

Higher Education Recovery Task Force

May 14, 2020, Meeting Summary, James Keller portion only

Presenter: Jim Keller, National Association of College and University Attorneys, with law firm based in Philadelphia

Jim Keller is the co-chair of Saul Ewing Arnstein & Lehr's Higher Education Practice and K-12 Schools Practice, vice-chair of the firm's Litigation Department, and a member of Executive Committee. He is a higher education lawyer, an ERISA litigator, and a complex commercial dispute trial lawyer.

In addition to his legal practice, Jim has served as an adjunct professor at the University of Delaware, where he taught undergraduate law courses.

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In his opening remarks, Mr. Keller emphasized that no one knows the future from legal or health perspective, but we can identify some hotspots for liability and strategies for mitigating those.

With respect to reopening:

Mr. Keller mentioned that it includes students and employees, but also visitors to the campus. Visitors might be the most difficult group to know how to identify and work to protect them.

With respect to personal protective equipment (PPE):

Mr. Keller said that institutions will need to require that these individuals wear personal protective equipment (PPE) and engage in social distancing. He said that this will need to continue for some period of time (weeks, maybe months, maybe even until a vaccine exists). PPE and social distancing will be required especially in classroom, cafeterias, and maybe campus wide.

What are the risks and liabilities?

Mr. Keller said there is a general risk in everything. Some people will not like these requirements and will protest. The first amendment is clear that they have the right to do that *in appropriate public forums*. Also, there is some personal injury risk to requiring people wear masks. Masks can obstruct vision, entangle with other objects, and can become breeding

ground for bacteria if they are not cleaned properly. He suggested that institutions provide training on the proper use of PPE to mitigate the risk.

Codes of Conduct and Faculty Guidelines

Keller suggested that institutions consider revising their student code of conduct and employee/ faculty handbooks to address social distancing and other requirements for maintaining the health and safety of students, faculty, and staff. He suggested that institutions make the requirements as explicit as possible to mitigate legal risks. People are bound by these provisions. Explicit guidelines give you leverage if people do not comply.

With respect to temperature checks:

Mr. Keller addressed temperature checks. He said normally institutions cannot force a medical exam [including temperature checks]. In some states, however, they are mandatory for any business that opens. He said that institutions can rely on the Equal Employment Opportunity Commission (EEOC) and national guidelines. The EEOC says that employers should follow local, state, and national health guidance. EEOC guidance also states that temperature checks are not singling out anyone. It is not disability discrimination. The EEOC says COVID-19 is a direct threat to the health and safety of employees and justifies temperature checks.

The question is does this apply to visitors? Mr. Keller said the same logic applies to students and visitors although they are not specifically mentioned. He said he would feel comfortable defending that certainly in FERPA context/privacy—the direct threat exception applies.

Mr. Keller said that you can require temperature checks, but risk comes with affirmatively asking about underlying conditions. If an institution asks a student, faculty, or staff member if they have an underlying condition that might put them at risk for contracting COVID-19, they may violate ADA or Section 504 for students and employees. If a student or employee volunteers that information, then an institution is within its rights to act on that information. At that point, the institution would be in a normal disability interactive process. If an employee or students says they need accommodations, there is a process to make that happen. Most of all, do what you think protects your campus and keeps people safe.

What if an employee refuses to return when campus reopens?

Mr. Keller pointed out that reopen can mean different things. Some employees are older or may have health risks. Mr. Keller suggested that institutions be practical.

If this employee is a faculty member, did they teach online? If so, how were there student evaluations? He said the institution might be able to reach a solution for this employee. If the employee volunteers information on an underlying health risk, an institution can ask for documentation. Medical documentation is required about condition. If the institution still believes the employee is failing to uphold their responsibilities and they refuse to return to campus, there could be grounds for termination legally.

Can you legally terminate if you have done all you can to accommodate? Yes. But consider the public relations aspect, too. The institution must weigh the legal vs. public relations risk.

Student Housing

Mr. Keller asked how do institutions enforce social distancing with lots of young people living in residence halls, some with communal bathroom? He suggested that institutions revise residence hall contracts and handbooks to make it clear that adherence to social distancing, PPE, and local, state, and national health official guidance is part of their obligation to the housing community. Mr. Keller said that institutions must make it very clear that students are responsible for helping to maintain the health and safety of students living in the residence hall. He advised institutions to have students sign new, revised contracts if they have already sent in housing contracts. We are in a state of national emergency.

In addition, Mr. Keller said that housing/residence life and the entire campus might consider a waiver or assumption of risk document. He advised institutions to check the laws in their state to make sure these are enforceable. In some states they are not. Be mindful that some students are minors (under 18) and would need their parent's signature on these waivers. And the student would have to sign the waiver when they become an adult. Finally, he suggested the institution ask how does asking a student to sign such a waiver feel. Is it consistent with institutional ideals? What are the optics?

On lawsuits if someone gets sick or worse:

Claims will vary depending on who sues (students, vendors, parents, visitors, or employees). He focused on students and employees.

- Breach of contract: The student might argue that s/he relied on representations in online materials and the enrollment contract that said the institution is a safe and healthy environment. They believe you breached the contract. Fraud could be alleged. Keller said an institution can mitigate this risk by making sure documents are airtight. Be sure to carefully review ALL that is on the institution's website. Specifically, look for language about a safe and healthy campus.
- Negligence: Keller said that negligence is a more likely claim. The basic elements of negligence are duty, breach, causation, foreseeable injury. Breach of duty is negligence 101. Keller said there is a lot of uncertainty around this risk. He is not sure what the scope of duty is to make a campus safe and to prevent COVID-19 infection. There will be a lot of case law written in response to these claims. The good news is that the extent of an institution's duty is up to a judge, whether you breached duty is up to the jury. For example: If there is ice on the sidewalk, you remove it. Same applies here. If you know of a COVID-19 case on campus, you have a duty to address it. You should not be liable for the first case, but if on notice and steps are not taken to make campus safe, then negligence may apply. Some states do have caps that apply. Some states do have caps that apply *and certain public institutions may have limited sovereign immunity.*

Tuition and class action cases:

Mr. Keller said there are now 80 of these cases around the country. Students want refunds because they claim full value of what they paid (if no refund given) was not met because spring semester was cut short.

- Most colleges will be sued eventually. Housing and fees are a commonsense argument—if you could not use it, a pro rata refund makes sense. Providing refunds on some fees might also make sense. There are good defenses, especially for tuition. The institution was obligated to teach and the student still able to earn credit toward degree. He doubts that class actions would be allowable, but unknown for certain.
- If institution reopens and must shut down again, it will be subject to claims. But spring 2020 suits may be a preview of what to expect if there are future closures.

Q&A with Mr. Keller:

Can an institution legally require mandatory testing? Can it also require masks in classrooms and other enclosed spaces? Short answer is yes—this is a national emergency. Consider state and local health requirements. What are the requirements? If you are not required by state, can you still require them? I think you should, for the greater good. A public health emergency. Will some protest? Of course. Err on side of public health. If a judge rules that you cannot make people wear masks, then that is your answer.

What is an institution's responsibility for any cases that have happened on campus, tracing contacts, providing quarantine areas for those infected? Are there limits to requirements for testing, tracing, and following up on those with the virus? We do not know—up to national, state, and local health authorities. If someone is diagnosed, then quarantine them, off campus if possible. Verify that the individual is COVID-19 negative before they allowed back on campus. With respect to contract tracing, do not know the legal requirements yet. Still evolving.

Can an institution send home students, faculty, or staff for ignoring recommendations? Yes, if you have revised the code of conduct or rules to say so. Some may sue.

What about asking faculty to disclose underlying conditions? Keller said he would be wary. What is the nondiscriminatory purpose of that question? Does it allow you to treat someone differently? Even now, it is risky, but may be defensible. Keller said he cannot tell you conclusively that it would violate ADA. If the institution thinks the risk is worth it, then do it.

What if a state only suggests face coverings? Can an institution be more stringent? Yes, private colleges within reason can. For public colleges, yes, just like other restrictions that may not be mandated. Public institutions might be more subject to challenge. You can do it, but you may be challenged.

What role does the public health emergency override an individual's claim to privacy or other rights? Keller thinks this is where the law is going to evolve in these unprecedented times. People have privacy rights, but there are always exceptions. Public health and safety, direct threat to others, and pandemics are the kinds of things that justify incursions on those rights. We just do not know yet.

Can you require employees who do not have underlying conditions and are not considered high risk or vulnerable to return to work, or do you have to provide alternatives? Legally, an institution does not have to offer alternatives, but there are no prohibitions. An institution may wish to offer those choices if they have the resources to offer alternatives. Some colleges may offer the chance for anyone to stay online in the fall without mandating it. Does the institution have the resources to continue teaching online and is teaching adequate?

Can an institution require documentation from someone who claims they have an underlying health condition? Yes. Just like any other disability claim. You should seek documentation.

Can an institution require employees to monitor their own temperature at home? Not sure. Institutions may not want to mandate that students and employees monitor their temperature, but they make it part of the guidelines—recommend that people check their temperature every day, but how would an institution enforce it even if it was mandated?

Does the Clery Act apply here? Are institutions required to make an announcement to protect the health and safety of the campus community? Yes. The U.S. Department of Education issued guidance on this on April 3. An institution should provide a single emergency notification about COVID-19 generally or create a banner on the institution's website containing information about what the institution is doing to mitigate the threat. The Act says notifications are required of any emergency—but not regular ongoing updates on COVID-19. That satisfies the institution's obligation, according to the U.S. Department of Education. A "single notification or banner" is required, but an institution *could* consider ongoing notifications if it deems it to be appropriate, applying all Clery Act factors.

What about student fees during online classes, for recreation, etc.? Some colleges waiving them. But what are the best options in insulating from liability?

Some institutions have returned the pro-rated portion of fees for the spring term and/or waived fees for the summer term. That is one thing an institution can do. Moving forward, institutions can revise enrollment contracts, communications, handbooks, catalogs (everything students, parents and the community sees) to include language that is clear about tuition and fees – what they are and how they apply regardless of mode of instruction (online, in-person or some hybrid). Keller said there is some risk there. If an institution charges students a "sitting on the quad fee" and you cannot sit on the quad because campus is closed, they are likely to lose that lawsuit. Institutions might tailor their fees to what students are actually getting.