

Client Alert: Ten Major Issues Facing Higher Education Institutions in 2023

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The last few years have been eventful and, at times, difficult ones for institutions of higher education. Institutions have been deeply impacted by issues ranging from the COVID-19 pandemic, to debates over free speech, to changes in immigration law, and to the ever-increasing pace of technological change, to name but a few. These impacts have been felt by institutions in numerous ways, including through increased legal risk and litigation. But notwithstanding all that has happened, 2023 may be one of the most impactful years for higher education in recent memory. Some of the issues we present below represent challenges for institutions of higher education while others represent opportunities. But all of these issues are important, interesting, and worthy of careful consideration as the year progresses.

#1 Race-Conscious Admissions

The Supreme Court is expected to decide two lawsuits challenging race-conscious admissions policies at Harvard College and the University of North Carolina at Chapel Hill (UNC) in June 2023. The petitioner in both cases, Students for Fair Admissions (SFFA), alleged that Asian-American applicants were denied undergraduate admission because of race-conscious admissions programs that benefit certain minority groups but disadvantage Asian Americans. The Court's decision could overturn 40 years of precedent—including *Bakke*, *Grutter*, and *Fisher*—permitting the consideration of race in admissions for the purpose of furthering student body diversity.^[1]

While oral argument in November 2022 reflected a sharply divided court, the conservative majority appeared prepared to overrule at least significant parts of *Grutter* and thus prohibit the explicit consideration of race in higher education admissions. Such a decision would obviously mark a sea change for admissions policies and would be one of the most significant court decisions regarding higher education in decades. Because the Supreme Court's decisions in these cases will likely not come out before June 2023, colleges and universities should be able to largely complete this year's admissions cycle in accord with the Court's existing precedent. Nonetheless, institutions of higher

education should be prepared for the need to reformulate policies before the next admissions cycle to comply with the Court’s forthcoming decisions.

To read more on this issue, please [click here](#).

#2 Artificial Intelligence

The exponential rate of development in AI poses challenges and opportunities for colleges and universities. The use of AI technology, particularly AI-based facial recognition, has become commonplace for remote assessment proctoring due to the COVID-19 pandemic, and its use is likely to grow. Used in this manner, AI can be a useful means of stemming academic misconduct.

On the other hand, the growth of AI presents substantial challenges, too. For example, institutions have already faced suit under statutes such as the Illinois Biometric Privacy Act for capturing of students’ biometric information, including through use of online remote proctoring tools.^[2]

Moreover, facial recognition technology, including AI-based proctoring software, is better at detecting light-skinned people than dark-skinned people and better at detecting men than women, raising issues of discrimination and equity.^[3] Students with accessibility needs, learning disabilities, neurodivergence, or mental health conditions may also be at risk for discrimination by AI proctoring systems, as may transgender students.^[4]

Recent well-publicized developments in generative AI—algorithms, such as ChatGPT, that can be used to create new content, including text, audio, code, images, and video—will require institutions of higher education to consider how to address AI use in assessments like essay writing and adjust academic integrity policies to address such technology. And the proliferation of generative AI will also raise copyright questions for institutions of higher education. Courts will soon consider the “fair use” of input data—i.e., the training data that is ingested and used by AI algorithms.^[5] As owners of tremendous amounts of intellectual property, colleges and universities will have to consider how best to protect their data and other intellectual property.

#3 Immigration: DACA Under Threat (Again)

Once again, colleges and universities will be forced to confront significant challenges related to immigration in 2023. The most high-profile issue remains the ongoing challenge to the legality of the Deferred Action for Childhood Arrivals (DACA) program. Originally brought in 2018, the lawsuit by Texas and several other states seeks to end the DACA program.^[6] It is being litigated in the Southern District of Texas before the same district court that ended the DAPA program during the Obama administration.^[7]

The federal district court and Fifth Circuit have already signaled that they believe DACA is unlawful.^[8] They are currently evaluating whether the rule promulgated by the Biden administration to

formalize the DACA program alters that legal calculus.^[9] The litigation is proceeding in the district court, on remand from the Fifth Circuit, but a decision is anticipated later this year.

If the district court finds that the codified rule is unlawful, the temporary reprieve given to existing DACA recipients could end, subjecting hundreds of thousands of existing DACA recipients to removal and threatening their ability to work legally in the United States.

Given the importance of the DACA program to colleges and universities, this is litigation that schools will want to follow closely as it continues to work its way through the federal courts. And should the courts ultimately end the DACA program, universities will likely play an important role in the compelling push for a legislative solution, which at that point may be the Dreamers' only option.

#4 Antitrust Scrutiny for Institutions and Athletic Conferences

The NCAA, conferences, and institutions of higher education will continue to respond to the Court's ruling in *NCAA v. Alston*,^[10] which held that certain NCAA restrictions on education-related benefits for student-athletes violated federal antitrust laws. For example, in *In re College Athlete NIL Litigation*, a potential class of football players, men's basketball players, women's basketball players, and other Division I athletes are challenging the NCAA's former NIL ban and current NIL rules as violative of antitrust laws.^[11] Plaintiffs' motion for class certification is currently pending, and the case is set for trial in mid-2024. At the same time, although the Court in *Alston* left the conferences free to impose many of their own restrictions on student-athlete benefits, some have speculated that antitrust concerns may come to the fore in light of the continued, and perhaps expanded, dominance of the SEC and the Big Ten conference.^{[12], [13]}

In addition, ongoing litigation in the Northern District of Illinois raises questions related to a former statutory antitrust exemption, called Section 568, and financial aid methodologies used by institutions across the country. The case, *Corzo et al. v. Brown University, et al.*, is currently proceeding through discovery.^[14]

#5: College Athletics

The coming year will likely bring numerous important changes related to college athletics. For one, in *Johnson v. NCAA*,^[15] the Third Circuit will rule on whether student-athletes can constitute "employees" under the FLSA.^[16] The Seventh and Ninth Circuits have already considered the question and ruled that student-athletes *cannot* be deemed employees, so a contrary ruling by the Third Circuit would create a circuit split, which could elevate the issue to the Supreme Court.^[17]

Meanwhile, in the 18 months since the NCAA began allowing college athletes to make money off their names, images, and likenesses (NIL), 32 states have passed legislation to set rules for this process.^[18] Given the variation across this "patchwork" of legislation, there have been calls for

Congress to pass a uniform federal law that would even the playing field amongst all colleges and universities. So far, none of the bills introduced have made it to the floor for debate, but this will be a topic to watch in 2023.^[19]

Ongoing litigation over concussions in college sports is another issue likely to make news in 2023. In November 2022, a jury in Los Angeles County found the NCAA was not responsible in a wrongful death action brought by the estate of Brian Gee, a former USC football player whose death was allegedly caused by CTE.^[20] But this trial is just the beginning; there are a number of other concussion cases against the NCAA working their way through state courts around the country, starting with a trial this February in Indiana.^[21]

#6: New Title IX Rules

In 2023, the Department of Education is expected to promulgate its highly anticipated rule clarifying the scope of Title IX protections and revising processes for handling Title IX grievances. Based on the Department's notice of proposed rulemaking, the rule is likely to make several key changes.

As to the scope of Title IX's substantive guarantees, the new rule will clarify that Title IX protects against discrimination based on sex-based stereotypes, sexual orientation, gender identity, and pregnancy. And the rule plans to restore the longstanding standard for when sex discrimination liability is triggered: harassment must be "severe, pervasive, *or* objectively offensive." (This standard had been abandoned by the Trump administration in its 2020 regulations in favor of a requirement that harassment be "severe, pervasive, *and* objectively offensive.") The new rule's revised definition means that a single instance of sex harassment could give rise to a Title IX violation if the incident is sufficiently severe or objectively offensive (such as an assault). The new rule will also clarify Title IX's coverage for conduct that occurs off-campus. In particular, it is expected to reverse the Trump administration's policy that study abroad programs are not included.

As to the procedures universities must use to respond to and adjudicate Title IX claims, the new rule will return the standard of proof for sex discrimination to the familiar "preponderance of the evidence" standard, meaning it is more likely than not that the alleged conduct occurred. This standard had been the express federal policy dating back to the 2011 Dear Colleague Letter, but the Trump administration abandoned it in 2020 for the heightened "clear and convincing evidence" standard. In reversing the Trump administration's approach, the new rule may leave universities some flexibility; if schools use the "clear and convincing" standard for all comparable disciplinary proceedings (including complaints alleging other forms of discrimination), then they will be permitted to use that heightened standard for Title IX complaints, too.

More broadly, the new rule will embrace a framework for adjudicating Title IX complaints that takes account of universities' different environments, resources, and needs—reversing the one-size-fits-all approach of the Trump administration's procedural requirements. Especially noteworthy, universities are expected to be allowed to return to a single-investigator model, a practice banned

by the Trump-era regulations. That change will, in turn, have downstream effects, including that universities will no longer be required to hold live hearings to evaluate evidence; however, they must have in place a process to evaluate witness credibility through live testimony where desirable and must afford the parties equal opportunity to present and respond to relevant evidence. The new rule will also roll back the Trump administration's requirement that cross-examination be available to the parties. That said, the Department is likely to allow universities to use cross-examination if they so choose. Finally, the new rule is expected to reiterate principles of evenhandedness and a commitment to fair process. In particular, it is likely to mandate that universities withhold disciplinary action any accused person unless and until it determines that sex discrimination has occurred.

#7 Department of Education Office of Civil Rights Complaints

The Office for Civil Rights (OCR) is tasked with enforcing civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability, and age in programs that receive Department of Education funding. Complaints may be filed with the OCR by anyone who believes that an institution receiving federal financial assistance has discriminated against someone on these prohibited bases. Over the course of the 2022 fiscal year, the Office of Civil Rights received nearly 19,000 complaints, more than doubling the number received in 2021 and surpassing the record 16,000 complaints received in 2016.^[22] Although the Office has not yet released its annual report, Assistant Secretary for Civil Rights Catherine Lhamon spoke with *The New York Times* about the upward trend, noting that the jump in the number of complaints “reflects [] confidence in the Office of Civil Rights as a place to seek redress.”^[23] In its most recent annual report, which correctly predicted that 2022 would be a record-breaking year in the number of complaints filed, the Office acknowledged that “addressing the rising number of civil rights complaints will be challenging” given staffing limitations.^[24] The Office has not provided any statement to suggest the uptick in complaints will stall in 2023.

Notably, in recent years, a small number of individuals have filed a large number of OCR complaints.^[25] For example, in 2017, 23 percent of the total cases were filed by three people.^[26] One individual, Mark Perry, Professor Emeritus of Economics at University of Michigan – Flint, has filed hundreds of complaints, including some as recently as December 2022 against programs designed to support minorities and other historically disadvantaged groups.^[27] The prevalence of frequent complainants, too, shows no sign of slowing.

#8: Challenges to Faculty Diversity Initiatives

This past year saw an increase not only in suits challenging universities' student diversity initiatives, but also in suits seeking to invalidate *faculty* diversity initiatives. Notably, America First Legal, a conservative legal organization,^[28] has sued Texas A&M University for its fellowship program seeking to hire faculty “from underrepresented minority groups” in order to “mov[e] the structural

composition of [its] faculty towards parity with that of the State of Texas.”^[29] The plaintiff, Richard Lowery, is a white professor at UT Austin who sued, alleging that he represented a class of “white and Asian men who stand ‘able and ready’ to apply for faculty appointments at Texas A&M.”^[30]

Lowery poses new potential risks for universities, not just because many universities may similarly seek to foster diversity among their faculties,^[31] but also because the plaintiff’s decision to sue under Title VI (addressing discrimination in institutions receiving federal funding) rather than Title VII (addressing employment discrimination) potentially presents novel legal questions. The use of Title VI, however, also provides universities with strong defenses against these claims. Universities may argue that disgruntled job applicants do not fall within the ambit of Title VI’s intended protections, as they are not the intended beneficiaries of the federal funds. They may also argue that a Title VI claim requires that the federal financial assistance have the “primary objective of ... provid[ing] employment,” which is not the case with most of the federal assistance universities receive.^[32] Texas A&M has raised these defenses in its motion to dismiss the suit, although the court has not yet ruled on the motion. The district court’s receptivity to these novel arguments could determine whether suits like this one proliferate in the coming months.

#9: A New, GOP-Controlled House of Representatives

Higher educational institutions should brace themselves for a host of challenges and scrutiny likely to be presented by the new, GOP-controlled House of Representatives. Universities should be prepared to receive information requests from several House committees—the Committee on Education and the Workforce, the Committee on Oversight and Accountability, and the new “Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party.”

Representative Virginia Foxx (R-NC), Chairman of the Committee on Education and the Workforce, recently announced her intent to launch “vigorous and sustained oversight” of the Department of Education,^[33] renewed demands for investigation and briefing on free speech at colleges and universities,^[34] and listed among her priorities “stopping Biden’s radical changes to federal student loans.”^[35]

Meanwhile, Representative James Comer (R-KY), Chairman of the Committee on Oversight and Accountability, sent a letter to the University of Pennsylvania on January 18 demanding a wide range of information purportedly related to “President Biden’s recent mishandling of classified information.”^[36] The letter sets forth allegations of improper influence of the Biden administration by both UPenn and China, and demands documents and communications related to donations to UPenn originating from China, efforts to solicit donations for the Penn Biden Center (a think tank affiliated with UPenn), and all persons with access to or who had visited the Penn Biden Center.^[37]

The new Select Committee on China will be chaired by Representative Mike Gallagher (R-WI), though House Speaker Kevin McCarthy vowed that the committee would not be partisan and that it would focus on issues such as bringing jobs and supply chains back from China and securing intellectual property.^[38] It remains to be seen whether this committee will put university funding issues in its crosshairs.

Separate from potential inquiries launched by these committees, other challenges could be presented by the mere fact of a divided Congress. For instance, a divided Congress is unlikely to pass a budget doubling the amount of the Pell Grant from \$6,500 to \$13,000 (which most involved with higher education agree is much needed) or to fund the scientific research part of the CHIPS and Science Act.^[39] Medical research funding could also face sharp cuts if House Republicans are able to fulfill their promise to decrease spending to 2022 levels.^[40]

#10: Student Debt Relief

In two cases, *Biden v. Nebraska* and *Department of Education v. Brown*, the Supreme Court will hear challenges to the legality of the Department of Education's student debt relief plan. While these decisions may not directly impact universities, they could meaningfully expand or contract the Department of Education's authority to change financial assistance programs by rule, and regardless will undoubtedly affect students and alumni in ways that could be felt on campus.

Last year, the Biden administration announced that borrowers earning less than \$125,000 (or \$250,000 if married and filing taxes jointly) were eligible to receive either \$10,000 or \$20,000 in debt forgiveness on non-commercially held loans.^[41] Millions of federal borrowers are expected benefit from this program.^[42] Plaintiffs in these two cases argue that the Biden administration failed to follow the proper procedures when enacting the policies, that the Secretary of Education lacks statutory authority to implement such a program, and that the program was arbitrary and capricious.^[43] The Department of Education claimed the legal authority to implement this debt-relief program under the HEROES Act,^[44] which authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under Title IV "as the Secretary deems necessary in connection with ... [a] national emergency."^[45] But the plaintiffs in these suits—both private individuals and a collection of states opposed to the program—maintain that the Secretary cannot simply wipe away millions of dollars in debt through executive rulemaking, and instead require express congressional authorization.

Both the private individuals and the states face threshold challenges to their suits, such as whether they can show injury from the program. But should the Court reach the merits of the case, its decision could have serious ramifications for the Department of Education's broader authority to modify financial assistance programs to meet changing needs—not to mention major financial consequences for millions of university alumni. If the Court requires more explicit authorization

from Congress, for example, the Department of Education’s ability to provide meaningful assistance to students will be sharply curtailed; and if the Court blesses this exercise of authority, the Department of Education could conceivably use the ongoing national emergency due to the COVID-19 pandemic to justify further changes to the federal financial aid landscape.

Footnotes

[1] See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

[2] See, e.g., *Powell v. DePaul Univ.*, No. 21 CV 3001, 2022 U.S. Dist. LEXIS 201296 (N.D. Ill. Nov. 7, 2022) (dismissing BIPA suit against DePaul University because the university fell within BIPA’s “financial institution” exemption); *Doe v. Northwestern Univ.*, 586 F. Supp. 3d 841 (N.D. Ill. 2022) (same).

[3] Larry Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial-Intelligence Systems*, MIT News (February 11, 2018), <http://news.mit.edu/2018/study-finds-gender-skin-typebias-artificial-intelligence-systems-0212>; Meredith Whittaker et al., *AI Now Report 2018*, AI Now Institute, at 16 (December 2018), https://ainowinstitute.org/AI_Now_2018_Report.pdf (citing Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, Proceedings of machine learning research (2018), <http://proceedings.mlr.press/v81/buolamwini18a.html>).

[4] Liane Colonna, *Legal Implications of Using AI as an Exam Invigilator*, Stockholm Faculty of Law Research Paper Series no. 91 (May 5, 2021), <https://ssrn.com/abstract=3839287>.

[5] See Sharon Goldman, *Why generative AI legal battles are brewing*, The AI Beat, VentureBeat (Oct. 21, 2022), <https://venturebeat.com/ai/why-generative-ai-legal-battles-are-brewing-the-ai-beat/>.

[6] See *Texas v. United States*, No. 18-cv-00068 (S.D. Tex., filed May 1, 2018).

[7] See *Texas v. United States*, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015).

[8] *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021); *Texas v. United States*, 50 F.4th 498, 528 (5th Cir. 2022).

[9] See Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53152-01 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts 106, 236, and 274a).

[10] *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

[11] *In re College Athlete NIL Litigation*, 4:20-cv-03919-CW (N.D. Cal., filed June 15, 2020).

[12] Kevin Harrish, *Big Ten potential conference expansion legal problems revealed*, The Comeback (Aug. 4, 2022), <https://thecomeback.com/ncaa/big-ten-conference-realignment-legal-problems-pac-12.html>.

[13] James Parks, *College football realignment: CA Regents to discuss litigation amid UCLA move*, Fan Nation Sports Illustrated (July 12, 2022), <https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-realignment-ucla-big-ten-regents-legal-issues>.

[14] *Corzo, et al. v. Brown University, et al.*, 1:22-cv-00125 (N.D. Ill., filed Jan. 9, 2022).

[15] No. 22-cv-1223 (3d Cir., filed Feb. 8, 2022).

[16] Oral argument in the case was recently postponed from January 18, 2023, to February 15, 2023. *Id.* at Dkt. 68 (Jan. 17, 2023).

[17] Babak G. Yousefzadeh & Skyler Hicks, *What the Third Circuit's Looming Decision Regarding Whether College Athletes Can Constitute "Employees" Will Mean for Universities and Employers of Unpaid Student Interns*, *The National Law Review* (Jan. 18, 2023), <https://www.natlawreview.com/article/what-third-circuit-s-looming-decision-regarding-whether-college-athletes-can>.

[18] Alex Lawson, *Sports & Betting Legislation And Regulation to Watch In 2023*, *Law360* (Jan. 2, 2023), <https://www.law360.com/articles/1560997/sports-betting-legislation-and-regulation-to-watch-in-2023>.

[19] *Id.*

[20] *Gee v. NCAA*, No. 20-STCV-43627 (Cal. Super. Ct., Los Angeles Cty.); *see also* Brian Melley, *Jury: NCAA not to blame in ex-USC football player's death*, *The Seattle Times* (Nov. 23, 2022), <https://www.seattletimes.com/business/jury-ncaa-not-to-blame-in-ex-usc-football-players-death/>.

[21] *Finnerty v. NCAA*, No. 49D14-1808-CT-033896 (Ind. Super. Ct., Marion Cty.); *see also, e.g.,* *Campion v. NCAA*, No. 27-CV-21-10480 (Minn. Dist. Ct., Hennepin Cty.); *Greiber v. NCAA*, No. 600400/2017 (N.Y. Sup. Ct., Nassau Cty.).

[22] Erica Green, *Strife in the Schools: Education Dept. Logs Record Number of Discrimination Complaints*, *The New York Times* (Jan. 1, 2023), <https://www.nytimes.com/2023/01/01/us/politics/education-discrimination.html>.

[23] *Id.*

[24] *Safeguarding Students' Civil Rights, Promoting Educational Excellence*, U.S. Department of Education Office of Civil Rights Report to the President and Secretary of Education (2021), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2021.pdf>.

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[27] Kim Elsesser, *Stanford University Under Investigation For Sex Bias – Against Men*, *Forbes* (Nov. 30, 2022), <https://www.forbes.com/sites/kimelsesser/2022/11/30/stanford-university-under-investigation-for-sex-bias-against-men/?sh=68fbf1c93c17>.

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[30] *Id.*

[31] Charlotte Huff, *Building a better, more diverse faculty*, *52 Monitor on Psychology* 25 (Nov. 1, 2021), <https://www.apa.org/monitor/2021/11/news-diverse-faculty>.

[32] *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 706 n.9 (5th Cir. 1994).

[33] Press Release, *Foxx Named Chair of Education and the Workforce Committee*, Committee on Education & The Workforce (Jan. 9, 2023), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408753>.

[34] Letter from Virginia Foxx, Chairwoman, Committee on Education and the Workforce, to Miguel Cardona, Secretary, Department of Education (Jan. 12, 2023), https://edworkforce.house.gov/uploadedfiles/jan._2023_follow_up_letter_to_ed.pdf.

[35] Press Release, *Foxx on Fox Talks Student Loans, Parents' Rights, and the Dignity of Work*, Committee on Education & The Workforce (Jan. 18, 2023), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408770>.

[36] Letter from James Comer, Chairman, Committee on Oversight and Accountability to Mary Elizabeth Magill, President, University of Pennsylvania (Jan. 18, 2023), <https://oversight.house.gov/wp-content/uploads/2023/01/2023-01-18-Letter-UPenn-Penn-Biden-Center.pdf>.

[37] *Id.*

[38] Patricia Zengerle, *New U.S. House creates committee focused on competing with China*, Reuters (Jan. 11, 2023), <https://www.reuters.com/world/us/new-us-house-creates-committee-focused-competing-with-china-2023-01-10/>.

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[43] *Id.*

[44] 20 U.S.C. § 1098bb (2003).

[45] *Id.*

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