The CARES Act: Higher Education Community Takeaways

By Ira M. Shepard, ACCT General Counsel

THIS COLUMN IS USUALLY DEVOTED to commentary on significant legal cases directly affecting the higher ed community and community college administration. Given the challenges we face in the wake of the unprecedented coronavirus pandemic, I will depart from my usual approach and provide a summary of takeaways important to the higher ed community from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Following that will be a summary of two non-coronavirus legal developments involving the First Amendment and gender pay bias of import to our community.

CARES Act Provisions Impacting Student Borrowers

Effect on Students' Eligibility to Receive Future Federal Student Loans and Pell Grants: For purposes of Title IV funding, any semester that a "student does not complete due to a qualifying emergency" (i.e., a public health emergency related to COVID-19 as declared by the Secretary of Health and Human Services or a major disaster or national emergency declared by the President of the United States) does not count toward a student's lifetime eligibility for subsidized student loans or, separately, a student's lifetime eligibility to receive a Pell Grant.

Non-Repayment of Federal Funds Due to Withdrawal Because of Qualifying Emergency: If a student withdraws from an institution due to a "qualifying emergency" such as COVID-19, that student does not need to return money received via a federal student loan, a Pell Grant, or "other grant assistance."

Academic Progress: Any credits that were "attempted" by a student but "were not completed" as a result of a qualifying emergency may be excluded from calculating whether "a student is maintaining satisfactory

academic progress" As a result, the noncompletion of credits due to a qualifying emergency will not adversely affect the student's eligibility to receive federal student loans or federal grants, including Pell Grants.

Deferral of Federal Student Loan Payments: Any borrower with federal student loan payments due will have those payments deferred, without penalty, until September 30, 2020. During that deferral period, no interest will accrue, and the Secretary of Education will "deem each month for which a loan payment was suspended…as if the borrower of the loan had made a payment for purposes of any loan forgiveness program or loan rehabilitation program…for which the borrower would have otherwise qualified." Similarly, for purposes of reporting to consumer-reporting agencies, "any payment that has been suspended is treated as if it were a regularly scheduled payment made by a borrower." In other words, all efforts by the U.S. Department of Education to collect on any federal student loan — *including wage garnishment, reducing tax refunds, reducing any other federal benefit, or taking any "other involuntary collection activity*" — is suspended during the deferral of federal student loan payments.

Moreover, beginning on August 01, 2020, the Secretary of Education will issue "not less than six notices by postal mail, telephone, or electronic communication to borrowers" indicating "when the borrower's normal payment obligations will resume" and "that the borrower has the option to enroll in income-driven repayment, including a brief description of such options."

Stabilization Fund Issues Impacting Institutes of Higher Education

Under the CARES Act, $30.75 billion is allotted to the **Department of Education's Education Stabilization Fund** to allow for: (1) emergency support of local school systems and institutions of higher education (IHEs) so that they may continue to provide educational services to students; and (2) ongoing educational operations. The fund provides approximately $14.3 billion to institutions of higher education; K-12 schools will receive about $13.5 billion.

Allocation of Funds for IHEs: Section 18004 of the Act establishes that of the roughly $14.3 billion allotted for emergency relief:

- 90 percent will be allotted to IHEs, and apportioned upon a formula that is predicated upon Federal Pell Grant allocation (and on-campus student learning):
  - 75 percent according to the number of Federal Pell Grant recipients not exclusively enrolled in online learning
  - 25 percent according to the number of non-Pell Grant recipients not exclusively enrolled in online learning.
- 7.5 percent will be allotted to Minority-Serving IHE's in "additional awards" under Title III, V, and VII of the Higher Education Act to "defray expenses" and "address needs directly related to coronavirus that shall be in addition to" the awards noted above.
  - Such expenses and needs include "lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty/staff trainings and payroll," and grants to students for "any component of the student's cost of attendance," including "food, housing, course materials, technology, health care, and child care."
- 2.5 percent for those IHEs that the Secretary determines to have the "greatest unmet need" related to COVID-19. However, the Act provides no details as to how such a determination is to be made and/or communicated.
  - This money may be used to defray expenses related to COVID-19, such as "lost revenue, reimbursement for expenses already incurred, technology costs associated with a transition to distance education, faculty/staff trainings, and payroll," and for grants to students for "any component of the student's cost of attendance," including "food, housing, course materials, technology, health care, and child care."
  - Priority will be given to IHEs not eligible for at least $500,000 under the 90 percent funding allocation or the 7.5 percent funding allocation outlined above that is able to "demonstrate significant unmet needs related to expenses associated with coronavirus." But no details as to what proof IHEs will be required to provide, or what the threshold will be, have been provided.
- In addition to the above, the Education Stabilization Fund makes $100 million available to domestic and international K-12 and

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postsecondary schools, supplementing the funds made available under Project SERV to assist with the costs associated with cleaning and disinfecting school buildings, counseling, distance learning, and other costs related to COVID-19. Said funding will be made available through September 30, 2021.

- A "Special Provision" of the Stabilization Fund allows Historically Black Colleges and Universities (HBCUs) and other Minority Serving Institutions (MSIs) to use funding allotted in prior awards under Titles Ill, V, and VII of the HEA to prevent, prepare for, and respond to COVID-19.
- $69 million will be made available to tribal schools, colleges, and universities through the Bureau of Indian Education.
- The Act makes additional monies available to Gallaudet University, Howard University, and "Student Aid Administrations."
- All of the funds outlined above will be distributed through the same processes currently used for HEA Title IV disbursements.
- None of the funds outlined above may be used to pay for contractors engaged in pre-enrollment recruiting, endowments, or certain types of capital outlays "associated with athletics, sectarian instruction, or religious worship."
- The rest of the funds — about 10 percent or $3 billion — will go to state governors for emergency education costs.

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Recent First Amendment, Pay Discrimination Legal Developments

Educators' support of disabled student's accommodation request not protected free speech. The U.S. Court of Appeals for the Fifth Circuit (covering Texas, Louisiana, and Mississippi) recently rejected the First Amendment claims of a teacher and a principal's assistant whose job function was to administer standardized tests. Both complained that the school district had violated the rights of a disabled student suffering from ADHD and learning disabilities who was not given the right to take a standardized test orally. Both were fired by the school district for their actions.

The court ruled that the educators did not have a First Amendment right to speak out on that topic, as it was part of their job duties. The court pointed out that both educators had compliance responsibilities for the school district under Section 504 of the Rehab Act and therefore their speech was part of their job and not protected by the First Amendment. The Court concluded that the educators were not private citizens speaking out on a public issue and that their terminations must stand. Their additional claims under the applicable Texas whistleblower statute were also rejected. Both were found not to have mitigated their damages properly after discharge because rather than seeking new jobs they retired and began accepting their annuities under the state system (*Powers v. Northside Independent School District*, 5th Cir., No. 18-50983, 2/26/20).

Appeals court upholds claim that salary history can lead to pay discrimination; case forwarded to U.S. Supreme Court. The full Court of Appeals for the Ninth Circuit (covering California, Oregon, Washington, Arizona, Nevada, Idaho, and Montana) recently rejected an employer defense to an Equal Pay Act claim of gender-based salary discrimination against a female employee who argued her salary history for pay in a prior job justified her current salary.

The court held that prior pay for a different prior job is simply not related to the current position and can be used to perpetuate gender-based salary discrimination (*Rizo v. Yovino*, 9th Cir., no. 16-15372, en banc 2/27/20). This development is of substantial importance to the rise of gender-based salary discrimination claims brought by college professors and other employees.

The court reasoned that prior pay is not job related for purposes of the Equal Pay Act because it pertains to compensation the worker received for a different job. The Second (covering New York, Vermont, and Connecticut), Fourth (covering Maryland, Virginia, West Virginia, and North and South Carolina), and Tenth (covering Colorado, Utah, Wyoming, Kansas, and Oklahoma) Circuits all agree. Only the Seventh Circuit (covering Illinois, Wisconsin, and Indiana) holds open the possibility that prior job history may be a defense in an Equal Pay Act claim. This split in the circuits makes the case ripe for Supreme Court review. Separately, it is notable that California is one of several states that have by state or local law banned the use of prior salary history as a defense to state and local gender-based salary sex discrimination claims.