline on when the proposed Rule may be finalized, we do not expect the Department to release the final athletic eligibility Rule until the 2023-2024 academic year is underway, particularly in light of the impending release of the Department's separate amendments to the 2020 Title IX regulations governing sexual harassment, which is tentatively scheduled for May 2023.

As a reminder, colleges and universities must comply not only with Title IX, but also with State anti-discrimination laws, such as the Illinois Human Rights Act which prohibits discrimination based on gender identity in places of public accommodation. If the proposed Title IX Rule is adopted, institutions will need to ensure that any existing policies and practices concerning athletic participation are consistent with the requirements of both State law and the Title IX Rule.

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Seventh Circuit Rules on Pronoun Usage, But Fate of Court's Ruling Hangs in Balance

By Frank B. Garrett and Christopher J. Moberg

On April 7, 2023, the Seventh Circuit issued its decision in *Kluge v. Brownsburg Community School Corporation*, ruling that Title VII of the Civil Rights Act of 1964 did not require a school district to accommodate its teacher's religious beliefs which prevented him from using students' preferred pronouns by allowing the teacher to refer to all students by their last name. In upholding the district's denial of the teacher's religious accommodation request, the Court found that the request constituted an "undue hardship" because it caused emotional harm to students and substantially disrupted the learning environment. *Continued on page 2*

Rules on Pronoun Usage

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Notably, in defining "undue hardship" in the Title VII context for religious accommodations, the Seventh Circuit relied on the United States Supreme Court's 1977 ruling in *Trans World Airlines, Inc. v. Hardison*. In Hardison, the Court held that an "undue hardship" results when the employer is required to "bear more than a *de minimis* cost" in making an accommodation for an employee's religious practice. (The Seventh Circuit has subsequently described *Hardison's de minimis* cost standard to mean a "slight burden.")

Less than three weeks after the Court issued its decision in *Kluge*, the plaintiff filed a petition for rehearing en banc, which is a request for the case to be heard again before the entire panel of justices in the Seventh Circuit, rather than the standard three-judge panel. The petition asserts, among other arguments, that the Seventh Circuit should have stayed its ruling in *Kluge* until the Supreme Court issues its decision in a related case involving employee religious accommodations, *Groff v. Dejoy*. The Seventh Circuit has decided that any action on the plaintiff's petition will be delayed pending the Supreme Court's resolution of appeal in *Groff*.

The petitioner in *Groff*, a USPS postal worker, claims that he was terminated because he could not work on Sundays due to his religious practice, and the USPS refused to accommodate his religious request to be exempt from Sunday work. Groff is asking the Supreme Court to reject *Hardison*'s "*de minimis* cost" standard and instead adopt a standard requiring the employer to show "significant difficulty or expense" to justify denying an employee's request for a religious accommodation under Title VII. Although *Groff* does not specifically address preferred pronoun usage, it will establish the standard for determining what constitutes an undue burden with regard to employees' religious accommodation requests under Title VII.

The Supreme Court heard oral arguments in *Groff* on April 18, 2023, and a decision is likely to be issued later this summer. We will continue to monitor these cases and their implications for colleges and universities and will provide an additional update when the Supreme Court issues its decision in *Groff*.

For a more detailed analysis of the *Kluge* and *Groff* cases, see Robbins Schwartz's recent publications titled Seventh Circuit Court Upholds Teacher's "Forced Resignation" for Refusal to Use Transgender Students' Preferred Names and Pronouns Claiming Religious Discrimination and US Postal Service Employee's Request for a Sunday Work Exemption Because of His Religious Beliefs was an Undue Hardship.

U.S. Department of Education to Broaden Definition of Third-Party Servicers that Administer Title IV Financial Aid Programs

By Matthew J. Gardner

On February 15, 2023, the U.S. Department of Education released a Dear Colleague Letter which significantly broadens the definition of "third-party servicers" that are subject to the Department's regulations relating to financial aid programs under Title IV of the Higher Education Act of 1965. The stated goal of the Letter is to "bring more transparency into the contractors who work closely with institutions of higher education on Title IV program management and delivery, particularly in the critical areas of recruitment and marketing."

The Department's updated guidance is based on language in the Higher Education Act which states that a third-party servicer is any entity that administers "any aspect" of an institution's administration of Title IV programs. The Dear Colleague Letter indicates that the Department has reviewed numerous contracts between institutions and outside entities and found that "most activities and functions performed by outside entities on behalf of an institution are intrinsically intertwined with the institution's administration of the Title IV programs," and thus, "the entities performing such activities are appropriately subject to [third-party servicer] requirements." The Letter also emphasizes that the Department's updated guidance applies to "online program managers," companies that are part of a growing industry of services related to recruitment, retention, the provision of software products and services involving financial aid activities, and the provision of educational content and instruction. Finally, the Dear Colleague Letter includes a number of charts listing various functions and services that, if outsourced by an institution to a third-party, would render that party a "third-party servicer" or "not a third-party servicer."

How does this impact colleges and universities? The Department's expansion of the types of entities classified as third-party servicers means that some institutions' vendors may now fall into the third-party servicer classification, thus

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Title IV Financial Aid Programs

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triggering certain reporting and contracting requirements for the institution. Colleges and universities generally must report any contracts with third-party servicers to the Department of Education within ten (10) days of the contract. Institutions complete this reporting through the Department's E-App (Electronic Version of the Application for Approval to Participate in the Federal Student Financial Aid Programs).

Institutions of higher education must also ensure that their contracts with third-party servicers contain certain information, including:

- A description of the functions that the third-party servicer and its subcontractor(s), if applicable, will perform on behalf of the institution, and the functions that will be performed by the institution;
- Biographical information about the third-party servicer, including its legal name, any trade name, address, primary telephone number, and email address of the president or CEO;
- Identity of each subcontractor and a description of the functions to be performed by the subcontractor; and
- Other Department of Education regulation requirements such as joint and several liability for Title IV violations, compliance with all Title IV requirements, and obligations to report fraud or criminal misconduct.

In addition, institutions must obtain a signed Certification by Lower Tier Contractor form from each contracted third-party servicer. Lastly, it is recommended that colleges and universities select third-party service providers capable of maintaining appropriate safeguards for institutional information and student information, and that they ensure that their contracts impose sufficient data security safeguards.

The effective date of the new mandatory reporting requirements established under the Dear Colleague Letter was initially May 1, 2023. The Department then extended the effective date to September 1, 2023 and provided stakeholders with a 30-day public comment period to provide feedback on the Letter. On May 16, 2023, the Department announced that the September 1, 2023 effective date is no longer in effect, and that the Department will be issuing an updated and final version of the Dear Colleague Letter, which will have an effective date at least six (6) months after the Letter's publication.

While colleges and universities await the final Dear Colleague Letter, they should take steps to identify all third-party vendors that perform services related to recruitment and retention, services involving financial aid activities, and online program managers that provide educational content and instruction. Institutions should consult with these vendors and legal counsel to determine the potential applicability of the Department of Education's third-party servicer regulations and any associated compliance requirements.

U.S. Department of Education Releases New FERPA Guidance

By Emily P. Bothfeld and Evan J. Deichstetter

In March and April 2023, the U.S. Department of Education's Student Privacy Policy Office ("SPPO") released three new guidance documents addressing requirements applicable to higher education institutions under the Family Educational Rights and Privacy Act ("FERPA"). Two of the documents, titled Family Educational Rights and Privacy Act: Guidance for School Officials on Student Health Records and Know Your Rights: FERPA Protections for Student Health Records, focus on the legal parameters governing student health records being maintained by educational institutions and by third-parties acting on their behalf. While these guidance documents do not reflect any legislative or regulatory changes at the federal level, they serve to remind institutions and students of FERPA's applicability and requirements in the context of health records.

One key issue highlighted in both documents is the interplay between FERPA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule. Consistent with prior guidance from the Department of Education, the documents make clear that FERPA applies to records concerning students that are maintained by campus health clinics and other health care facilities operated by higher education institutions. Such records are considered either "education records" or "treatment records" under FERPA, which are both expressly excluded from coverage under the HIPAA Privacy Rule, even if the institution qualifies as a HIPAA-covered entity. The guidance documents go on to note that, if an institution's health clinic or other health care facility also treats non-students, then any health records pertaining to non-students would likely be subject to the HIPAA Privacy Rule.

In addition to the two documents on student health records, SPPO also released a third document titled The Eligible

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New FERPA Guidance

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Student Guide to the Family Educational Rights and Privacy Act, which contains a useful breakdown of the FERPA rights afforded to "eligible students," defined as students who have reached 18 years of age or who attend an institution of postsecondary education. As a reminder, when a student enrolls in college, regardless of their age, all rights afforded by FERPA transfer from the parent/guardian to the student. Such rights include, but are not limited to, the rights to access their education records, to request amendments to their education records, and to provide consent for the institution to release their education records to a third-party. Institutions should be mindful of the rights afforded to eligible students and of FERPA's parameters governing the release of personally identifiable information from students' education records when interacting with or responding to communications from parents of enrolled students.

The FERPA guidance documents discussed above can be found here.

New (and Anticipated) Legislation

By Kevin P. Noll and Matthew M. Swift

As a busy spring legislative session draws to a close, several bills that will require higher education institutions' attention in the coming months have been signed into law, and several others are well on their way to being passed by the General Assembly and signed by the Governor. Read on for highlights from these major legislative developments.

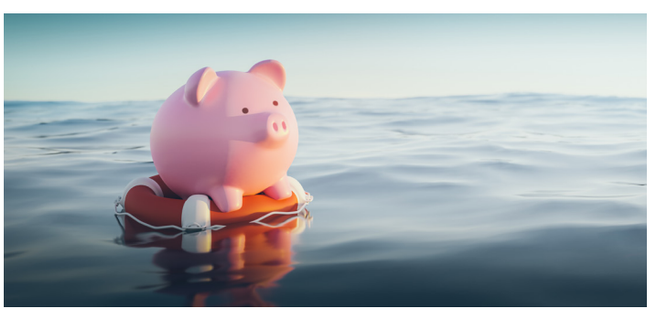
Public Act 102-1143 – Paid Leave for Workers
Signed Into Law, Effective January 1, 2024

The Illinois legislature recently passed the Paid Leave for All Workers Act, which guarantees covered employees up to 40 hours of paid leave per year, beginning on January 1, 2024.

Of note to colleges and universities, the Act does not apply to temporary student workers working part-time at higher education institutions. Further, the Act does not affect the validity or change the terms of collective bargaining agreements in effect as of January 1, 2024. After that date, the requirements of the Act may be waived in collective bargaining agreements so long as the waiver is set forth in the agreement in clear and unambiguous terms.

For more information on the Act, please see our recent publication, Paid Leave for (Almost) All Illinois Workers Required under New Law.

Senate Bill 49 – Student Debt Assistance
Passed General Assembly



Senate Bill 49, which passed the General Assembly and is awaiting Governor Pritzker's signature, amends the Student Debt Assistance Act ("Act") by expanding the reasons that a postsecondary institution must provide an official transcript to a current or former student.

Currently, the Act requires that an institution provide an official transcript to a current or potential employer, even if the current or former student owes a debt to the institution. Under S.B. 49, institutions will be required to provide an official transcript to a current or former student who owes a debt if the current or former student requests the transcript in order to: (a) complete a job application; (b) transfer between institutions of higher education; (c) apply for financial aid; (d) join the U.S. Armed Forces or Illinois National Guard; or (e) pursue other postsecondary opportunities.

In addition, S.B. 49 requires institutions to adopt a policy, beginning with the 2023-2024 academic year, that outlines the process for a student or former student to obtain a transcript or diploma that has been withheld because of a debt. Institutions will be required to post their policies online, along with procedures for filing a complaint concerning the withholding of a transcript or diploma due to a debt, and will be required to provide their policy and procedures to students as part of the information they share about the cost of attendance.

Finally, on or before July 1, 2024, and on or before each July 1 thereafter, institutions will be required to report to the Illinois Board of Higher Education (for four-year universities) or Illinois Community College Board (for community colleges) information about their policies and the number of students whose official transcripts, diplomas, or registration privileges have been withheld each year. S.B. 49 will go into effect immediately when the Governor signs it into law.

Senate Bill 99 – Students with Disabilities
Passed General Assembly

Senate Bill 99, which creates the Removing Barriers to Higher Education Success Act, passed both Houses and is awaiting the Governor's signature. The Act will require public colleges and universities to adopt a policy providing that, at a minimum, any of six (6) types of documentation will be sufficient to establish that a student is an individual with a disability. The policy will also be required to include "transparent and explicit" information regarding the institution's process for determining student eligibility for disability accommodations. In addition to making information about the disability accommodation process readily available on their websites, institutions will be required to distribute the information annually to students, parents and faculty in accessible formats, including during student orientation. If signed by the Governor, S.B. 99 will go into effect on January 1, 2024.

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Senate Bill 2034 – Bereavement Leave
Passed General Assembly

Senate Bill 2034, known as the Child Extended Bereavement Leave Act or "Zachary's Parent Protection Act," would require higher education institutions with 50 or more full-time employees to modify their bereavement policies to provide unpaid leave to certain employees who have lost a child to suicide or homicide.

For institutions with 50 to 249 full-time employees, any full-time employee who has worked for the institution for at least two weeks and loses a child by suicide or homicide would be entitled to use up to six weeks of unpaid leave. For institutions with 250 or more full-time employees, the amount of unpaid leave would be up to twelve weeks.

S.B. 2034 also provides that the leave could be taken in a continuous period or intermittently within a year of the employee notifying the institution about the child's death. As with other bereavement leave, institutions would be permitted to require reasonable documentation to support the employee's leave request, along with reasonable advance notice whenever such notice is practicable.

This legislation has passed both houses of the legislature, and if the Governor signs it, we expect it to go into effect on January 1, 2024.

As more bills pass and are signed into law this summer, Robbins Schwartz attorneys will be monitoring for other legislation that will impact colleges. Keep an eye out for more updates in our Law Alerts and the next issue of Higher Ed Happenings!

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.

Let's Talk About Robbins Schwartz

After ten years of marriage, and another long year of sporting events and dance recitals for our son Jack (8) and daughter Emma (6), my wife and I were able to escape to celebrate our anniversary with adventures old and new. We revisited Calistoga, a sleepy city in the northernmost part of Napa Valley, where we had not been since we first started dating. After overindulging in food and wine, we headed to Lake Tahoe for the remainder of the trip for some hiking and relaxation. Hope you all have the chance to take a moment for yourselves and enjoy adventures of your own…with or without the kids!
- Christopher R. Gorman

In recognition of Women's History Month, Robbins Schwartz recently held an office clothing drive in support of Poised for Success, a non-profit based in Lombard, Illinois devoted to empowering women in need by providing interview and business appropriate attire for free. Pictured are Partner Matthew Gardner, Marketing Manager Maritza Guevara, Associate Aaron Kacel and Legal Assistant Devon Kelly delivering donations on behalf of the Firm.

Upcoming Higher Education Events

Community College Trustee Virtual Training Session
June 10, 2023 | 8:30 AM - 1:00 PM

Join us for professional development leadership training for newly elected and returning community college trustees.

Click here to register!