

Legal Issues that Keep Presidents Up at Night



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Presenters

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Legal Issues That Keep Presidents Up at Night – 2024

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***Selected Highlights of the 2024 Legal
Environment of American Higher
Education from Inside Higher Ed***

Students Press Biden Administration to Finalize New Title IX Rules

By Katherine Knott

A delay in issuing the regulations likely means that Trump-era rules will stay in place for another academic year.

Students gathered at the Education Department Monday to share their frustrations with the ongoing delays in the Biden administration's plans to issue new Title IX regulations.



Jim Watson/Getty Images

A New Legal Blitz on Affirmative Action

By Liam Knox

Challenges to race-conscious policies are surging in the wake of the Supreme Court ruling against affirmative action, including a new lawsuit against West Point.

The Supreme Court's June decision striking down race-conscious admissions may have been the most significant higher ed case in years, providing a concrete answer to questions that have spurred dozens of court cases since the 1990s. But it hardly put an end to the legal fight over affirmative action.

In fact, the outcome has unleashed a stream of new challenges to colleges' race-conscious policies and revived cases that had been dismissed or lost before the ruling was handed down.



Photo illustration by Justin Morrison/Inside Higher Ed | Getty Images

Game On, Again, for Gainful Employment

By Katherine Knott

The rule, which is stronger than versions released during the Obama administration, adds new disclosure requirements for all academic programs despite opposition from across higher education.

The Biden administration released its final gainful-employment rule Wednesday.

Starting in 2026, students who enroll in an academic program that leaves graduates with debt they can't afford will have to sign a disclosure notice, under a new federal rule aimed at providing families with more information about the costs and risks associated with programs.



Jim Watson/Getty Images

Liberty Flouted Federal Law on Crime Reporting

By Josh Moody

Preliminary findings from a Department of Education investigation of the evangelical university indicate years of missteps on issues of sexual misconduct.



Colleges Confounded by Flood of Borrower-Defense Claims

By Katherine Knott

The Education Department is working to clear a backlog in applications for debt relief through its borrower-defense program. Colleges aren't sure how to respond to notifications of the claims.

Colleges and universities beyond the for-profit sector are seeing a rise in the number of borrowers alleging that they were misled or defrauded by their institution, as the Education Department works to clear a backlog in claims.



Caroline Brehman/CQ-Roll Call Inc./Getty Images

U.S. Bans Most Withholding of Transcripts

By Katherine Knott

The Education Department strengthens its oversight of institutions with a sweeping set of rules finalized this week.

A federal policy change could give thousands of students access to transcripts and academic credits their colleges have withheld because they owed the institutions money. The new rule, part of a broad package of regulations the U.S.

Education Department unveiled Tuesday, could amount to a national ban on the practice of transcript withholding, experts say.



Photo illustration by Justin Morrison/Inside Higher Ed | U.S. Department of Education | Getty Images | Rawpixel

Grand Canyon University Fined \$37.7M for ‘Lies’ to Students

By Katherine Knott

The university, which has been locked in a years-long battle with the Education Department, vowed to fight back.

The Education Department is fining Grand Canyon University a record \$37.7 million for misleading more than 7,500 students about the cost of doctoral degree programs and violating federal law. “GCU’s lies harmed students, broke their trust, and led to unexpectedly high levels of student debt,” Richard Cordray, chief operating officer for Federal Student Aid, said in a statement. “Today, we are holding GCU accountable for its actions, protecting students and taxpayers, and upholding the integrity of the federal student aid programs.”

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Richard Cordray,
Federal Student Aid Chief Operating Officer

Justin Morrison/Inside Higher Ed

2024 Overview

Significant Discussion Topics

- Campus Protests
- Financial Stresses
- Wage & Hour Issues
- Personal Liability on PPAs
- Unionization
- Gainful Employment/FVT

“Lightning Round” Topics

- Clery Enforcement
- COVID Cases
- DEI & Race-Based Scholarships
- Title IX Regulations Update
- Third Party Servicer Rules
- Borrower Defense to Repayment Applications

Campus Protests

- Lessons learned in real time – Penn, Harvard, MIT – oh my!
- Policies and response plans
- PR/common sense v. legal responses
- Addressing issues early
- Private campus benefits

Financial Stresses

- Consider fiduciary duty obligations of officers and trustees
- Endowment management under UPMIFA
- Downsizing/restructuring/eliminating programs
 - Faculty handbook issues
 - Early exit plans
- Dealing with the Triad
- Timing issues are critical

Wage & Hour Issues

Proposed FLSA Overtime Rule Changes

- Increase salary threshold to \$55,068 and \$143,988 for highly compensated employees
- Automatic increases every three years
- No change to duties tests
- Comment period closed November 7, 2023
- Review of exempt positions under the proposed threshold

Personal Liability on PPAs

- USDOE may require two groups from non-exempt institutions to assume personal liability in PPAs
 - Owners
 - Individuals in substantial control, including
 - Trustees
 - CEOs
- Electronic announcement identifies 13 factors to be considered by USDOE in determining whether to require personal commitments

Personal Liability on PPAs

- Institutions are exempted by statute if:
 - Not subject to any limitation, termination, or suspension action by USDOE for 5 prior years
 - No findings in last 2 audits requiring repayment of amount greater than 5% of TIV funds received in any year
 - Does and has met financial responsibility test for last 5 years and
 - Not cited for failure to submit audits in last 5 years

Unionization Efforts

- Continued expansion of unionization efforts on campuses
- Consideration of potential triggers (review of terms and conditions of employment, addressing complaints, etc.)
- Proactive communication
- Preparation for potential organizing activity

Gainful Employment/FVT Rules

- New GE rules adopted in September
 - Applicability
 - Degree programs at for-profits
 - Non-degree programs at all Title IV institutions
 - Students in affected programs required to sign disclosure
- Financial Value Transparency disclosures required in 400 +/- graduate programs

The Lightning Round!

Clery Enforcement

- Reporting Obligations
 - Annual Security Report
 - Daily Crime Log
 - Timely Warnings/Emergency Notifications
- Liberty University – Possible \$37.5 MM Fine??
- Establishing a Culture of Compliance

COVID Cases

- Update on Cases
- Lessons Learned

DEI & Race-Based Scholarships

- *SFFA* Impact
- Admissions, Financial Aid, Other Programs
- Race and Sex Challenges
- Review of Criteria
- Alternative Approaches

Title IX Regulations Update

- Status of proposed regulations
 - 240,000 comments received
 - Delivered to OMB for 90-120 day review
 - USDOE's now expects final regs release in March (don't count on it) with late 2024 effective date
- Anticipate 2024 final regulations to be very similar to 2022 proposed regulations
- Encourage TIX coordinators to plan, but not act yet

Third-Party Servicer Rules

- 2/15 – TPS rules released with 5/1/23 effective date
- 2/28 – Effective date revised to 9/1/23
- 4/11 – TPS rules revised and effective date postponed indefinitely
- 5/5 – Moody's report notes credit risks for IHEs
- 5/16 – TPS rules rescinded
- 11/28 – USD OE promises early 2024 TPS guidance

BDR Applications

- Rules vary depending on disbursement dates per 34 CFR § 685.222
 - Prior to July 1, 2017 - 34 CFR § 685.206(c)
 - July 1, 2017 through June 30, 2020 - 34 CFR § 685.222
 - July 1, 2020 through June 30, 2023 - 34 CFR § 685.206 (e)
 - July 1, 2023 and after – Well . . .

BDR Applications

- Career Colleges & Schools of TX v. USDOE (USCA, 5th Cir., Docket No. 23-50491) – Stayed enforcement of 2023 regs pending 11/6/23 hearing
- USDOE established application process under new regs (<https://studentaid.gov/manage-loans/forgiveness-cancellation/borrower-defense#should-i-apply>) but decided not to make any determinations pending Fifth Circuit decision
- Fifth Circuit conducted 11/6 hearing but no order entered (as of 12/11)

The Troubling Future Legal Environment

- US News – Harris poll of 2,000 Americans conducted December 8-10, 2023
- Key Findings
 - 63% believe that IHEs are not handling antisemitism on campus effectively
 - 60% believe that colleges and university presidents should be dismissed from their jobs
 - 60% believe they are prioritizing donors, press and other external factors over students

The Troubling Future Legal Environment

- More Key Findings
 - 80% of Americans say that IHEs are more worried about their endowment than creating leaders of tomorrow
 - Nearly 80% of them say that if colleges and universities don't become more accessible to all people and emphasize diversity, then the leaders of tomorrow will all be the same.

The Troubling Future Legal Environment

- Conclusions
 - The substantial majority of Americans believe IHEs and their leaders are AWFUL
 - That perspective will cause legislators, regulators, judges, and juries to create a difficult legal environment in the coming years
 - Higher ed has many fences to mend with our fellow citizens

Really Hot Topics



Questions?

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