

Reopening College and University Campuses in Fall 2020— Covid-19 Considerations

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Introduction

This document provides a list of Covid-19 related issues for consideration by institutions of higher education (IHEs) and entities responsible for their governance as they contemplate reopening their campuses and other operations in the fall of 2020. These considerations are framed in the context of three broad areas of interest:

- Risk/Liability Avoidance
- Good Operations and Management—Policy and Process
- Seizing Opportunities to Advance Diversity and Equity Goals

See also Taylor, Turk and Sanchez, *College and University Presidents Respond to COVID-19: May 2020 Survey* (American Council on Education, May 21, 2020) (a report of 310 IHE presidents' responses to April and May 2020 surveys conducted by the American Council on Education (ACE) regarding reopening issues and initial plans) <https://www.acenet.edu/Research-Insights/Pages/Senior-Leaders/College-and-University-Presidents-Respond-to-COVID-19-May-2020.aspx> and *Here's a List of Colleges' Plans for Reopening in the Fall* (*The Chronicle of Higher Education*, July 13, 2020) <https://www.chronicle.com/article/Here-s-a-List-of-Colleges-/248626>.

Nothing in this document constitutes institution- or organization- specific legal advice; IHEs and related entities should consult their counsel on issues described here.

Some Key Considerations

Consider three overarching principles in assessing issues on this checklist: (1) mission is the driver of policy in higher education; risk/liability and funding issues are design parameters that must be navigated for feasibility and sustainability; (2) transparency and clarity of communications about actions taken and why, issues not yet resolved, and potential for changes and consequences as conditions change, will help to preserve reputation and stakeholder relationships and minimize liability; and (3) plan and act equitably, with consideration of the voices and needs of those within the IHE's community who are disproportionately affected by the pandemic.

1. Risk/Liability Avoidance

- a. **Minimizing Tort/Negligence (and Contract) Liability**—what is the duty of reasonable care to avoid foreseeable harm to students, employees, invited visitors, others who can be expected to come to campus?

- i. **Sovereign Immunity.** Public institutions—and employees/agents acting in their official capacities—enjoy sovereign immunity. Often state legislatures waive immunity up to a cap for negligence generally (above the cap, immunity kicks in again). Waivers of immunity may also apply to certain types of negligence and for wanton, willful acts. (Employees/agents who act outside of the scope of their official duties generally are not covered.)
- ii. **Insurance.** IHEs should check on coverage and exclusions for Covid-related harm under their insurance policies and, for public IHEs, their state risk management programs. Also be sure to adhere to any notice of claim or potential claim requirements. Note that acts by volunteers are not always covered or require special steps for coverage in advance. Ask your insurer if they have risk avoidance guidance.
- iii. **Negligence Liability/General.** State law governs tort/negligence liability and may vary. Generally, the duty to employees (faculty, staff) and those invited to campus (including the public re: areas of the campus that are generally open) is greater than to those without authority to be on campus or in a facility. For the latter, posting “no trespass” and warnings and securing “attractive nuisances” (particularly when it is known that unauthorized people access an area) are good practices.
- iv. **Negligence Liability/Students—and Contract Liability.** Whether there is a heightened duty of care to students (e.g., duty to provide safety/ security of students in dorms, on campus and in curricular and co-curricular activities, in externships that are required for degrees but run by others, in general to protect students at risk from suicide, etc.) has been the subject of litigation over whether an IHE has an “in loco parentis” duty to students or only a “business to invitee” duty. There has been some split in the courts, resulting in differences by jurisdiction. Although an automatic, full in loco parentis duty may not be the modern trend, an IHE may assume a heightened duty based on marketing materials, other communications, and circumstances. These materials may also give rise to contract liability/misrepresentation claims. Also recognize that mission and the court of public opinion, affecting reputation, may require or expect a duty that the law does not impose.
 - Updating marketing materials and websites, and crafting reopening messaging with care and a Covid overlay are good practices.
 - Be clear about the risks and that each individual has a personal responsibility to self and others for safety.
 - Avoid assuming a duty to make the campus safe if that is not intended—and, in any event, avoid over-promising what the IHE can do to make it safe.
- v. **Adherence to Official/Expert Orders/Guidance.** If an IHE reopens based on (and complies with) a federal or state or local executive order or statute, as well as CDC and state/local health department guidance, there would be some demonstration of reasonable care. Consider the guidance that is most protective and most specific to an IHE’s locale and circumstances, where there is variation. Some of the orders aren’t as specific as others on particular points.

- vi. **Implementation Considerations.** Exposure could arise, particularly as to reasonable care in precautions to maintain distancing, disinfecting, and possibly opening discrete facilities or functions that pose high exposure risk, etc. IHEs could also incur liability if they require a return to campus for all employees and students and don't provide alternatives for those with compromised immunity or over the age of heightened risk.
- b. **Flexibility to Meet Mission and Liability Interests.** IHEs might be able to limit liability—and best fulfill their missions—by providing alternative work arrangements for employees and alternative pathways to graduation and/or options for course delivery.
 - i. It would be a good practice to notify students and families that, although the campus is reopening, there are unavoidable Covid risks in the world, nation and state and students and families have a choice whether to return in the fall or accept an alternative pathway/schedule or course delivery options as they decide how much risk they wish to assume.
- c. **Clery Act Requirements.** Reporting on emergencies affecting campus safety likely include Covid. A banner and notice on the IHE's website with information on its actions to address safety during the pandemic, with a link to the CDC's website, is required. See the U.S. Department of Education notice of April 3, 2020. <https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19>
- d. **CARES Act Funding.** Any effect of the intersection of federal immigration law and proper use of CARES Act funding for students. See <https://www2.ed.gov/about/offices/list/ope/caresact.html> The California Community Colleges have sued over limitations on funding use.
- e. **U.S. Attorney General Enforcement Effects.** A U.S. Attorney General memorandum directs enforcement action to assure that measures to address the pandemic do not over-reach in impinging on Constitutional speech and religious freedoms. While addressed to state and local authorities, the memorandum may affect public IHEs—particularly regarding directives from their regents. All IHEs may be affected if their state and local government orders are affected.
- f. **International Students Studying On-line.** A March 13, 2020 ICE/SEVP guidance permits F-1 visa holders to study in the U.S. in their IHEs' degree programs delivered entirely or partially on-line during the Covid-19 emergency. IHEs must provide notice to SEVP within 10 business days of changes in their form of program delivery (procedural changes). The guidance provides temporary relief from regulations limiting international students to one course or no more than three credits per semester/session, in a full-time degree program to maintain their visa status. A July 6, 2020 update that would have ended this relief was abandoned by ICE, after widespread opposition. <https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance%203.13.20.pdf>
- g. **Anti-trust.** Avoid formal, informal, or implied, written or oral agreements with other IHEs regarding "commercial" activities that may affect competition among IHEs for goods or services, including faculty, staff or students. (Agreements for price fixing, e.g., re: fixing, capping, or cuts or refunds of tuition, fees, room/board, or aid, faculty/staff pay, benefits, and furloughs, and

agreements for market share allocations, e.g., in recruiting or hiring, are *per se* violations. Agreements for other actions that have more than a minor effect on competition under certain analytic frameworks also are prohibited.) Consult your legal counsel about anti-trust issues, including safety to share pricing/compensation data through 3rd party surveys satisfying conditions. See this ACE guidance: <https://www.acenet.edu/Documents/Collaboration-and-Information-Sharing-in-the-Coronavirus-Era.pdf#search=Antitrust%20Covid>

2. Good Operations and Management—Policy and Process

- a. **K-12-Higher Ed Misalignment and Child Care.** How will mis-alignment of K-12 school reopening and campus reopening be managed for the IHE’s workforce and students? How will need to care for a family member be handled? Will campus child care supports (including subsidies and on-site child care) continue to be available and/or what flexibility and alternative support can be provided to parents? Review existing employment policies to determine if any temporary amendment is needed. Consider whether virtual work arrangements can be made. (State and local communities have enacted specific child care regulations and best practices to protect children and caregivers during this time that may impact the availability and cost of care. Keep in mind as well that general negligence standards of reasonable care, as applied to care of children, are elevated. Satisfying regulatory child care standards is a helpful fact in defending negligence claims; whether it is a complete defense depends on the law of each state and local government.)
- b. **Task Force/Emergency Protocols.** Consider activating a special Covid Task Force and Emergency Response Team of multi-office, public health, EHS, medical, and faculty experts to focus on designing, advising on, and implementing safety policy, protocols and guidance. (Can IHEs in hurricane and earthquake areas adapt their plans and share with other IHEs? Can IHEs conduct tabletop exercises before reopening to prepare?)
- c. **Medical and Crisis Communications Teams.** IHEs should have their on-campus or affiliated medical and crisis communication teams ready with plans and protocols, to address Covid hot-spot break-outs. Individual names should not be released, but when will notice on overall incidence be given?
- d. **Testing/Symptom ID.** Guidance should be provided on symptom identification. Will testing or an exposure survey and temperatures be required prior to individuals re-entering campus and other IHE activities?
- e. **Safety/Containment Protocols.** Protocols should address disinfection by the IHE, soap and water/sanitizer being highly accessible across campus, distancing requirements and physical barriers to facilitate distancing, “rules of engagement,” requirements to use and provision of Personal Protective Equipment and masks, taking temperatures of employees and students and inquiring about symptoms as prerequisites to return to campus and participation in activities, testing-contact tracking-quarantining protocols and facilities, and protocols for accessing medical services and back-up medical services when on-campus and affiliated medical services capacity are limited, etc.

- f. **Disability and Privacy Laws.** As required under federal disability laws, do not inquire about pre-existing conditions, but make known that accommodations/exceptions to otherwise applicable requirements (e.g., to return to in-person work or study) are available. Properly secure personally identifiable information about students and employees. Consider FERPA, ADA and other federal disability law, HIPAA (to the extent applicable), state laws.
- g. **Mental Health.** It is a good practice to make increased mental health services available.
- h. **Inspiring Responsibility/Enforcing When Needed.** Good communications, implementation plans and policy are needed.
 - i. How can the community be inspired to do a great job, rather than the administration having to become the Covid police? How will students, faculty and staff recognize the seriousness of the policies and rules of engagement? Focus on safety of self and others.
 - ii. How will safety protocols and rules of engagement be enforced, if needed? Is there a need for a Code of Conduct or HR policy amendment or supplementary policy memo?
- i. **Proactively address campus policing and local policing to prevent avoidable crises.** Review the campus' policing record of campus and local police for use of force and disparate impact on people of color or others. Consider planning needed changes in a collaborative advisory process, including all stakeholder civilian voices and police, but led by a respected and thoughtful faculty leader of color. Develop incremental, tailored response protocols that depend on trained student affairs, mental health, facilities and events, and/or communications professionals and faculty and student volunteers to intervene and de-escalate minor misconduct and conflicts, threatened but not-yet violent conduct, failure to adhere to Covid-19 or other safety rules (e.g., wearing a mask), and mental health issues. While available if needed, avoid unnecessary police interventions.
- j. **Case-by-Case Facility Closure.** Consider whether some facilities should remain closed because they are not conducive to distancing or otherwise cannot be made reasonably safe.
- k. **Dining.** Should dining facilities be entirely take-out or delivery, with scheduling and distancing measures to avoid crowding?
- l. **Class Schedules/Size/Delivery.** Consider how to schedule classes to limit size of gatherings/contact—whether some classes should be entirely virtual. How will laboratory and artistic performance activities be controlled for distancing?
- m. **Student Life Activities.** Consider student life activity protocols to limit size of gatherings/contact (also for student organizations)—what activities should be entirely virtual. Can IHEs build on any existing distance education student life programs?

- n. **Study Abroad/Travel.** Consider whether to cancel study abroad and limit IHE-required, supported or sanctioned domestic and foreign travel for students, faculty and staff. Create or update your campus travel policy—consider how peer IHEs are addressing this issue. (MIT has had a travel policy for many years and is one example from the field. We have not reviewed it recently to identify any further guidance.)
- o. **Limitations on Campus Events, Visitors.** Consider rules on who (other than students, faculty and staff) may come to campus—size of gatherings (convenings, events) if any are permitted—whether (and on what conditions) visiting lecturers and collaborating researchers and others may come to campus? How can an open environment become more controlled?

3. Seizing Opportunities to Advance Diversity and Equity

- a. **Exposure of Inequity.** The pandemic is exposing longstanding societal inequity in many areas:
 - i. Educational and career opportunities
 - ii. Income and wealth
 - iii. Housing and environmental conditions
 - iv. Healthcare and mental health
 - v. Family/community support
 - vi. Criminal justice
- b. **Avoid Perpetuating Inequity/Determine Vulnerable Populations.** Take precautions not to perpetuate bias and inequity in reopening campus. Consider the effect of bias and inequity on your own students and campus community:
 - i. Determine populations in your campus community (students, faculty, staff) who are particularly vulnerable to the effects of Covid-19 and attend specially to their needs.
 - ii. Determine why some students opt not to return—and, if possible, provide alternative delivery methods and special financial aid for students who cannot return due to visa issues (considering the federal government’s immigration policy), family financial situation (job loss resulting in a student having to work to support a family or being unable to afford to return to college), or illness.
 - iii. Consider creating a leave policy and guidance for students who can’t return in the fall and would benefit from assistance to develop a plan to return later—and prioritizing aid to students who are close to graduation to enable them to complete their degree.

- iv. Consider how family responsibilities that have fallen disproportionately on women will affect resumption of on-campus work, as well as research and publication, and whether flexibility and adjustments to the tenure clock are warranted.
 - v. Identify and report disaggregated, disparate effects on people of color, people from low socio-economic backgrounds, women, and others within the campus community both to elevate understanding of these “close to home” issues—and to assure that reopening plans are addressing everyone’s needs.
- c. **Seize an Historic Teachable Moment.** This is an historic teachable moment for IHEs, as the inequity has been made real and hard to ignore for a generation of students. Engage faculty and other experts and students to:
- i. Elevate understanding of inequities and emphasize moral imperatives to address them
 - ii. Emphasize the mission-necessity of diversity and equity initiatives—the inextricable contribution of diversity and equity to excellence
 - iii. Create opportunities to discuss difficult realities and inspire commitment to ameliorate inequity and embrace diversity

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