

How Higher Education Institutions Can Survive the Pandemic

The coronavirus pandemic has drastically changed the face of higher education in a matter of weeks and institutions must be prepared for the likelihood of another such outbreak in the future. The United States has reported over one million confirmed COVID-19 cases;¹ New York accounts for over three hundred thousand of these confirmed cases.²

In New York, and across the country, colleges and universities have had to adapt to this new reality. In the United States, over 4,000 higher education institutions have been impacted by COVID-19, which equates to over 25,700,000 students.³ These impacts are not minor. Many colleges and universities have cancelled in-person classes and switched to remote learning.⁴ Commencement ceremonies have been cancelled.⁵ The number of students permitted on campus has been limited;⁶ many institutions are applying strict standards regarding which students are permitted to remain and require students who wish to remain on campus to petition to do so.⁷

The adjustments made by colleges and universities, however, do not end with the current semester. While some institutions have already announced plans to reopen in the fall,⁸ other colleges and universities are still grappling with how to conduct classes during the Fall 2020 semester.⁹ Possible options include: beginning the semester remotely and transitioning to in-person classes, staying fully remote, having only certain groups of students (i.e., freshmen) attend classes on campus while the remainder of the institution remains remote, or if circumstances allow, completely returning to the in-person model.¹⁰

Even if all social distancing mandates can be lifted by the time the Fall 2020 semester begins, colleges and universities should now begin considering the legal ramifications and issues exposed by this pandemic in order to streamline whatever decision is made and ensure preparedness for another mass closure scenario in the future. This article explores some of the many legal issues that institutions should be considering as they adjust to this new normal.

Examine Contracts and Consider Renegotiating

Higher education institutions are parties to myriad contracts, including, for example, contracts regarding food service, books, and technology.¹¹ Particularly relevant to higher education institutions now is whether these contracts contain a force majeure clause and what specific language is contained within it. “Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance.”¹² However, “[i]nterpretation of *force majeure* clauses is to be narrowly construed and ‘only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.’”¹³

In light of Covid-19 and subsequent campus closures, it is possible that the services or goods that the institution has contracted for will no longer be needed in the Fall 2020 semester; alternatively, campus closure could prevent the institution from being able to satisfy its obligations under the contract. Institutions should examine the language in their contracts to determine if and how the contract can be modified or terminated without giving rise to a breach of contract claim against the institution.

Notably, “financial hardship is not grounds

for avoiding performance under a contract.”¹⁴ Thus, while higher education institutions may be struggling financially,¹⁵ they cannot use this as a reason to unilaterally terminate the contract. Likewise, regarding a force majeure clause, if no reference to a pandemic or similar scenario is made in the contract language, institutions may not be able to rely on this clause to terminate current contracts. Moving forward, however, institutions may wish to include language in new contracts that would encompass this kind of scenario.

Institutions should also review the contracts that they have with their employees, specifically faculty. Many teachers this semester needed to quickly switch to teaching via online learning methods as opposed to in-person instruction.¹⁶ If institutions are considering maintaining this method during the Fall 2020 semester, they should confirm that requiring online teaching does not violate the terms of any faculty contracts. While some unions may have temporarily renegotiated in the midst of the COVID-19 pandemic regarding subjects such as online teaching requirements and pay,¹⁷ institutions should strive for permanent terms regarding this type of situation during any future renegotiation of collective bargaining agreements.

Anticipate Litigation Regarding Closures

In the wake of campus closures, class-action lawsuits have been brought against colleges and universities regarding refunds of tuition and fees.¹⁸ While it is beyond the scope of this article to address the full panoply of claims that institutions could face, colleges and universities should be prepared for the possibility of litigation initiated by students demanding the refund of tuition, room and board, and/or any other fees relating to the Spring 2020 semester.

There are numerous defenses to these types of cases, especially those brought as class actions, and institutions should take care to explore the various litigation strategies that are available to them. Looking forward to the Fall 2020 semester, institutions should consider whether any fees or tuition payments should be preemptively adjusted based on the anticipated format for classes or students’ limited access to the campus and its resources. If the decision is made to leave everything as it is, the institution should be prepared to explain the decision, update its contracts and policies accordingly, and point to any other authority that supports it, such as an Executive Order or other legal mandate.

Adapt Title IX Investigations

Title IX of the Education Amendments of 1972 (“Title IX”) states that, with certain named exceptions, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁹ Colleges and universities are legally required to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints” related to Title IX.²⁰ In light of campus closures due to COVID-19, institutions have had to adjust the way that investigations



James G. Ryan



Jennifer E. Seeba

are conducted.²¹ Some institutions are choosing to postpone hearings in light of social distancing orders while others have decided to continue with the investigation process remotely.²² Under current²³ Title IX requirements, there is no specific time limit within which investigations must be completed.²⁴

Nevertheless, the Department of Education’s Office for Civil Rights issued a warning on May 12, 2020 that “institutions should not delay investigations or hearings solely on the basis that in-person interviews or hearings are cumbersome or not feasible, so long as the institution is able to comply with the requirements in 34 CFR 106.8 to resolve complaints promptly and equitably.”²⁵ There are, however, concerns that conducting the process and hearing remotely—such as through video chat or over the phone—could negatively impact both the accuser and the accused.²⁶

While schools may have quickly adjusted their policies and procedures in order to conduct investigations during the Spring 2020 semester, they should begin thinking about a more permanent, codified policy regarding remote investigations if one was not already

in place. In order to allay fears that parties will be able to circumvent certain investigation policies if the investigation is conducted remotely,²⁷ institutions should include policies that address this possibility.

Having a clear and written policy regarding remote investigations not only ensures the required “equitable” process for the parties,²⁸ but ultimately it helps to protect the institution as well. If a party were to appeal the results of a disciplinary hearing via an Article 78 hearing, part of the standard that the Court uses to evaluate the institution’s decision is whether “the determination...was rendered in accordance with the university’s published regulations.”²⁹ If the only policy in place refers to an in-person procedure and there is no formal policy regarding remote investigations, the institution may have a difficult time showing it followed its published regulations. Additionally, having a clear policy in place regarding remote procedures will benefit the institution in the long run, as the policy will already be in place should another campus closure be required.

Be Prepared for Issues Regarding Reopening

Though some institutions have already announced that they intend to reopen their

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campuses for the Fall 2020 semester,³⁰ both they and those that are still deciding how to proceed should consider various factors. For example, many different government entities have released guidance regarding the reopening of businesses, such as the U.S. Equal Employment Opportunity Commission (“EEOC”),³¹ the Centers for Disease Control and Prevention (“CDC”),³² and New York State, via Governor Cuomo.³³ Institutions would be wise to read, and if possible, apply, this guidance to their own reopening strategies. Additionally, institutions should make sure that their plans do not run afoul of any federal, state, or local government mandates relating to closures due to COVID-19.

Even if an institution is able to and chooses to fully return to in-person norms on campus for the Fall 2020 semester, this does not mean that all of its employees or students will be comfortable returning to campus. Under federal law, employees have the right to stop working “in good faith because of abnormally dangerous conditions for work at the place of employment.”³⁴ Essentially, “a work stoppage called solely to protect employees from immediate danger is authorized by [section] 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction.”³⁵ Even unionized employees with “contractually prohibited work stoppage” provisions in a collective bargaining agreement can stop work under this section if they “present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.”³⁶

Institutions should be prepared for employee questions and concerns regarding the safety of returning to work. Taking appropriate safety measures will not only protect the employees from getting sick, but it will also protect the institution from being unable to reopen due to employee’s refusal to return. Students may have similar concerns regarding returning to campus. Institutions should begin crafting a policy now regarding how they will respond in this scenario, whether it be with an option for deferral, an option for remote learning, or by some other means. To help calm fears, it is also recommended that institutions inform employees and students of the steps they have taken to make the campus as safe as possible.

James G. Ryan is the head of the Commercial Litigation department at Cullen and Dykman, LLP, is in the firm’s Higher Education practice group, and is chair of the firm’s Employment Litigation practice. Jennifer E. Seeba is an Associate at Cullen and Dykman, LLP.

1. See Johns Hopkins University, *COVID-19 Dashboard by the Center for Systems Science and Engineering (CCSE) at Johns Hopkins University (JHU)*, Johns Hopkins University <https://bit.ly/2WqjHW5>; Lynsey Jeffery, *U.S. Surpasses 1 Million Coronavirus Cases*, NPR, (Apr. 28, 2020), <https://n.pr/2Wo34dG>.
2. See Johns Hopkins University, *supra* n. 1.
3. Entangled Solutions, *Institutional Change and Impact Map*, Entangled Solutions, <https://bit.ly/2AmZU1l>.
4. See, e.g., Peter Salovey, *COVID-19 - Moving courses online and other significant updates*, Yale University, (Mar. 10, 2020), <https://bit.ly/2SVQeRG>; Martha E. Pollack, *Cornell suspends classes; virtual instruction begins April 6*, Cornell University, (Mar. 13, 2020), <https://bit.ly/35R1fcm>.
5. See, e.g. Griffin Jones, *Columbia and Barnard cancel Commencement ceremony in light of the coronavirus outbreak*, Columbia Daily Spectator, (Mar. 20, 2020), <https://bit.ly/2Wpq9r9>.
6. See, e.g., Ellis Giacomelli, *SUNY Canton, SUNY Potsdam respond to NY on PAUSE order*, NNY360, (Mar. 23, 2020), <https://bit.ly/3bwRtSQ>.

7. See, e.g., *March 17, 2020: Message from President Brown, COVID-19 Update*, Boston University, (Mar. 17, 2020), <https://bit.ly/2AmiVkw>.
8. See, e.g., Brian O. Hemphill, Ph.D., *Fall 2020 Campus Reopening*, Radford University, <https://bit.ly/3brZovG>; Jonathan Alger, *A look toward the future*, James Madison University, (May 1, 2020), <https://bit.ly/2WStMKJ>.
9. See, e.g., *UMass Amherst Response to the Coronavirus (COVID-19) – FAQs About the Fall 2020 Semester for Returning Students*, University of Massachusetts Amherst (Apr. 29, 2020), <https://bit.ly/2zst3d>.
10. See Edward J. Maloney and Joshua Kim, *15 Fall Scenarios, Inside Higher Ed*, (Apr. 22, 2020), <https://bit.ly/2WNsBMz>.
11. See *Contract Finder*, E&I Cooperative Services, (last visited May 12, 2020), <https://bit.ly/2zzydCc>.
12. *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 154, *reargument denied*, 25 N.Y.3d 1189 (2015).
13. *Reade v. Stonybrook Realty, LLC*, 63 A.D.3d 433, 434 (1st Dept. 2009) (quoting *Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900, 902–903 (1987), *superseded by statute on other grounds*).
14. *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227–28 (1st Dept. 2001) (citations omitted).
15. See Andrew Smalley, *Higher Education Responses to Coronavirus (COVID-19)*, NCSL, (May 8, 2020), <https://bit.ly/3fECJj7>.
16. See, e.g., Salovey, *supra* n. 4; Pollack, *supra*, n. 4.
17. See *COVID-19 Related Agreements between the MCCC and the BHE as of 3/20/20*, MCCC Union, (Mar. 20, 2020), <https://bit.ly/35Rc7H6>.
18. See, e.g., *Adelaide Dixon, individually and on behalf of all others similarly situated v. University of Miami*, US District Court for the District of South Carolina Charleston Division, Case No. 2:20-cv-1348-BHH, *available at* <https://bit.ly/2T056yB>; Kate Murphy, *Should UNC System students get tuition refunds after COVID-19? Some have filed suit.*, The News & Observer (Apr. 28, 2020), <https://bit.ly/2yP9g5A>.
19. 20 U.S.C.A. § 1681(a).
20. 34 C.F.R. § 106.8(b).
21. See Greta Anderson, *Hold Off or Proceed*, Inside Higher Ed, (Mar. 26, 2020), <https://bit.ly/35Pujwe>.
22. See *id.*; Sarah Brown, *Sexual-Assault Investigations May Be Delayed as Coronavirus Disrupts Colleges*, The Chronicle of Higher Education, (Mar. 23, 2020), <https://bit.ly/3ctTZpw>.
23. Currently, there are new regulations regarding Title IX, entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” which have completed review by the Office of Management and Budget and are currently in their final form. See *OIRA Conclusion of EO 12866 Regulatory Review*, Reginfo, (last visited May 12, 2020), <https://bit.ly/35WN7yf>. On May 6, 2020, the Department of Education released the unofficial version of the regulations, but they are not effective until August 14, 2020. See *U.S. Department of Education Releases Final Title IX Rule*, United States Dep’t of Education Newsroom, (May 6, 2020), <https://bit.ly/3cmccFg>.
24. United States Dep’t of Education, *Q&A on Campus Sexual Misconduct*, Dep’t of Education, p.3, (Sept. 2017), available at <https://bit.ly/3fRgGpl>.
25. United States Dep’t of Education, *Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency*, Dep’t of Education, p. 3, (May 12, 2020), available at <https://bit.ly/2Wo913I>.
26. See Anderson, *supra* n. 21; Brown, *supra* n. 22.
27. See Brown, *supra* n. 22.
28. See 34 C.F.R. § 106.8(b).
29. *Galiani v. Hofstra Univ.*, 118 A.D.2d 572 (2nd Dept. 1986) (citations omitted).
30. See, e.g., Hemphill, *supra* n. 8; Alger, *supra* n. 8.
31. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission, (May 5, 2020), <https://bit.ly/365hR0l>; *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission, (Mar. 21, 2020), <https://bit.ly/2Wpxu7>.
32. See, e.g., *Coronavirus Disease 2019 (COVID-19) Guidance for Businesses & Employers*, CDC, <https://bit.ly/3cCSIMA>.
33. See, e.g., *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Additional Guidelines for Phased Plan to Re-open New York*, New York State Governor, (Apr. 28, 2020), <https://on.ny.gov/2YU4jTG>.
34. 29 U.S.C. § 143; see also *Clark Eng’g & Const. Co. v. United Broth. of Carpenters & Joiners of Am., Four Rivers Dist. Council*, 510 F.2d 1075, 1079 (6th Cir. 1975) (“Section 502 serves an entirely different purpose. When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section protects him from employer retaliation. The employee cannot be discharged . . . ; the employer cannot resort to a lockout.”) (citations omitted).
35. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974).
36. *Id.* at 386–87 (internal quotation and citations omitted).



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