

Potential Legal Land Mines For Colleges Opening This Fall

By **Lisa Lori**

Life before COVID-19 feels like the dinosaur age. In some ways, it was — the days of handshakes, high-fives and hugs — which existed for thousands of years — are gone. Pundits have been talking about the new normal in a post-COVID-19 world. In the world of higher education, even this new normal — without the handshakes, high-fives and hugs — presents multiple legal liability landmines.



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Let's start with the reopening of college campuses in the fall — something that must happen if colleges and universities are to avoid an economic catastrophe, and something which brings with it threats of litigation. Face it. Students have had it with remote learning and lack of social contact with their fellow students (not to mention, the lack of contact with other human beings besides their parents and siblings).

So, too, have the faculty, staff and administration. They want to be back on campus, and colleges and universities need to have them back on campus.

According to the U.S. Department of Labor's Bureau of Labor Statistics, nearly 4 million people are employed in the higher education sector, adding approximately \$600 billion to the United States' gross domestic product. Individuals also depend on higher education as a means of upward mobility for people all over the world. Thus, the opening of college and university campuses this fall is, and should be, of critical importance. However, keeping students, faculty and staff and others safe and healthy is of equal, if not greater, importance.

Infections on campuses, whether in dormitories, classrooms or administrative offices and anywhere in between, will happen. When they do, lawsuits will follow. These lawsuits will involve claims relating not only to the infections themselves, but other aspects of campus life, such as campus closures and the need to complete the semester remotely.

The increased costs of student health and safety are significant. But the costs of the failure to keep students healthy and safe could be far greater. In fact, if the past is any indicator of the future, higher education institutions need to be ready for a glut of lawsuits that will follow in and after the fall.

For example, students at many colleges and universities have already filed lawsuits, mainly contract-based claims, seeking refunds of tuition because students had to finish the spring semester remotely when COVID-19 hit the U.S.

These students, including students from University of Pennsylvania, Columbia University, Boston University, Georgetown University, Drexel University, Purdue University, Pennsylvania State University, Rutgers University, New York University and Brown University, and over 40 other institutions (and the list continues to increase), are claiming in the lawsuits essentially that they were promised the value of an in-person, on-campus experience and that they should be reimbursed for their tuition because the institutions, which were forced to close on-campus operations due to COVID-19 government shutdown orders, failed to deliver on that promise.

While these student-plaintiffs face an uphill battle with these claims (institutions will, no doubt assert "act of God" and force majeure defenses), institutions still are going to have to spend time and money defending the claims. Turning to the future, when campuses reopen in the fall, an unprecedented amount of lawsuits and legal challenges are expected to follow. These legal challenges include the following:

1. Personal injury or negligence-based lawsuits due to students, faculty or staff becoming infected with the virus and the institutions' alleged failure to keep the community safe from the virus;
2. Accessibility lawsuits from students or faculty based on new teaching and testing methodologies required due to COVID-19, and claims based on failures to make reasonable accommodations for individuals with disabilities;
3. Employment-based claims, including whistleblower claims, in which plaintiffs (and others) call out institutions for failing to take certain actions; and
4. False Claims Act proceedings relating to the institutions' use of stimulus funds they received under the Coronavirus Aid, Relief, and Economic Security Act. This spring, institutions received CARES Act funding, a portion of which was to be paid to students directly and another portion of which was to be utilized by the institutions to cover certain expenses. Questions abound as to how institutions were to use these funds. And, the U.S. Department of Education's guidance was anything but clear. Accordingly, in the event an institution is audited by the Department of Education, the institution may face proceedings and potential liability under the False Claims Act if it is found to have misused the funds.

The following are some strategies universities and colleges can employ to reduce their exposure to liability from lawsuits:

1. Follow Centers for Disease Control and Prevention and other regulatory guidelines, at a minimum. Forget large, packed lecture halls and big events — sports or other. Common areas, such as libraries and dining halls, should be spaced out. Many colleges are also considering individual resident living to combat COVID-19.

Also, at least two universities in New York, Syracuse University and the State University of New York College of Environmental Science and Forestry, announced plans to routinely test sewage leaving student residence halls to check for COVID-19. Another university in California announced that it will be testing wastewater on campus to check for COVID-19.

Nonetheless, social distancing will have to be the norm, as will testing, face masks, hygiene protocols, regular temperature checks and contact tracing programs. Plans for reopening and COVID-19 contingencies, which should include provisions for testing, tracking and treating those who become ill, should be in place long before campuses reopen.

2. Communicate regularly with returning students, potential students, faculty and staff (and the entire campus community) as to COVID-19 contingencies, and be transparent and truthful in those communications. Keep communications clear and free from ambiguity, and if a clear answer is not known or possible, be clear too about that.

Don't overstate or overpromise what can be delivered, and don't understate dangers and risks that the pandemic presents. And manage expectations — sometimes the most effective way to avoid unhappy communities is by telling them the bad news in advance (e.g., let them know ahead of time that you are expecting to have COVID-19 cases on

campus and what the university will do when that happens).

3. Have students sign waivers or statements acknowledging risks associated with COVID-19. Having students sign appropriately worded waivers or acknowledgements can help students to have an increased awareness of the risks and their responsibilities to help combat the pandemic and protect others from it.

While legal waivers may not always be enforceable, appropriately worded documents (perhaps titled "notice") informing students of the risks, university protocol for dealing with COVID-19, and steps students (and other members of the community) can take relating thereto should go a long way in the event the student (or other community member) files a lawsuit against the institution.

In fact, recently, the University of South Carolina, School of Medicine Greenville announced that it is requiring its students to sign waivers acknowledging COVID-19 risks and agreeing to not hold the school liable in the event they become infected, before these students start their next clinical rotation. If students do not sign, they risk delaying their graduation. While this example of a waiver is on one end of the spectrum, something in the middle may be more appropriate.

4. Relatedly, institutions should update their employee and student handbooks or procedures to include the institutions' plans for reopening and dealing with COVID-19 matters, and COVID-19 contingencies.

5. Press congressional leaders (i.e., lobby) for the passing of legislation that provides immunity to higher education institutions that reopen campuses in the fall.

For example, recently, many states' public and private universities have been lobbying Congress for legislation that would protect the institutions and hold them harmless in the event they are sued by students, faculty, staff and visitors who may become infected with the virus on campus. While such legislation could be a slippery slope, institutions that take reasonable precautions to protect their communities against COVID-19 should not have to worry about exposure to lawsuits when they decide to reopen in the fall.

6. Keep records and a solid paper trail with respect to use of stimulus funds under the CARES Act. And, most importantly, be sure to only use the funds appropriately, following the guidance issued by the Department of Education.

7. Review insurance policies to ensure that the institutions have appropriate insurance coverage for the issues that may arise.

While these strategies may help to reduce liability in litigation, the best strategy always is to avoid litigation all together, if possible.

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