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Higher Education Happenings

ChatGPT and Artificial Intelligence: Legal and Policy Implications for Higher Education Institutions

By Matthew J. Gardner

Since the public release of the artificial intelligence chatbot known as ChatGPT in the fall of 2022, there has been significant and ongoing speculation on ChatGPT's potential to disrupt higher education. Now, more than a year later, it is still too early to fully assess ChatGPT's overall impact on educational institutions. Most agree, however, that ChatGPT and similar AI tools will undoubtedly have a transformative effect on students' learning, faculty's teaching, and the higher education field as a whole.

But what do colleges and universities need to know about artificial intelligence from a legal standpoint? Because ChatGPT and similar tools are so new, the legal considerations surrounding their use are still developing and, to a certain degree, theoretical. Artificial intelligence is a relatively unregulated industry, though it is worth noting that Sam Altman, CEO of OpenAI, the company that owns ChatGPT, recommended future regulation when he testified before Congress on May 16, 2023. Future regulation will likely be more focused on issues such as misinformation and the ability of AI to self-replicate or learn on its own, which have broad implications but which are not specifically tied to higher education.

More directly relevant to colleges and universities are issues relating to academic integrity, plagiarism, student privacy, and ownership of any intellectual property created by artificial intelligence tools. Colleges should ensure that their academic integrity policies address the use of artificial intelligence tools and clearly define what constitutes unauthorized use. An institution's academic integrity policy should be included in the academic catalog, incorporated in individual instructors' course syllabi, and posted on the institution's website. Additionally, departments or faculty considering the use of new AI tools should review those tools' terms of use and privacy policies to ensure compliance with applicable privacy laws and to determine how the output from such tools may be used.

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Artificial intelligence and its use in higher education will undoubtedly be an evolving process requiring colleges and universities to be mindful of both the incredible benefits of AI and the risks posed by its use. Robbins Schwartz's data privacy team is actively monitoring the development of artificial intelligence and its implications for higher education institutions, and we will continue to provide updates as new issues emerge.

In the News: OCR Clarifies Legality of Religious Harassment on College Campuses

By Aaron J. Kacel

On November 7, 2023, the U.S. Department of Education's Office for Civil Rights ("OCR") released a Dear Colleague Letter in response to the recent rise in attacks on Jewish, Muslim, Arab and Palestinian students on college campuses across the country. As institutions already know or should know, Title VI of the Civil Rights Act of 1964 ("Title VI") requires colleges and universities receiving federal financial assistance to provide all students an academic environment free from discrimination based on race, color, or national origin. Notably, religion is absent from this list. Accordingly, as OCR clarifies in its Dear Colleague Letter, discrimination based on religion is not expressly prohibited by Title VI. That said, Title VI's protections against discrimination extend to "shared ancestry or ethnic characteristics" and "citizenship

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OCR Clarifies Legality

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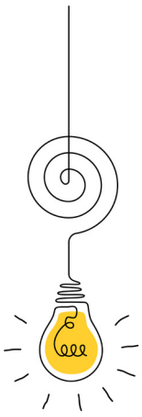
or residency in a country with a dominant religion or distinct religious identity." In other words, Jewish, Muslim, Arab and Palestinian students are protected against discrimination on college campuses, and discrimination of these groups violates federal law.

As OCR further clarifies, harassment is one kind of discrimination. The same legal standard that applies to unlawful harassment based on race, color or national original applies to harassment based on ancestry characteristics and citizenship or residency in a country with a dominant religion. Unlawful harassment under Title VI is defined as: (1) unwelcome conduct that is (2) subjectively and objectively offensive, and (3) so severe or pervasive that it limits or denies a person's ability to participate in or benefit from an institution's educational programs or activities. As OCR notes, harassing conduct can be verbal and/or physical, and it need not be directed at a particular individual. Moreover, harassment can be based on actual or perceived membership in a group; a student does not in fact have to be a member of one of these groups to be a victim of unlawful harassment.

On the requirement of "subjectively and objectively offensive," OCR and courts typically examine whether a reasonable student would find the alleged harassment offensive, in addition to the student who experienced the conduct finding it subjectively offensive. On the "severe or pervasive" requirement, OCR and courts typically require more than one occurrence, but a single incident of particularly egregious conduct can constitute unlawful harassment in certain circumstances. Examples of potentially harassing conduct based on shared ancestry or citizenship or residency in a country with a dominant religion may involve slurs, stereotyping, or threats based on a student's skin color, physical features, style of dress, accent, name, or speaking a non-English language. In January 2023, OCR released a Fact Sheet further explaining and providing additional examples of unlawful harassment.

Takeaways for Colleges and Universities



Generally, an educational institution violates Title VI when it knows or should know of harassment and fails to take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent the harassment from reoccurring. Colleges and universities are legally obligated to resolve complaints of harassment based on shared ancestry or citizenship in a country with a dominant religion in the same manner that they resolve complaints of harassment based on race, color and national origin; the same urgency, thoroughness and fairness should be applied to all such complaints of harassment on college campuses.

OCR clearly takes seriously complaints of harassment based on shared ancestry or citizenship in a country with a dominant religion. On November 16, 2023, it released a list of educational institutions, including six colleges and universities, currently under investigation for alleged failure to resolve these kinds of complaints. OCR updates this list weekly, and since November 16, 2023, an additional 22 colleges and universities have been added to the list.

In sum, while harassment based on religion is not expressly prohibited under Title VI, the law extends to harassment based on shared ancestry and citizenship or residency in a country with a dominant religion. Therefore, Jewish, Muslim, Arab and Palestinian students are protected against harassment on college and university campuses, and institutions are required to ensure that their academic communities are free of harassment against students who identify with or are perceived to be part of these groups. Institutions should take seriously all complaints and reports of conduct that could qualify as harassment and, where such complaints and reports are made, institutions should consult with legal counsel familiar with this area of law to ensure they provide an appropriate response. Failure to promptly consult with legal counsel and/or resolve allegations of unlawful harassment can expose an institution to legal liability, loss of federal funding, and as the news has recently demonstrated, unfavorable press.

Illinois Community College Settles Lawsuit Over Clinical Student's Vaccination Exemption Request

By Emily P. Bothfeld and Evan J. Deichstetter

An Illinois community college that was sued in October 2022 for denying a clinical student's COVID-19 vaccination exemption request has settled the lawsuit, serving as a cautionary tale for colleges and universities that contract with external agencies to provide clinical experiences for students. Plaintiff John Wegmann brought a civil action against John A. Logan College after he was forced to withdraw from the College's Sonography Program because the College would not grant his request for a religious exemption from a requirement of the College's clinical partner, Blessing Hospital, that

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Vaccination Exemption Request

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all students placed at the hospital be vaccinated against COVID-19. According to the complaint, Blessing had informed the College that while it did not provide separate exemptions to students, it would accept a religious exemption provided by the College. In response to Wegmann's request, however, the College informed Wegmann that "the College did not require the COVID-19 shot and therefore, it could not accommodate his religious beliefs by providing him with a religious exemption for the clinical affiliate."

Wegmann claimed that the College's denial of his exemption request constituted: (a) a violation of his free exercise rights under the federal and Illinois Constitution; (b) a violation of the Illinois Religious Freedom Restoration Act; and (c) retaliation under the First Amendment. In March 2023, the College filed a motion to dismiss for lack of standing, asserting that it was Blessing's action of not providing its own religious exemption option for the COVID-19 vaccine that caused Wegmann's injury, rather than the College's own actions. The District Court denied the College's motion to dismiss, concluding that Wegmann's complaint adequately alleged an injury in fact traceable to the College's conduct—namely, in denying Wegmann's request for a religious exemption, the College failed to provide Wegmann with an equal educational opportunity by accommodating his sincere religious beliefs. *Wegmann v. Trustees of John A. Logan College*, 2023 WL 3346831, *2 (S.D. Ill. May 10, 2023).

Shortly after the Court denied the College's motion to dismiss, the case was referred to mediation, and in November 2023, the parties reached a resolution, the terms of which have not been made public.

Although the Court did not reach the merits of Wegmann's claims, this case illustrates the importance of developing clear procedures for verifying student compliance with clinical health requirements and managing student requests for exemptions from such requirements. Colleges and universities that partner with third-party clinical agencies should ensure that all health-related placement requirements of a given clinical site are identified and documented in the affiliation agreement between the institution and the agency. Institutions should also include language in their program handbooks, manuals, and promotional materials that notifies students of the relevant clinical health requirements and the potential implications associated with a student's non-compliance with said requirements. Finally, colleges and universities should develop and maintain a process for considering student requests for exemptions from immunization or other health-related clinical requirements, working in conjunction with their clinical affiliates.

New Laws Effective January 1, 2024

By Emily P. Bothfeld, Evan J. Deichstetter, Kevin P. Noll, Kathleen C. Ropka, and Matthew M. Swift

Happy New Year! The start of 2024 has brought a host of legislative changes impacting colleges and universities. Read on for highlights of these major developments.

Public Act 102-1143 – Paid Leave for All Workers Act

On January 1, 2024, the Illinois legislature's landmark Paid Leave for All Workers Act ("PLFAWA") went into effect. The PLFAWA requires employers to provide workers with 40 hours of paid leave, or a pro-rated amount, during a 12-month period. Paid leave accrues at a rate of one hour for every 40 hours worked. Alternatively, employers may frontload the minimum amount of paid leave on the employee's first day of employment or the first day of the designated 12-month period. Employers may designate the 12-month period, meaning that colleges and universities have the option to synchronize the 12-month period with their fiscal year.

The PLFAWA applies to most private and public employers in Illinois. However, relevant to colleges and universities, the PLFAWA exempts short-term employees in higher education. A short-term employee in higher education is an individual who is employed for less than two consecutive calendar quarters during a calendar year and who has no reasonable expectation that they will be rehired by the institution for the same service in a subsequent calendar year. The PLFAWA also exempts temporary student workers who work part-time in higher education. A student worker who works part-time in higher education is a student enrolled and regularly attending classes at a college or university, and that college or university is also the student's employer on a temporary, part-time basis.

College and university employees covered by a collective bargaining agreement ("CBA") in effect as of January 1, 2024 are grandfathered, meaning that institutions do not need to comply with the PLFAWA as to those employees covered by the CBA for the term of the CBA. New and successor CBAs entered into after January 1, 2024 must comply with the PLFAWA or contain an explicit waiver of the law.

The Illinois Department of Labor ("IDOL"), the state agency responsible for enforcing the PLFAWA, published proposed rules in November 2023, which are available on IDOL's website. The proposed rules provide guidance on how IDOL interprets the provisions of the PLFAWA. The proposed rules are expected to be finalized in the Spring of 2024.

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New Laws

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Public Act 103-0159 – Community College Access and Out-of-District Tuition

P.A. 103-0159 amends the Public Community College Act ("PCCA") to provide students with greater access to affordable community college educational services. The amendment provides that, if a resident of a community college district seeks to enroll in a program that is not offered by the student's home district but is offered by a community college in another district, and the two community college districts do not have a contractual agreement under Section 3-40 of the PCCA for the particular program, then the student may attend the public community college offering the program and pay tuition and fees at the in-district rate of the receiving college. If the student is seeking State or federal financial assistance, the student must apply for assistance at the receiving college.

The amendment directs the Illinois State Board of Education ("ISBE") to create and maintain a program directory on its website to assist community colleges in determining which programs are offered at each institution and whether sufficient "programmatic differences" exist to allow a student to attend a community college outside their home district. ISBE must also establish a process for resolving disputes between community college districts regarding programmatic differences. Finally, the amendment sets forth various procedural requirements and terms related to financial assistance, State grants, application and enrollment procedures, coursework completion, records and transcripts, access to campus services, and athletic eligibility.

Public Act 103-0401 – Remediation Data

P.A. 103-0401 amends the Public Community College Act to require a community college district, upon request from a high school district within its boundaries, to provide individualized disaggregated data on the enrollment of students in community college remediation courses from the most recently completed academic year.

Prior to sharing remediation data, the community college district and high school district must enter into a remediation data sharing agreement that includes certain identified provisions. A community college district may choose to adopt a uniform agreement for all high school districts within its boundaries. The Illinois Community College Board ("ICCB") and Illinois State Board of Education ("ISBE") are working to develop a model remediation data sharing agreement containing the requisite provisions, which will be available for use by school districts and community college districts. Robbins Schwartz is monitoring the development of the model agreement and will provide a further update when it is released in the coming months.

Public Act 103-0314 – VESSA Leave

P.A. 103-0314 expands the Victims' Economic Security and Safety Act ("VESSA") to provide unpaid leave to employees who are victims or whose family or household members are victims of a wider range of crimes of violence. The amendment adds three reasons unpaid leave can be used related to the death of a family or household member who is killed in a crime of violence: (a) attending a funeral or alternative; (b) making arrangements necessitated by the death; and (c) grieving the death. Unlike other reasons outlined in VESSA, leave for these three reasons is limited to two work weeks or 10 workdays, and the leave must be completed within 60 days of when the employee learns about the death. For employees who also qualify for leave under the Family Bereavement Leave Act ("FBLA"), VESSA leave used for these three reasons can supplement their FBLA leave.

Public Act 103-0450 – Organ Donation Leave

This bill allows employees who have worked for six months or more to use up to ten days of paid leave in any 12-month period to serve as an organ donor. Employees must receive approval from their employer before taking the leave.

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

My family celebrating Misericordia's "Artist in All" at the Chicago Art Institute, where my Daughter's artwork was on display. After a prolonged bidding war, I was able to purchase her painting and it now hangs proudly in our house!
- Howard A. Metz

Upcoming Higher Education Events

Purchasing & Construction Virtual Conference

Stay tuned for more details on the conference date and topics. For updates, visit our website at www.robbins-schwartz.com.