SUMMER 2017

Contacts:

James A. Keller
Co-Chair

William E. Manning
Co-Chair

James D. Taylor, Jr.
Co-Chair & Newsletter Editor

Joshua W. B. Richards
Vice Chair

Christina D. Riggs
Vice Chair & Newsletter Editor

Saul Ewing LLP

Higher Education Highlights

The Newsletter of the Higher Education Practice

CONTENTS

Professor Deprived of Due Process Through Salary Reduction

By Emily H. Edmunds

Due process with respect to an employee's property interest in employment is a vitally important consideration at public institutions, and, as a recent case from the U.S. District Court for the Western District of Pennsylvania illustrates, **sometimes timing is everything**. In *McKinney v. University of Pittsburgh*, Jerome McKinney, a tenured professor at the University of Pittsburgh, a state-related institution in Pennsylvania, proved the importance of the timing of certain employment actions when he prevailed in a due process claim against the university on June 5, 2017.

The professor claimed that a 20 percent reduction in his salary was a deprivation of his property interest, and that he was denied due process prior to the reduction. The university cited a poor merit assessment as a reason for the reduction. The assessment took into consideration the professor's record of teaching, research, service, completion of course evaluations, efforts to improve teaching, and turning in copies of publications listed "as in pipeline." The university noted that it found his performance "more unsatisfactory than last year by many measures," and that it was "impossible not to conclude that [he had] been overstating [his] record in one important area – research – for at least the past several years." The university concluded that his performance was "highly unsatisfactory" and would result in a salary reduction.

Notably, the letter that communicated the university's salary reduction was dated August 3, 2013, but was not presented to the professor until a meeting on September 6, 2013. In that letter, the professor was informed that the 20 percent salary reduction would be effective as of September 1, 2013 — **five days** before he was informed of the reduction. He had, however, received a written warning the previous year that if his job performance did not improve, he was at risk of not receiving a salary increase or receiving a salary reduction.

Due Process Basics

Public employees have procedural due process rights in life, liberty and property interests. The right to continued employment, including continued salary, is a property interest that is protected by due process when an

employee has a legitimate claim of entitlement to the employment expectation. That legitimate claim of expectation can be created by contract, including tenure. When an employee can demonstrate a legitimate property interest in employment by a governmental employer, the focus shifts to what process is due. The Supreme Court has said that the process due depends upon the factual circumstances of the particular situation at issue, including the private interest affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value, if any, of additional or substitute procedural safeguards, and the government's interest, including the function involved and the fiscal and administrative burdens that an additional or substitute procedure would entail. *Matthews v. Elridge*, 414 U.S. 319 (1976). Using these factors, courts have concluded that where the government can provide a pre-deprivation hearing before taking property, it must generally do so. When a pre-deprivation process can be effective in preventing errors, the process is required.

Notice and an Opportunity to be Heard

Using these standards, the court held that the professor had a property interest in his salary such that it could not be reduced by the university without due process. The court concluded that "the expectation of employment to which Dr. McKinney is entitled as a tenured professor includes a property interest in the entirety of the salary that accompanies his tenured position."

Applying the *Matthews* factors, the court noted that the professor's interest was significant because it was a permanent reduction in salary and affected his livelihood, and that if he had been informed of the evaluation of his job performance before the reduction in salary occurred, he would have had an opportunity to present his version of the story, and the risk of erroneous deprivation would be greatly reduced. The court also found it significant that it would not have been fiscally or administratively burdensome to provide the professor with the basis for the reduction in salary and an opportunity to explain prior to the reduction. In sum, the professor "was entitled to notice and an opportunity to be heard prior to the University reducing his salary by twenty percent, as well as a post-deprivation hearing."

The professor was provided with adequate notice of the possibility of receiving a salary reduction in his prior year's evaluation, the court said. Despite adequate notice, the court concluded that "there is no evidence in the record from which a reasonable fact finder could conclude that the University provided Dr. McKinney with an adequate pre-deprivation opportunity to be heard prior to depriving him of his property interest in his full salary on September 1, 2013," because he was not informed until September 6, 2013 that his salary had already been reduced. Because the deprivation had already occurred when the professor was made aware of it, there was no pre-deprivation opportunity to be heard, which amounted to a violation of the professor's procedural due process rights. Highlighting the **importance of timing**, the court noted that "[h]ad Defendant not reduced Plaintiff's salary prior to the September 6, 2013 meeting, and instead announced its intent to reduce Dr. McKinney's salary forthwith at the conclusion of the September 6, 2013 meeting," the outcome likely would have been different.

Having found a lack of any pre-deprivation opportunity to be heard, the court did not have to decide whether the professor was afforded due process post-deprivation, and chose not to do so.

Takeaway

In many sensitive situations, employment matters included, the timing of decision-making and notice to employees can become very important. Careful planning of adverse actions, including when and how to present those conclusions to employees, can go a long way toward avoiding a claim. For help navigating murky timing issues, feel free to contact the author or any member of Saul Ewing's Higher Education Practice.

The Protection of Biometric Information

By Sandy Bilus and Dave Shafer

The fragmented spectrum of statutes and regulations regarding data protection and data privacy at American colleges and universities may be getting even more complicated. Most are familiar with the Family Educational Rights and Privacy Act ("FERPA") and its governance of students' personally identifiable information, but the development of new state laws directed at the security of biometric identifiers may put a wrinkle in an already complicated data privacy landscape. If current legislative trends remain steady, the increased regulation of biometric identifiers and biometric information will give rise to a host of new compliance requirements and increase liability exposure to private causes of action. This is particularly true for many colleges and universities that have diversified their roles and expanded into traditionally "commercial" enterprises. Thus, campus counsel should have an understanding of how biometric information is being regulated and how their institutions can ensure that they properly protect the biometric information that they collect.

Biometric Basics

Biometric identifiers are unique physical characteristics about a person that include: fingerprints, facial recognition, retina or iris scans, voiceprints, and hand geometry. An individual's collection of biometric identifiers, frequently referred to as their biometric information, has quickly become an easy and accurate way for companies to authenticate the identities of their customers. Smartphone users can now unlock their phones using their fingerprints, for instance. Other companies are using technology to enhance their consumers' experiences. For example, Facebook captures and stores facial features in order to allow their users to "tag" their friends in photographs.

Biometrics are biologically unique to an individual, so if an individual's biometric information is stolen or compromised, he or she has no genuine recourse. Unlike social security numbers, passwords, credit card numbers, or other unique identifiers, an individual cannot replace his or her fingerprints, faceprint, voiceprint, retina scan or iris scan. With biometric identification being leveraged for customer authentication and becoming more prominent in our daily lives, not only would an individual whose biometrics have been compromised be subject to a heightened risk of identity theft, but that individual also will be discouraged from participating in the marketplace and possibly withdraw from commerce.

The Current Legal Landscape for Biometric Protections

The innovative uses of biometric information have led to the creation of laws focused entirely on the collection, use, sale, and disclosure of biometric identifiers. And while many state data privacy statutes provide that entities must take reasonable measures to protect "personally identifiable information"—and some states include biometric identifiers in that definition—biometrics are being singled out for increased scrutiny because they are unlike any other unique identifiers that we commonly use today.

The first state to pass legislation to address the collection of biometric information was Illinois in 2008. In response to several national corporations' selection of Chicago as a testing site for new applications of biometric-facilitated financial transactions, the Biometric Information Privacy Act, 740 ILCS 14 et seq. ("BIPA") was passed. BIPA contains a comprehensive set of rules for companies collecting biometric information and creates a private right of action, with liquidated damages, for those Illinois residents whose biometric information is collected or used in a prohibited manner.

The basic requirements and restrictions set forth in BIPA establish (1) the need for a written policy covering the collection, retention, and destruction of biometric identifiers within a set time period; (2) the restriction that no private entity may obtain a person's biometric information without first obtaining their written consent; (3) the prohibition against the sale or profit from a person's biometric information; (4) the limited circumstances in which disclosure or dissemination of biometric information is permissible; and (5) the requirement that those in possession of biometric information must safeguard such information with reasonable care and are subject to a private right of action if harm is incurred due to a violation.

Following Illinois' lead, Texas and Washington passed their own laws regulating the use and collection of biometric information that use many of the same substantive provisions as BIPA. And across the country, state legislatures are debating similar laws. Each statute or proposed law follows a similar formula but no two are the same. BIPA likely will remain the framework that other states will follow, but each state will tailor its statute to suit the best interests of its residents.

How Do Biometric Privacy Laws Apply to Higher Education Institutions?

The applicability of state biometric privacy statutes to American colleges and universities will vary depending on each statute, jurisdiction, and the type of educational institution.

Some—but not all—of the state laws exclude public institutions from coverage. BIPA, for instance, only regulates "private entities" and defines private entities to not include state or local government agencies or their contractors, subcontractors, or agents. Texas' law, on the other hand, is silent as to government agencies, and as more states pass laws that specifically regulate biometric privacy, it is possible that they too will not exclude public institutions from their coverage.

Some of the laws apply only to entities that capture biometric information for a "commercial purpose." Due to the nascent nature of these statutes, there is little discussion and case law as to what is meant by "commercial purpose" though it is possible that non-profit institutions, due to their nature and status, fall outside of the regulatory scope. Conversely, BIPA's regulations likely apply to private non-profit institutions as the statute does not specifically discuss a "commercial purpose" requirement and has a broad definition of private entities. Further, depending on the nuances of an educational institution's organization, there may be private, for-profit companies working under the guidance of the institution. And a privately-owned, for-profit educational institution would be subject to the array of biometric privacy statutes in all states in which the school has students since it is not an agent of the state and operates for a commercial purpose.

The applicability of these biometric privacy statutes are state-specific and fact intensive inquiries that require a heightened sensitivity to the nature of the organization itself and any subsidiaries or vendors operating on its behalf. Thus, it will be important to remain vigilant as these statutes are passed and litigated over the coming months and years.

One last note: FERPA includes biometric records in its definition of "personally identifiable information." Because FERPA and state privacy and data protection statutes typically work hand-in-hand to protect student information, a higher education institution would be remiss to only become familiar with FERPA's requirements and ignore state law requirements—or vice versa—when it comes to the collection, protection, retention, and destruction of student biometric information in the institution's possession.

Putting Biometric Protection Into Practice

More and more states are moving towards regulation in the biometric space and it is incumbent upon entities that touch that space to err on the side of caution and get ahead of the game. Technological innovation, particularly within the financial sector, is rapidly changing how business, governments, and individuals approach data privacy and security. With the need for quick and reliable authentication to both enhance the user experience and safeguard user accounts, the use of biometrics as the gateway to services will only grow.

So what can you do? As an initial matter, gain an understanding of what personally identifiable information, including but not limited to biometric information, your institution is collecting and verify your data protection and retention practices. Do you know what student biometric information is being collected and how it is being used? Think creatively about the source of information, the lifespan of the information, and who has access to that information.

Next, look at your third-party vendors with an eye towards your contracts with them. Student education records include those records that are directly related to a student and maintained by an educational institution or by a party acting for the institution. As the collegiate ecosystem becomes more prolific in terms of embracing technology vendors, it is reasonable to believe that the list of those "acting for the institution" will grow. If necessary, take steps to amend or modify your existing contracts. Modifications may include the:

- incorporation of appropriate contractual terms, such as a requirement to protect the information according to current industry standards;
- periodic deletion of unnecessary personal information; and
- inclusion of indemnification provisions for liability exposure.

Finally, update your privacy policies and create a schedule to ensure that you routinely keep them up-to-date.

Take these steps and be proactive about biometric information—it will only increase in importance from here.

Younger Abstention in Title IX Litigation: A Tale of Two Outcomes

By Joshua W. B. Richards and Meghan Talbot

The United States Court of Appeals for the Sixth Circuit has affirmed [http://bit.ly/2rRDrEB] a district court decision holding that the federal trial court must abstain from judicial review of an ongoing disciplinary proceeding against a student at the University of Kentucky ("UK"). As we previously reported [http://bit.ly/2ttsrKM], the District Court for the Eastern District of Kentucky found in ***John Doe v. Hazard, et al.*** that UK's disciplinary process for addressing alleged sexual assault was sufficiently akin to a state criminal proceeding to trigger the abstention doctrine articulated by the Supreme Court in ***Younger v. Harris***, which precludes the involvement of the federal court in ongoing state proceedings.

Despite the applicability of *Younger* abstention, the Court of Appeals acknowledged that the plaintiff's lawsuit against UK could still be subject to federal judicial review if UK's proceeding against him was "flagrantly unconstitutional" or was made in bad faith. The court held, however, that even if the disciplinary process was unconstitutional in his *application*, the plaintiff would not have judicial recourse mid-proceeding unless the policy itself was *facially* unconstitutional. The Court of Appeals found that UK's policy did not reach this level. Because the plaintiff had also failed to demonstrate a pattern of bad faith prosecution or harassment, the Court of Appeals agreed that the district court's application of *Younger* was correct.

The limits of Younger: the same proceeding, but a different party – and a different result

As is the case in many Title IX proceedings, both respondent and complainant filed suit in federal court against UK. The Honorable Joseph M. Hood heard both cases, and although he applied *Younger* abstention to the respondent's suit, he held that *Younger* abstention would *not* apply to the complainant's Title IX suit.

In his determination that the complainant's suit did not fit into the framework of *Younger* abstention, Judge Hood highlighted the last required element of *Younger*: that the plaintiff in the case before the federal court must be able to raise constitutional challenges in the course of the ongoing university disciplinary proceeding. The court noted that the constitutional rights afforded in a Title IX disciplinary action are afforded only to the respondent, not the complainant–and therefore the principles precluding the court from hearing the respondent's challenge to the ongoing Title IX proceedings would not apply to the complainant, who would be allowed to proceed with her suit.

Takeaways

- As we previously discussed [http://bit.ly/2ttsrKM], while *Younger* abstention may prove beneficial for colleges and universities to protect the continuity of their internal disciplinary proceedings without mid-process judicial intervention, casting internal university disciplinary proceedings as "state" proceedings may open the door to more judicial review in the long term.
- Public colleges and universities should note that *Younger* will not preclude all challenges to an ongoing disciplinary proceeding–as articulated in the Sixth Circuit and district court decisions discussed above, the doctrine applies only in "exceptional circumstances" and when all three elements are present: (1) where there is an ongoing state judicial proceeding (in this case, a public institution's disciplinary hearing); (2) involving an important state interest; (3) in which the federal plaintiff will have adequate opportunity to raise his constitutional claims.

National Spotlight on Hazing: Understanding Common Litigation Trends

By Sandy Bilus and Patrick Hromisin

Recent high-profile hazing incidents involving college students have prompted discussion and action on campuses across the country. Many of these incidents have also led to civil lawsuits, sometimes involving claims against the school. This article describes the key features of civil claims that arise from hazing. While the applicable case law will vary from jurisdiction to jurisdiction, most cases have proceeded along the lines described below, and any future claims involving hazing will probably build upon the cases that have already been litigated. The key topics covered here are: 1) the factual settings giving rise to litigation; 2) the claims that plaintiff students are likely to assert; and 3) key considerations impacting an institution's defenses against claims relating to hazing.

Facts Leading to Litigation

The definition of hazing varies by jurisdiction. But generally, state statutes define hazing through two components: 1) endangering the mental or physical health or safety of the victim; and 2) serving as a condition for admission into, or continued membership in, a group.

Because "groups" come in all shapes and sizes on a college campus, hazing can occur in a variety of contexts. But, practically speaking, hazing arises most frequently in the context of Greek life "rush." Rush typically requires recruits, or pledges, to earn membership in the organization by completing a series of requirements. Pledges generally stay on a probationary status for a limited amount of time before they become full-fledged members, and it is during this time that the organization's membership challenges the pledges to show their dedication and drive to belong. Proponents of Greek life point out that this process often creates a sense of belonging and a shared bond among members of the group. But in a number of reported instances, the initiation procedures have involved activities that verge on, or constitute, hazing of pledges.

Since 2013, at least 8 students have died nationwide as a result of injuries they sustained during alleged fraternity hazing activities. Two of those students died from alcohol poisoning during parties where they were allegedly required, or at least heavily encouraged, to drink to excess. Three students died during run, hike, or obstacle course challenges that the fraternity allegedly required pledges to complete. And two students drowned during the same initiation event in which they were allegedly forced to cross a river. Also in the fraternity context, plaintiffs have brought claims relating to injuries suffered during alleged hazing activities involving forced exercise, forced consumption of alcohol or unpleasant or dangerous substances, or forced labor.

Of course, hazing is not limited to Greek organizations. Sports teams and marching bands have been settings for alleged hazing, as well. Just as Greek life proponents point to the shared bond that initiation rituals create, members of these groups point to the fact that shared experiences build trust, which can improve the performance of the entire group. Nevertheless, allegations of physical beatings, forced alcohol consumption, or requirements to divulge personal information, have been raised with respect to these groups, as well.

When alleged hazing leads to death or injuries, the victims or their estates often pursue litigation. Depending on the situation, claims have been raised against the applicable institution, against property owners when the events took place off campus, or in the Greek life context, against the national and local chapter of the organization.

Common Legal Claims

Most lawsuits that allege hazing injuries follow a similar pattern. The claims that are most commonly asserted against institutional defendants are:

- **Negligence**. Negligence claims generally require a plaintiff to prove that: 1) the defendant owed a duty of care to the plaintiff; 2) the defendant breached that duty; 3) the defendant's breach caused the plaintiff's injury; and 4) the plaintiff suffered damages. The most contentious aspects of negligence claims based on hazing are duty and breach.
    - ***Duty.*** Most jurisdictions do not recognize a duty for higher education institutions to guarantee the safety of students. That duty was generally referred to as the *in loco parentis* (meaning "in place of parents") doctrine, but courts have moved away

from that theory. Now, plaintiffs generally attempt to frame a duty based on one of these four theories, generally described below:

- Premises Liability – Plaintiffs allege that if the school owns or controls the land or building where the hazing occurred, the school owes students a duty as invitees under a premises liability theory.
- Assumption of a Duty – Plaintiffs argue that although there is no general duty for higher education institutions to guarantee student safety, institutions have assumed that duty by creating and enforcing rules and policies relating to the organizations carrying out the alleged hazing.
- Special Relationship – The analysis of this argument is often similar to the assumption of a duty analysis; plaintiffs generally allege that by involving themselves with the oversight or regulation of the organizations that carried out the alleged hazing, higher education institutions have created a special relationship that creates a duty to students.
- Hiring/Training/Supervision/Oversight of Employees and Agents – Where school personnel (usually residence life personnel, faculty advisors, counselors, coaches, or student life supervisors) have allegedly played some role in hazing either through acts or omissions, plaintiffs have alleged that the institution was negligent in hiring, training, or supervising those individuals.

- ***Breach.*** No matter how a plaintiff may frame the duty that the institution allegedly owed to a student, the following actions are usually what the plaintiff claims were a breach of that duty:
  - The institution failed to warn students of the dangers of hazing.
  - The institution failed to implement or enforce anti-hazing policy.
  - The institution failed to investigate, intervene, stop the hazing, and discipline students for hazing.
  - The institution failed to properly hire, train, supervise, or oversee employees or agents to enforce hazing or alcohol policies, recognize dangers, take actions to protect students, manage fraternities, implement practices to prevent hazing, create alcohol-free housing, respond to reports of hazing, supervise clubs or teams, and perform inspections of parties and other Greek activities.
  - The institution failed to enforce underage drinking laws and regulations.
  - The institution fostered a culture of non-enforcement of anti-hazing policies, one that was permissive to underage drinking, sexual mistreatment, and unsupervised, dangerous behavior, all of which contributed to hazing.
  - The institution breached its duty by allowing fraternities to self-manage despite knowledge of past incidents of hazing and underage drinking.

- **Negligence Per Se.** As discussed above, most states have anti-hazing statutes. Plaintiffs allege that if the alleged hazing constituted a violation of the applicable state statute, then the institution is *per se* liable for any injuries that arise from that violation.
- **Fraud and Violation of Consumer Protection Laws.** A plaintiff may allege that a school's agents or employees falsely guaranteed that there would be no hazing if the student attended and joined the relevant organization. This theory generally requires the plaintiff to identify a false or misleading statement and prove that he or she relied on it in choosing the school or joining the organization.
- **Battery and False Imprisonment.** Depending on the nature of the alleged hazing, plaintiffs may allege that an institution is liable for battery or false imprisonment. This claim requires a finding that the individuals actually

carrying out the hazing were agents or employees of the school, which is unlikely if the hazing was done by students.

- **Alcohol Law Violations.** If the alleged hazing involved alcohol consumption, a plaintiff may allege that the institution is liable for injuries arising from a violation of state laws that prohibit serving alcohol to minors or to intoxicated people. Similar to claims for battery or false imprisonment, these claims likely require a finding that the individuals actually serving the alcohol were school employees or agents.
- **Conversion.** A plaintiff may allege that hazing took the form of forced purchases for members of the organization at issue, and that the institution is liable for conversion of any funds the plaintiff spent on such purchases. Again, for the institution to be liable for this tort, there would likely need to be a finding that the individuals forcing the purchases were agents or employees of the school, which is not common in cases of student-to-student hazing.
- **Survival/Wrongful Death.** In cases where the alleged hazing victim died, his or her estate would pursue a survival or wrongful death action. The merits of the claim would be decided along the lines of the negligence analysis above, but this claim can entitle a plaintiff to damages based on the likely future earnings of the decedent, as well as the decedent's pain and suffering.

Key Considerations for an Institution's Defense

As the previous section indicates, plaintiffs may pursue a variety of claims alleging institutional liability for hazing. But whatever specific causes a plaintiff pleads, there are certain factors that are important to the defense of nearly any hazing suit.

- **Control.** Simply put, the more control an institution exercises over an organization involved in alleged hazing, the greater chance there is that a court will find that the school owed a duty to the plaintiff to prevent the hazing. Some schools regulate Greek organizations directly and in great detail, some do not officially recognize them at all, and many fall somewhere between these two ends of the spectrum. If the institution has the capacity under applicable policies to directly enforce rules regarding hazing and alcohol use by Greek organizations, a plaintiff may have a better argument that the institution has assumed a duty to prevent hazing- or alcohol-related injuries. Of course, a school may conclude that a heightened risk of liability is justified because exercising control gives it a better chance to prevent hazing injuries in the first place, but that is a complicated determination. For non-Greek organizations, such as sports teams or bands, a plaintiff may have a stronger argument that the institution directly controls the organization.
- **Notice Relating to Plaintiff.** If a school's agents or employees are put on notice that a plaintiff is being hazed, the plaintiff can have a stronger argument that the school has a duty to prevent the hazing. This consideration may arise, for instance, if a student informs a resident advisor, coach, or counselor that he or she is being hazed. These situations can be very difficult to manage because, in some cases, the student requests that no action be taken to stop the hazing. Nevertheless, fact dependent, courts are more likely to find a duty when a report has been made.
- **Notice Relating to Hazing in General.** If an institution is aware of hazing as a persistent issue, a court may be more likely to find that the school had a duty to prevent it. This argument arises where institutions have documented a series of complaints regarding hazing, or where the institution or student organizations have initiated campus programming centered on hazing. This argument tends to be fact-sensitive; a general recognition that hazing is dangerous is less likely to create liability than a specific awareness that one particular organization has engaged in hazing. But it is a factor most plaintiffs raise.
- **Premises Ownership/Control.** Under a premises liability theory, ownership and control of the site of the hazing are critical. This consideration arises most often in connection with Greek organizations that occupy houses of their own. In some situations, those houses are owned by the institution and are on campus, but in others, they are owned by the national organization or an alumni group. If the institution does not own the property, a plaintiff might still argue that the institution controlled it if the institution's agents have authority to visit it to enforce applicable laws and rules. The extent of the institution's authority under the school's policies, and in practical terms, is therefore likely to be a key issue.

Hazing injuries are often tragic and can lead to a significant risk of liability on the part of an institution. But as discussed above, most civil claims arising from hazing follow a similar pattern. Knowing the pattern can help a higher education institution assess its own risk, and hopefully, put it in a better position to help prevent injuries from occurring in the first place.

Lessons for University Health Care Providers from WannaCry

By Karilynn Bayus

This May, the United Kingdom's National Health Service experienced a massive attack by a type of ransomware known as "WannaCry." The attack crippled multiple hospitals, leaving them without access to their electronic health information for days and placing patient care at risk.

Ransomware is a type of malware that denies the user access to data on the user's infected system (most commonly by encryption of the data). To regain access to the data, the system owner must pay the hacker a ransom, typically in "bitcoin." Health care providers are attractive targets for ransomware attacks and other forms of hacking because of the critical nature of health care data and the need for regular and ongoing access to patient data. Several studies have noted that health care data sells on the "black market" at higher values than credit card information.

For health care providers that are "covered entities" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), a ransomware event may also be a breach of unsecured protected health information. HIPAA breaches must be reported in a timely manner to the individuals affected, the U.S. Department of Health and Human Services (HHS) and, depending on the size of the breach, the media. Breaches may result in financial and reputational damage to the reporting covered entity. In its Fact Sheet entitled *Ransomware and HIPAA*, the HHS Office for Civil Rights (OCR, the agency that oversees HIPAA compliance) states that whether or not a ransomware event is a breach will be fact specific, but "[w]hen electronic protected health information (ePHI) is encrypted as the result of a ransomware attack, a breach has occurred because the ePHI encrypted by the ransomware was acquired (i.e., unauthorized individuals have taken possession or control of the information), and thus is a 'disclosure' not permitted under the HIPAA Privacy Rule." The only way the event is not a breach is if the covered entity can prove that there is no more than a low probability that the protected health information has been compromised based upon a four-factor risk assessment.

While the public emergency and hysteria of WannaCry has passed, it is very likely that ransomware attacks will continue. For universities that have health care components that are covered entities under HIPAA, there are several important steps that should be implemented to try and protect against and recover from ransomware attacks:

- **Identify all health care components that are a part of the university system.** This can be challenging for universities when multiple departments or individuals may be providing some type of health care service. For universities that have health care components subject to HIPAA, the failure to properly identify all HIPAA "covered components" — and therefore not having appropriate HIPAA protections in place — has led to large dollar HIPAA settlements with OCR.
- **Ensure health care components are performing regular risk assessments and creating risk management plans.** For health care components subject to HIPAA, these action steps are mandatory under the HIPAA Security Rule. Even if not subject to HIPAA, performing these items is a best practice for other health care providers to try to protect the security of health information. Universities should ensure that their HIPAA covered components have comprehensive Security Rule plans. Consider using the Security Rule as a guideline for health care components not covered by HIPAA.
- **Develop Security Policies and Train the Workforce.** Often times, a ransomware or other security issue could

have been avoided if an individual had been able to identify a "phishing" scam or known not to click on an inappropriate link. Running internal "phishing" tests with employees may help raise awareness of the potential serious consequences of a ransomware attack.

- **Prepare a Ransomware and Cyber Event Response Plan.** Be prepared in advance if an event occurs. Identify who will be the point and the participants for the response team. The day an event occurs should not be the first time the response plan is executed. Ensure that the workforce is trained on the response plan. The OCR has prepared a basic checklist that may be consulted: http://bit.ly/2r3M5vf .

If you have any questions about HIPAA compliance or health care data privacy or security, please contact the author or any member of the Saul Ewing Higher Education Practice.

CYCLE by Saul – Covering Your Campus's Legal Education

The Higher Education Practice of Saul Ewing LLP is delighted to offer a free education CLE series CYCLE by Saul – Covering Your Campus's Legal Education. CYCLE by Saul provides regularly occurring legal education courses to in-house counsel and senior management of higher education institutions. CYCLE programming will focus on the unique nuances and legal challenges associated with operating a higher education institution, as it relates to particular areas of law including litigation (Title IX and Clery Act), labor and employment, real estate and intellectual property, among others. All workshops are interactive and informative.

If you would like to opt-in to the CYCLE mailing list to learn about future programming or are interested in having Saul Ewing's Higher Education team bring a CYCLE workshop to your college or university campus (at no cost), please contact Shannon Duffy, sduffy@saul.com.

James A. Keller
Co-Chair
215.972.1964
jkeller@saul.com

William E. Manning
Co-Chair
302.421.6868
wmanning@saul.com

James D. Taylor, Jr.
Co-Chair
302.421.6863
jtaylor@saul.com

Joshua W. B. Richards
Vice Chair
215.972.7737
jrichards@saul.com

Christina D. Riggs
Vice Chair
215.972.7810
criggs@saul.com