

Top Issues in 2021: Higher Education

While many institutions of higher education have reassessed, restructured, and evolved, moving forward in 2021 and beyond will require even more resilience. The following is a list of top issues and considerations that colleges and universities should expect to face throughout 2021.

PRIVACY, SECURITY, AND ONLINE LEARNING

Privacy and Cybersecurity risks have significantly increased due to greater security vulnerabilities surrounding the fast evolving legal and regulatory landscape governing the protection of student records and personally identifiable information. Although online learning itself is not new and can present risks absent a pandemic, the unprecedented move online eradicated the luxury of time to conduct adequate due diligence of the software solutions. In the rush to provide, enhance, and scale online learning to consistently and equitably meet community needs, institutions are contending with an increase in outsourcing and vendor/third-party information collection and use of information. The development of these additional factors demands a focus on individuals' privacy and the policies of the institution in alignment with heightened contractual scrutiny and careful vendor management to mitigate the accompanying increased risks. The increased level of digital engagement, coupled with the number of personal devices with varying standards of cybersecurity hygiene, has led to an exponential number of security risks.

Higher education professionals should evaluate their privacy policies and existing security controls and make changes that provide a reasonable level of data protection, including robust endpoint threat detection solutions as well as multifactor authentication in the current environment. Universities should also take additional steps to mitigate troublesome cybersecurity problems, such as deploying a methodical approach to evaluation and selection of effective remote learning software solutions.

PANDEMIC-RELATED LITIGATION

The pandemic already has spawned a wide variety of litigation against colleges and universities, and presents significant potential avenues and risks for future litigation. Current cases range from numerous class actions seeking damages related to tuition and activity fees; employment cases arising from terminations and other adverse employment actions against faculty and staff; and cases focused on contractual and other issues resulting from the pandemic. Given the amount and variety of pandemic-related litigation already filed against higher education institutions, it is particularly important for institutions to take proactive steps to assess and mitigate risks to help avoid significant potential liability and exposure, especially when institutions already are grappling with limited resources and public relations issues on campus and in their broader communities.

FINANCIAL SUSTAINABILITY

Even before the pandemic, many colleges and universities confronted difficult choices in an evolving industry. The pandemic has significantly exacerbated and complicated the financial pressures on higher education institutions. Some institutions have been forced to close and others to merge/consolidate. Affected institutions continue to consider how and when to deploy reductions in force and make other changes to maintain and restructure stable operations to meet these challenges.

Colleges and universities may consider:

- Declarations of financial exigencies
- Faculty/staff layoffs
- Voluntary severance programs
- Benefit restructuring
- Affiliations/consolidations/joint ventures
- Debt/bond issuance
- Endowment reviews to free up operational support
- Creative real estate solutions

USING COPYRIGHTED MATERIALS IN A VIRTUAL LEARNING CAPACITY

With online learning being utilized more and more by educators as institutions are learning to manage the COVID-19 crisis, educators are often using materials purchased and licensed for in person instruction in an online instruction capacity. If the license rights provided to an educational institution for such instructional material do not explicitly provide for distribution or presentation online, the educator and their respective educational institution may still be able to utilize such materials in an online capacity if such use complies with the “fair use” doctrines under the copyright law, or the more educator friendly, TEACH Act. While the TEACH Act does provide wider permission for educators to use properly licensed educational materials intended for in-person learning in an online setting, there are parameters to this that many institutions may not be aware of or are complying with. [Click here](#) to learn more about these parameters.

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MENTAL HEALTH AWARENESS

Before the pandemic, the 2019 Annual Report of the Center for Collegiate Mental Health suggested that over 60 percent of students who completed an assessment of psychological symptoms reported anxiety.¹ The early studies on college student anxiety during the pandemic suggest that a significant majority of *all* responding students reported symptoms of stress and anxiety due to the pandemic.² Many students reported changes to their behavior, including positive and negative coping activities. On top of the pandemic, many students are likely to have been impacted by the historically tumultuous social and political events of the past few years. As a result, institutions of higher education are likely to confront an unprecedented level of concern and activity relating to student mental health, and this trend is likely to impact staff and faculty as well.

¹ 2. Center for Collegiate Mental Health. University Park, PA: Penn State University; 2020. [2020-05-11]. 2019 Annual Report. Available at: https://ccmh.memberclicks.net/assets/docs/2019-CCMH-Annual-Report_3.17.20.pdf.

² See, e.g., Son C, Hegde S, Smith A, Wang X, Sasangohar F. Effects of COVID-19 on College Students' Mental Health in the United States: Interview Survey Study. J Med Internet Res. 2020;22(9):e21279. Published 2020 Sep 3. doi:10.2196/21279

Widespread changes regarding technology use, remote teaching and learning, web-based provision of services, quarantine, and other health-based practices undoubtedly will lead to a shift in what constitutes a reasonable accommodation going forward. Even as the pandemic subsides, higher education institutions will need to remain agile and proactive in responding to student mental health issues. More than ever, leadership across all institutions should be evaluating and implementing at-risk identification and crisis management plans, life skills and coping programs, group-based support models, technology-based solutions, accommodation planning, and staff and faculty training.

Throughout 2021 and beyond, we anticipate new and groundbreaking theories, legal developments, and litigation impacting the application of the Fair Housing Amendments Act (FHAA), Section 504 of the Rehabilitation Act of 1973 (Section 504), the Americans with Disabilities Act (ADA), the Family Educational Rights and Privacy Act (FERPA), and the Health Insurance Portability and Privacy Act (HIPAA), as well as state and local laws and regulations, to students, staff, and faculty with mental health related disabilities. As always, a proactive and informed approach with the partnership of legal counsel will help higher education institutions to stay on top of this fast-changing area of law.

HOW WE CAN HELP

While institutions of higher education face unprecedented challenges, what has not changed is the determination among today's academic leaders to respond with a dignity and honor that befit their academic mission. And to work relentlessly to secure the resources their scholars need to carry out that mission. In our work as full-service outside counsel to many university leaders, we know how educational institutions work, what academic leaders face, what they do, and why they do it.



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