CONGRESSIONAL AND ENFORCEMENT PRIORITIES RELATED TO HIGHER EDUCATION ISSUES

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Colleges, universities, and their federally funded research centers must navigate a range of evolving legal challenges associated with changing technologies, increased frequency of cyberattacks, global expansions, and more. While also grappling with a range of perennial issues, from programmatic funding to regulatory changes, higher education institutions must now also manage the impact of coronavirus on their campuses.

Congress continues to take a keen interest in issues affecting higher education institutions. This alert summarizes the hot-button issues that have captured congressional interest of late and are likely to result in increased enforcement and congressional investigative activity.

RESEARCH INTEGRITY

Another topic that has captured significant congressional interest and increased enforcement activity is integrity in academic research at institutions of higher education such as academic medical centers (AMCs). Congress in particular has taken steps to impede China's recruitment of scientists and academics in the United States and to prevent the transfer of intellectual property from U.S. institutions to China. On 8 June 2021, the U.S. Senate passed the U.S. Innovation and Competition Act.[1] We recently analyzed key components of the statute. The U.S. House followed suit three weeks later, on 28 June 2021, passing the National Science Foundation for the Future Act.[2] In the coming weeks, lawmakers from both chambers are expected to reconcile the differences between the bills and chart final legislation for President Biden's signature. Both bills include various national security measures designed to thwart cyberattacks, foreign infiltration of domestic supply chains, as well as theft and exfiltration of U.S. intellectual property, with a particular focus on China.[3]

Moreover, the Department of Justice has made rooting out Chinese government intelligence gathering at U.S. academic institutions a top priority, indicting at least one person for making false statements to federal authorities regarding their participation in China's Thousand Talents Program, and charging (though, ultimately dismissing charges against) several individuals for lying about their ties to the Chinese government on their visas, acting as foreign agents, and attempting to smuggle biological research to China.[3]

GENDER & TITLE IX

Congress has been keenly interested in the debate over gender and Title IX. In July, House Oversight Committee Chair Carolyn Maloney (D-N.Y.) and two colleagues sent a letter to the President of the National Collegiate

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Athletic Association (NCAA) seeking documents and information on the NCAA's treatment of men's and women's sporting events.[4] Following the August release of a gender equity review commissioned by the NCAA, these lawmakers issued a statement and released documents obtained in their inquiry. On the legislative side, Reps. Katherine Clark (D-Mass.), Chris Pappas (D-N.H.), Sharice Davids (D-Kan.), and Mondaire Jones (D-N.Y.) introduced a bill that would reverse a Trump-era rule and require federally-funded universities to apply for a waiver from the U.S. Department of Education before they can receive a religious exemption from Title IX of the Education Amendments of 1972. These representatives introduced the legislation because the exemptions reportedly allow students to be removed from extracurricular organizations, leadership posts, sports teams, and be expelled for being members of the LGBTQ community.

Gender parity and equity issues in higher education have also been areas of focus in the Biden administration. After concluding a review of the Trump administration's removal of Title IX LGBTQ protections, the Department of Education's Office for Civil Rights issued a Notice of Interpretation explaining that it will enforce Title IX's prohibition on discrimination on the basis of sex to include: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity.[5] The interpretation stems from the U.S. Supreme Court's decision in *Bostock v. Clayton County*, in which the Court held that it is impossible to discriminate against a person based on their sexual orientation or gender identity without discriminating against that person based on their biological sex. This action is part of the Biden-Harris administration's commitment to advance the rights of the LGBTQ community, set out in two recent executive orders. The Department of Education has stated that this interpretation will guide the Department in processing complaints and conducting investigations.[6]

FREE SPEECH & POLITICAL BIAS

In June, Reps. Jim Jordan (R-Ohio) and Kat Cammack (R-Fla.) launched the Campus Free Speech Caucus. The Caucus, which is joined by Young America's Foundation, will reportedly aim to educate other legislators about anti-conservative biases on college campuses nationwide. On 17 June 2021, House Education and Labor Subcommittee on Higher Education Ranking Member Rep. Greg Murphy introduced a bill to amend the Higher Education Act of 1965 aimed to prevent public institutions from constraining student expression and keep private institutions transparent about their chosen speech policies.[7] At the same time, a conservative group sued Virginia Tech to prohibit the university from enforcing policies that it alleges encroach on the rights of right-leaning students.[8]

FOR-PROFIT CONVERSIONS

Earlier this year, the U.S. Government Accountability Office (GAO) released a report on conversion of for-profit colleges into nonprofit colleges. At the request of House Education and Labor Committee Chair, Rep. Bobby Scott (D-Va.), and Senate Health, Education, Labor, and Pensions (HELP) Committee Chair, Sen. Patty Murray (D-Wash.), the GAO conducted an investigation into these college conversions after it was reported that deals were often structured to generate large profits for the former owners even after conversion to a nonprofit. The GAO investigation found, among other things, that in a large percentage of the conversions, former owners or other officials were insiders to the conversion and that the Internal Revenue Service (IRS) and Department of Education could better address risks associated with for-profit college conversions.[9] In response, Rep. Scott wrote to

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Secretary of Education Miguel Cardona, calling on the Department of Education and IRS to "take steps to reform their processes and halt the approval of all conversions until they finalize those reforms."[10]

If a nonprofit college's revenues are diverted to improperly benefit insiders, funds available to support the college's educational mission would be reduced, potentially harming the college and violating federal requirements. IRS has released staff guidance on this issue suggesting increased attention. Similarly, general counsel and senior officials at these institutions should expect—and the Department of Education has signaled—enhanced scrutiny of previously for-profit college applications for nonprofit status and improved its oversight of for-profit college conversions.

FOOTNOTES

[1] United States Innovation and Competition Act of 2021, S.1260, 117th Congress (2021-2022) https://www.congress.gov/bill/117th-congress/senate-bill/1260/actions.

[2] National Science Foundation for the Future Act, H.R.2225, 117th Congress (2021-2022) https://www.congress.gov/bill/117th-congress/house-bill/2225.

[3] Department of Justice, Press Release, *Harvard University Professor and Two Chinese Nationals Charged in Three Separate China Related Cases* (Jan. 28, 2020), https://www.justice.gov/opa/pr/harvard-university-professor-and-two-chinese-nationals-charged-three-separate-china-related; Department of Justice, Press Release, *Harvard University Professor Indicted on False Statement Charges* (June 9, 2020); Department of Justice, Press Release, *Researchers Charged with Visa Fraud After Lying About Their Work for China's People's Liberation Army* (July 23, 2020), https://www.justice.gov/opa/pr/researchers-charged-visa-fraud-after-lying-about-their-work-china-s-people-s-liberation-army.

[4] House Oversight and Reform Committee, U.S. House of Representatives, Press Release (Aug. 3, 2021), https://oversight.house.gov/news/press-releases/maloney-speier-and-sherrill-call-on-ncaa-to-take-action-to-address-gender.

[5] Department of Education, Press Release, *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity* (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity.

[6] *Id*.

[7] Campus Free Speech Restoration Act, H.R.4007, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/4007?q=%7B%22search%22%3A%5B%22actionCongress%3A117+AND+%28billIsReserved%3A%5C%22N%5C%22+OR+type%3A%5C%22AMENDMENT%5C%22%29%22%5D%7D&s=1&r=1.

[8] Complaint, *Speech First, Inc. v. Sands et. al*., Case 7:21-cv-00203-MFU (W.D. Va. 2021), https://speechfirst.org/wp-content/uploads/2021/04/VT%20Complaint%20%28April%207%29%20--%20%28clean%29.pdf?_t=1617894728.

[9] Government Accountability Office, *Higher Education: IRS And Education Could Better Address Risks Associated*

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with Some For-Profit College Conversions (Dec. 2020), GAO-21-89, HIGHER EDUCATION: IRS And Education Could Better Address Risks Associated with Some For-Profit College Conversions.

[10] Letter from Rep. Robert C. Scott to Secretary Miguel Cardona, Committee on Education and Labor (June 3, 2021), https://edlabor.house.gov/imo/media/doc/For%20Profit%20Conversions%20Request.pdf.

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