

Top Issues in 2020: Higher Education

FINANCIAL CHALLENGES AND RESTRUCTURING

Many higher education institutions (HEIs) are confronting difficult choices in an evolving industry. Market contraction is forcing some HEIs to close and others to merge/consolidate. Many schools have failed to meet their Fall 2019 enrollment targets, which is troubling given a heavy reliance on an upward trend in enrollment and/or increasing annual tuition to meet rising operating costs. Affected institutions may need to consider how and when to deploy reductions in force to maintain stable operations – and when to restructure operations to meet challenges. HEIs may consider:

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

MENTAL HEALTH ON CAMPUS

Issues surrounding student mental health diagnoses, treatment, accommodations, and resulting legal claims have been on the rise, a trend which is expected to continue in 2020. Many experts point to a dramatic increase in the rate of diagnosis, recognition of mental health issues among college students as well as in children prior to entering a HEI as a trend driver.

To manage sensitive mental health issues among their student populations HEIs can implement life skills and coping programs, encourage group-based support models, and embrace technology-based solutions. HEIs must also identify at-risk students and train staff and faculty on crisis management and risk reduction strategies. The policies for implementing such programs often benefit from a legal review to ensure compliance with best practices and legal requirements.

Mental health issues on campus can also lead to nuanced legal and compliance concerns. Federal laws, including 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, provide rights to students with mental health related disabilities. Legal questions frequently arise in relation to requests for housing accommodations, classroom and testing accommodations, physical accessibility of facilities and equipment, and the use of service animals or assistance animals on campus, all of which must be balanced against the safety and operational needs of the institution.

TITLE IX

New regulations on Title IX are expected early this year. Due process and fairness concerns regarding an HEI's handling of campus investigations are expected to remain a focus of the proposed changes. Civil litigation by both respondents and complainants regarding these same due process concerns also continue to rise, with federal courts acting as courts of appeal over typical institution enforcement procedures.

Treatment of camps and scholarships geared towards female students and their potential noncompliance with Title IX laws should also be watched in 2020. Title IX bans any sex discrimination in education, including discrimination against males. Continued investigations and litigations surrounding this topic are expected and clarification around potential defenses to such claims, including whether such gender-based scholarships and programs address inequalities or imbalance is necessary.

PRIVACY AND CYBERSECURITY

Privacy and cybersecurity obligations will continue to be a significant concern for HEIs as sophisticated cybercriminals – as well as the lack of resources available to mitigate cybersecurity threats – are ongoing and expected to increase. Meanwhile, the day-to-day risks, arising from the proliferation of devices tied to campus' networks, and unmitigated security vulnerabilities posed by third party vendors and service providers, require technical and administrative solutions that college and university staff may not have the expertise to create.

Compliance challenges will increase when enforcement of the California Consumer Privacy Act (CCPA) begins in July of 2020 and other domestic and international jurisdictions enact copycat laws with similar burdensome obligations on for-profit HEIs. At the federal regulatory level, expect further debates and calls for a federal solution from agencies such as the U.S. Federal Trade Commission and the U.S. Department of Education.

HOW WE CAN HELP

While HEIs 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, our lawyers take calls on whatever campus exigencies occur, from intellectual property protection to technology transfers and licensing; investigations; benefit plans and internal fiduciary audits; labor and employment matters; immigration counsel; real estate transactions and project development; and privacy & cybersecurity. We know how educational institutions work, what academic leaders face, what they do, and why they do it.

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