Legal Issues That Keep Presidents Up at Night
Presenters

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2023 PRESIDENTS INSTITUTE
Designing the Future

guidebook
Stevens Strategy
Dynamic Campus
With Grateful Acknowledgement to Our Great Colleagues

- Peter Lake – Title IX
- Shawn Morgan – Cybersecurity
- Josh Stearns – NIL
- Melissa Watkins – UPMIFA

Thank you
2023 Issue Overview

- Impact of *Dobbs*
- Title IX Update
- Financial Stresses
- Tenured Faculty Termination
- Affirmative Action

- Evolution of NIL
- Cybersecurity Threats
- Things to Always Do
- Hot Topics
Supreme Court’s rejection of *Roe v. Wade* has multiple implications on campus, including:

- Health services provided by the institution
- Aiding and abetting restrictions
- Student activism
- Admissions
- Title IX/Title VII
- Employee benefits
Title IX Update

• Status of the Biden Administration’s Proposed Regulations

• Trends in Title IX Cases
  – *Tennessee v. U.S. Department of Education*
  – *Cummings v. Premier Rehab Keller, PLLC*—Not a TIX case but likely an important limitation
  – *Fairfax Co. Sch. Bd. V. Doe*—Sustains Gebser/Davis
Financial Stresses

- Endowment management under UPMIFA
- Downsizing/restructuring/eliminating programs
  - Personnel issues
    - Faculty handbook
    - Early exit plans
  - Accreditation issues
Faculty Termination Issues

- *Porter v. Berea College* – Terminated tenured faculty member asserted the following claims:
  - State and Federal Civil Rights Discrimination Claims
    - Age
    - Race
    - Sex
    - Retaliation
Faculty Termination Issues

• *Porter v. Berea College* (Cont’d)
  – Breach of Contract
    • Constitutional claims imported through faculty handbook
    • Impact of AAUP statements
    • Due process claims
    • Confidentiality claim
    • Refusal to mediate claim
    • Lack of counsel claim
    • Academic freedom claim
The Harvard/UNC Affirmative Action Cases

• Key Issue – Are “holistic” admissions processes which consider race and ethnicity valid under the First Amendment or a violation of prospective students’ Equal Protection and Title IV rights?
The Harvard/UNC Affirmative Action Cases

• ACE filed an amicus brief for 39 higher education groups, including CIC, arguing
  – IHEs should be allowed to pursue holistic reviews of applicants’ backgrounds
  – IHEs cannot pursue missions by mechanically relying on “objective” criteria
  – Race-conscious admissions disadvantage minorities and discriminates against speech
  – Perils of judicial interference in IHE administration will worsen
The Harvard/UNC Affirmative Action Cases

- October 31 oral arguments should suggest USSC will overturn *Bakke, Fisher I, Fisher II* precedents
- Ultimate outcome may be based on divided majority, with different justices writing nuanced opinions
- The nuance will matter to IHEs
- More to come!
The Ongoing Evolution of NIL

- Compliance issues
  - Recruiting
  - Collectives v. athletic department funds
  - F-1 students
  - Enforcement

- Quality control
  - IP licensing
  - Hostile industries
Cybersecurity Threats

• Types of threats
  – Phishing
  – Vishing
  – Ransomware/malware
  – Vendors/campus users
  – Website spoofing

• Sources of liability
  – Graham-Leach-Bliley (notice obligations)
  – HIPAA/HITECH
  – State data privacy laws
Cybersecurity Threats

• Proactive Steps as to employees/students
  – Adopt a solid “Acceptable Use Policy”
  – Conduct regular and unannounced training as a condition of continued use
  – Limit vendor access
  – Terminate access rights promptly when employees depart
  – Embrace “See Something, Say Something” culture
Cybersecurity Threats

• Proactive preparedness
  – Search Internet for “Your” content
  – Implement Multi-Factor Authentication for ALL users
  – Upgrade threat detection/response measures
  – Consider “red team”/“blue team” attacks
  – Conduct tabletop exercise
  – Consider joining Infragard
Cybersecurity Threats

• Proactive management of risk
  – Obtain adequate cyber insurance
  – Understand the limits of cyber insurance policy
  – Enlist third party to evaluate the policy
  – Know limits/breadth of ransomware payments
  – Coordinate with insurers to identify a response team, including external experts, now to avoid post-breach delays in resolving cyber emergency
Some Things to Always Do

• Be nice to the neighbors (a/k/a potential jurors!) – Oberlin

• Notify your insurers – Harvard

• Be objective about your litigation and avoid injecting personal acrimony into assessing – College of DuPage
Really Hot Topics

[Image: Newspaper page with the headline 'Breaking News']
QUESTIONS?
Legal Issues That Keep Presidents Up at Night - 2023

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Thank you