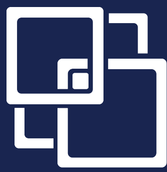
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September 2023 | Higher Education Happenings

Responding to Data Breaches: Lessons Learned from the National Student Clearinghouse Cybersecurity Incident

By Matthew J. Gardner and Logan K. Sweeney

Table of Contents

Responding to Data Breaches: Lessons Learned from the National Student Clearinghouse Cybersecurity Incident, *page 1*

U.S. Departments of Justice and Education Issue Guidance for Higher Education Institutions on Lawful Diversity and Equity Measures Following Supreme Court's Harvard/UNC Decision, *page 2*

Legislative Updates, *page 3*

Let's Talk About Robbins Schwartz, *page 5*

Upcoming Higher Education Events, *page 5*

Risks associated with data privacy and network security have become a more frequent concern for colleges and universities over the last few years as institutions rely more and more on products and services that are hosted online and/or have access to confidential or sensitive information. This summer, thousands of educational institutions across the country were faced with addressing how to respond to a potential data breach when the National Student Clearinghouse ("NSC") notified the institutions that information housed at NSC, including personally identifiable student information, was affected by a cybersecurity incident through one of NSC's third-party software tools, MOVEit Transfer.

On or around May 29, 2023 and May 30, 2023, an unauthorized third party accessed and downloaded NSC data located on NSC's MOVEit Transfer servers. On June 28, 2023, NSC provided notification of the incident to those institutions whose data NSC determined may have been affected by the incident. Following an investigation, NSC determined that the files accessed and downloaded by the unauthorized third party contained personal information pertaining to current and former students of educational institutions and customers of education finance associations. Although this data incident did not affect every institution that provides data to NSC, the incident serves as a worthwhile lesson for all institutions that disclose personal data in connection with the utilization of online services.

For many colleges and universities, the NSC incident was the first time they had received notification of a potential data breach affecting individuals' personal information. Appropriately, many of these institutions' first call was to their legal counsel to determine what, if any, legal obligations were triggered by the event, particularly as the exact nature and scope of the incident were initially unknown. Another recommended step that many institutions took was to contact their insurance carrier to put the carrier on notice of a potential claim. Finally, following NSC's determination of the specific individuals and types of information affected by the event, each institution was tasked with evaluating whether, and to what extent, they needed to notify their students, employees, or community as a whole of the incident. Some institutions elected to provide some form of notification for transparency purposes, even where they determined they had no legal obligation to do so.

In Illinois, the Personal Information Protection Act ("PIPA") is the primary statutory authority that regulates data security and procedures for breaches of "personal information." PIPA applies to data collectors, including public and private universities and other entities that handle, collect, disseminate, or otherwise deal with nonpublic personal information. "Personal information" includes an individual's first name (or initial) and last name in combination with their social security number, driver's license, financial account information, medical information, or biometric information. It also includes a username or email address in combination with a password or security question and answer that would allow access. PIPA contains express notification requirements in the event of a breach that compromises the security, confidentiality, or integrity of personal information maintained by a data collector. In NSC's case, both NSC and individual colleges and universities satisfy PIPA's definition of "data collector" in that they possess (and, in institutions' case, disseminate) students' personal information.

Continued on page 2

Responding to Data Breaches

Continued from page 1

Ultimately, whether PIPA's notification requirements were triggered as a result of the NSC incident varied by institution. For some colleges and universities, the information impacted by the incident was limited to student names or other basic information falling outside the scope of PIPA. For other institutions, the affected information included student names in combination with social security numbers, thereby triggering PIPA's notification procedures.

Learning from the NSC event, higher education institutions should take certain proactive action to safeguard students' and employees' personal data and minimize the likelihood of future data incidents. Colleges and universities should work with their Chief Technology Officer or other data/IT professionals, insurers, and legal counsel to ensure, at a minimum, that they: (1) implement commercially standard security processes; (2) adopt up-to-date data security policies and procedures; (3) maintain adequate cyber liability insurance; and (4) obtain legal review of all contracts with vendors and third parties that will have access to confidential or personally identifiable information or to the institution's network.

While data breaches, ransomware attacks, and other cybersecurity incidents will continue to be a risk that colleges and universities may face, taking these steps will serve to provide greater protection if, and when, future incidents arise.

U.S. Departments of Justice and Education Issue Guidance for Higher Education Institutions on Lawful Diversity and Equity Measures Following Supreme Court's Harvard/UNC Decision

By Frank B. Garrett III

In the aftermath of the United States Supreme Court's June 29, 2023 decision invalidating the use of race in student admissions, on August 14, 2023, the United States Departments of Justice and Education released written guidance to assist colleges and universities in understanding the Court's ruling and identifying ways that institutions can continue to pursue a diverse student body.

The guidance document, titled Questions and Answers Regarding the Supreme Court's Decision in Students For Fair Admissions, Inc. v. Harvard College and University of North Carolina ("Guidance"), begins by acknowledging the Court's conclusion that Harvard and UNC unlawfully considered race in their student admissions decisions. The Guidance then goes on to quote the statement of Chief Justice Roberts, who authored the decision, that "nothing in [the Court's] opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise." The Guidance states that colleges and universities may continue to embrace appropriate admission considerations through a holistic application-review processes and provide opportunities to assess how an individual's background and attributes, including those related to race, racial discrimination experienced or the racial composition of their neighborhood or schools, position a student to contribute to campus in unique ways. Examples provided include a student's description of what it means to be the first Black violinist in the City's youth orchestra, or an applicant's essay in which she discusses overcoming prejudice when transferring to a rural high school where she was the only student of South Asian descent.

The Guidance goes on to provide higher education institutions with specific types of equity and diversity practices that remain lawful post-Harvard/UNC. Among the practices that the Departments have determined remain legal are the following:

1. Colleges and universities can still engage in targeted outreach and recruitment of diverse students. These initiatives allow institutions to connect with a broad range of prospective students and help ensure that the group of future applicants includes a "robust pool of talented students from underrepresented groups."

2. Colleges and universities can partner with particular high schools and offer mentoring or other programming to enhance the academic exposure for students at those partner schools.

3. The Departments encourage colleges to offer "Pathway" programs with local or select high schools. If a Pathway program is based on non-racial criteria (e.g., all juniors in a geographic area with a certain G.P.A.), then the Program participants may be given preference in the institution's admissions process.

Continued on page 3

Diversity and Equity Measures
Continued from page 2

4. Colleges may continue to collect student demographic data, so long as they ensure that the demographic data related to a student's race does not influence admissions decisions. Student demographic data can aid institutions in ensuring that their admissions practices do not discriminate based on protected characteristics and can also provide useful information regarding student retention and graduation rates.

5. An institution may continue to offer support clubs, activities and affinity groups, "including those that have a race-related theme" to ensure students have a space to celebrate shared identities, interests and experience, "so long as the clubs, activities and affinity groups are open to all students regardless of race."

While the Departments' Guidance does not have the force of law, it is impactful because both the Department of Education and Department of Justice have administrative authority to investigate and resolve complaints or racial discrimination pursuant to Title VI of the Civil Rights Act. Robbins Schwartz strongly recommends that higher education institutions engage in a thorough legal review and assessment of all diversity, equity and inclusion efforts to ensure compliance with current law and to minimize the risk of legal challenges.

Legislative Updates

By Emily P. Bothfeld and Matthew M. Swift and Aaron J. Kacel

Summer 2023 brought a variety of new laws and amendments to existing laws that will impact higher education institutions during the 2023-2024 academic year. Highlights of some of the major legislative developments follow below.

Public Act 103-0054 – Student Debt Assistance

Effective June 9, 2023

Senate Bill 49, which amends the Student Debt Assistance Act, and which we discussed in our May 2023 issue of Higher Ed Happenings, was signed into law on June 9, 2023, as P.A. 103-0054. As such, beginning with this 2023-2024 academic year, institutions are required to adopt a policy that outlines the process for a student or former student to obtain a transcript or diploma that has been withheld because the student owes a debt. Institutions must post their policies online, along with procedures for filing a complaint concerning the withholding of a transcript or diploma due to a debt, and institutions must also provide their policies and procedures to students as part of the information they share about the cost of attendance.

Additionally, on or before July 1, 2024, and on or before each July 1 thereafter, institutions are 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.

20 U.S.C. § 2000gg – Pregnant Workers Fairness Act

Effective June 27, 2023

The federal Pregnant Workers Fairness Act ("PWFA") adds another layer of legal protections for employees who have physical or mental limitations affected by pregnancy, childbirth, or related medical conditions. While Illinois employees already enjoy similar protections under the Illinois Human Rights Act ("IHRA"), the PWFA adds a federal requirement to provide reasonable accommodations for conditions that may occur even with uncomplicated pregnancies and that may not qualify as disabilities under the Americans with Disabilities Act ("ADA"). The PWFA also provides protection for employees who temporarily cannot perform an essential function until "the near future," if their inability can be reasonably accommodated.

Like the ADA and IHRA, the PWFA requires an interactive process to discuss what adjustments to the work environment or how work is performed may be reasonable and effective. While the PWFA does not require accommodations imposing an undue hardship on the employer's business operations, the Act makes clear that employers cannot require an employee to accept an accommodation other than a reasonable accommodation reached through this interactive process. Federal guidance states that possible reasonable accommodations may include but are not limited to: the ability to sit or drink water; closer parking; flexible hours; appropriately sized uniforms and safety apparel; additional break time to use the bathroom, eat, and rest; leave or time

Continued on page 4

Legislative Updates

Continued from page 3

off to recover from childbirth; and being excused from activities that are strenuous or involve exposure to compounds not safe for pregnancy. Mirroring the IHRA, the PWFA also prohibits requiring an employee to take leave if another reasonable accommodation can be provided. As with other legal protections for pregnant employees, employers are prohibited from discriminating or retaliating against an employee based on a request for accommodations.

As part of its implementation of the PWFA, the U.S. Equal Employment Opportunity Commission ("EEOC") has proposed rules that would make clear that the PWFA covers a wide range of conditions, including relatively modest or minor conditions, and limitations relating to past, current, or potential pregnancies (including fertility treatment); childbirth or the end of a pregnancy; and post-partum conditions and lactation. The rules also propose a definition of "the near future" that would require considering what reasonable accommodations are available, if any, when a temporary inability will last up to forty weeks. The proposed rules have not yet been finalized; the EEOC is accepting public comment on the proposed rules until October 10, 2023.

Although we will be watching the proposed rules closely, it appears that the impact of the PWFA will be relatively limited for Illinois colleges and universities, which are already covered by various overlapping state and federal requirements related to employee pregnancy and similar conditions. For more on the PWFA, check out our recent law alert, New Federal Laws Increase Protections for Pregnant Employees.

Public Act 103-0288 – PSVHEA Climate Survey Timeline

Effective July 28, 2023

This legislation updates the timeline for the administration of sexual misconduct climate surveys under the Preventing Sexual Violence in Higher Education Act ("PSVHEA"), in addition to making other minor technical changes. It clarifies that both the Illinois Board of Higher Education ("IBHE") and the Illinois Community College Board ("ICCB"), as applicable, will provide a base survey at least biannually to the institutions they regulate. Under this legislation, the deadline for the State Task Force on Campus Sexual Misconduct Climate Surveys ("Task Force") was extended by a year to July 31, 2023, and the biannual Task Force meetings to discuss survey results and updates were also postponed by a year.

The initial Task Force Report and Base Survey Recommendations, published on July 31, 2023, can be found here. Institutions must administer their initial climate surveys and submit a summary of the results to IBHE or ICCB, as applicable, by no later than July 31, 2024.

Public Act 103-0311 – OMA Remote Attendance

Effective July 28, 2023

P.A. 103-0311 amends the Illinois Open Meetings Act ("OMA") to expand the reasons that members of a college board of trustees may attend a public meeting by phone or videoconference. Specifically, when a quorum of the board is physically present, a trustee may attend a meeting remotely if they are prevented from attending in person due to unexpected childcare obligations. Institutions with policies allowing remote meeting attendance will need to update their policies to include unexpected childcare obligations alongside the previously available reasons for remote attendance, including personal illness or disability, employment purposes or the business of the public body, and a family or other emergency.

Public Act 103-0465 – Wellness Kiosks

Effective August 4, 2023

P.A. 103-0465 requires that each public institution of higher education in the State make at least one wellness kiosk available on each campus under its jurisdiction. "Wellness kiosk" is defined as a mechanical device used for retail sales of wellness products that may include, but is not limited to, prophylactics, menstrual cups, tampons, menstrual pads, pregnancy tests, and nonprescription drugs. A wellness kiosk must also include discounted emergency contraception.

For community colleges, the Act requires that the wellness kiosk be located in an area of campus where students can access it during class hours; for all other public institutions, the kiosk must be located in an area where students can access it on weekends and after class hours. In addition, institutions should ensure that each kiosk satisfies the Act's requirements related to labeling, storage and maintenance of products.

Continued on page 5

Legislative Updates

Continued from page 4

Public Act 103-0058 – Students with Disabilities

Effective January 1, 2024

On June 9, 2023, Governor Pritzker signed into law P.A. 103-0058, which creates the Removing Barriers to Higher Education Success Act. The Act requires all Illinois 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. In addition, an institution's policy must include transparent and explicit information regarding the institution's process for determining student eligibility for disability accommodations. Lastly, institutions must disseminate information about the disability accommodation process annually to students, parents and faculty in accessible formats, including during student orientation, and must make the information available on their websites.

Public Act 103-0466 – Bereavement Leave

Effective January 1, 2024

On August 4, 2023, Governor Pritzker signed into law P.A. 103-0466, known as the Child Extended Bereavement Leave Act or "Zachary's Parent Protection Act." The Act requires that any Illinois employer with 50 to 249 employees provide up to six weeks of unpaid leave to any full-time employee who has worked for the employer for at least two weeks and who has lost a child to suicide or homicide. For employers with 250 or more full-time employees, the employer must provide up to twelve weeks of unpaid leave. The Act provides that the leave may be taken in a continuous period or intermittently within a year of the employee notifying the employer about the child's death. As with other bereavement leave, employers are permitted to require reasonable documentation to support the employee's leave request and to require reasonable advance notice where practicable. In preparation for the Act becoming effective on January 1, 2024, institutions with 50 or more full-time employees should review and modify their bereavement policies to incorporate the Act's requirements.

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

This year brought me back to my home state of Utah more than I had expected. However, I was happy to go back with my family and attend the Utah vs. Florida football game. It was my son Zachary's first game, and carrying on a tradition I grew up with was a special moment for all of us.

- Matthew J. Gardner

Robbins Schwartz recently participated in Race Judicata, a 5K race that benefits the Chicago Volunteer Legal Services Foundation to help ensure that the law works for everyone. The race took place in Lincoln Park, ensuring participants a beautiful view along the course. Shoutout to Devon Kelly, a Paralegal in the Chicago office, for completing the race in 24 minutes and 41 seconds.

Upcoming Higher Education Events

Legal Update for Illinois Higher Education Institutions Virtual Conference

September 14, 2023 | 8:30 AM - 1:30 PM

Join us for our Legal Update for Illinois Higher Education Institutions Virtual Conference on Thursday, September 14, 2023. To view our conference program, click here.

Click here to register!