

# Questions Clients Are Asking About COVID-19

## US Outlook: Top Questions for Higher Education Amid Novel Coronavirus Outbreak

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**Crystal Nix-Hines**

[crystalnixhines@quinnemanuel.com](mailto:crystalnixhines@quinnemanuel.com)

Phone: +1 213-443-3332

**Molly Stephens**

[mollystephens@quinnemanuel.com](mailto:mollystephens@quinnemanuel.com)

Phone: +1 213-443-3635

**Tara Lee**

[taralee@quinnemanuel.com](mailto:taralee@quinnemanuel.com)

Phone: +1 202-538-8257

**William Weinreb**

[billweinreb@quinnemanuel.com](mailto:billweinreb@quinnemanuel.com)

Phone: +1 617-712-7114

**Michael E. Williams**

[michaelwilliams@quinnemanuel.com](mailto:michaelwilliams@quinnemanuel.com)

Phone: +1 213-443-3251

**Andrew Schapiro**

[andrewschapiro@quinnemanuel.com](mailto:andrewschapiro@quinnemanuel.com)

Phone: +1 312-705-7403

**Summary:** The emergence of the global coronavirus pandemic has created perhaps the most significant challenges for colleges and universities in their history. Forced to largely close their campuses and require the vast majority of students to pack up and leave in a matter of days, educational institutions, both public and private, are now grappling with a range of complex—and potentially litigious—issues amid a burgeoning COVID-19 crisis. These issues range from how to maintain the same quality of education and sense of community in an online environment to whether room and board fees should be partially refunded; how to weather massive drops in revenue due to diminished school populations and cancelled sporting and alumni events, to how ongoing contracts with third-party vendors should be handled.

Underlying these and other issues is a singular question: how long will this crisis endure? For educational institutions, this elusive question has particular salience due to the need to fulfill their duties by planning for and executing safe and equitable reentry protocols, addressing increased demands for mental and physical health services once potentially traumatized students return, and mitigating likely devastating hits to their budgets and endowments. Universities requested \$50 billion in stimulus money from the federal government to address losses and additional expenses incurred during the COVID-19 pandemic but received little more than one-quarter of their request in the final package. The financial strains educational institutions are undergoing could implicate insurance coverage and contractual issues, including loan and bond commitments. Similarly, schools may well consider cost-cutting measures such as suspension or reduction of payments on existing construction contracts, food service contracts, or even to faculty and staff. In some instances, university decisions may implicate contractual provisions known as force majeure clauses or the legal doctrines of impossibility and frustration of purpose.

This memorandum discusses the following important issues facing university administrators and board members as they navigate the myriad legal and policy COVID-19 has spawned:

- Duties of university governing boards in the pandemic: Boards generally owe fiduciary duties of care, loyalty, good faith, and obedience to the institution. During this pandemic, they should ensure adequate procedures are in place for monitoring the situation and receiving relevant information in a timely manner so they may satisfy their other fiduciary duties. With respect to financial information in particular, boards should request budget updates, make spending or financing decisions only with updated information, and retain and rely on financial experts, especially for endowment issues arising from turbulent markets.
- Special considerations for public institutions versus private institutions: In analyzing responses to the pandemic, public institutions have special defenses and obligations they should consider, including (i) sovereign or governmental immunity, which may affect the institution's liability to private plaintiffs alleging a claim; (ii) obligations under open records acts, which may affect how an institution documents its reaction to the pandemic; (iii) reliance on government funding, which may limit the ability to take certain actions and create additional pressure to cut costs; and (iv) governmental reporting requirements, which may affect the need to implement monitoring systems.
- Risks related to students: Institutions face potential liability to students in multiple areas, four of which we discuss in detail. First, students and parents already have sued schools seeking refunds of room and board fees under breach of contract and unjust enrichment theories. Schools should carefully review their contracts to determine what their rights and obligations are and should consider other potential compensation, such as a reduction in future tuition costs, if they are obligated to refund fees and do not have the budget to do so. Second, schools may face claims for tuition refunds because classes have moved online. Although courts routinely dismiss claims for lower "quality" of education, they allow claims if the school promised particular services that were not provided. Schools should ensure that their instruction is consistent with what was promised to students, including in brochures and online materials. Third, schools should assume they have a duty of care to protect the safety of students on campus, and they should monitor and follow industry standards and safety guidelines in guarding against the spread of COVID-19. Fourth, schools should exercise care in protecting property left by students having to vacate campuses quickly, while complying with official policies and privacy expectations.

- Risks related to employees: As with students, institutions should assume they have a duty of care to protect the safety of employees coming to campus. Again, schools should follow industry standards and safety guidelines to provide a safe working environment that minimizes the spread of COVID-19. Separately, the Families First Coronavirus Response Act may affect an institution's obligations to provide paid leave to employees, and we address specific questions relating to that statute in a separate memorandum.
- Risks related to third-party contracts: Like other businesses during this time, higher education institutions may face or find the need to invoke the contractual doctrines of force majeure, frustration of purpose, and impossibility if a contract can no longer be performed, if performance becomes too burdensome or expensive, or if the contract no longer has value. Institutions may face unique challenges in public/private partnerships, where a private party has a housing, dining, or other contact with students, who then ask the school to help with altering the contract. Schools should be careful to respect the separate contractual relationship and refer the student to the contracting party. Institutions also should review the covenants in their debt financing arrangements and seek legal and financial advice if the economic impacts of COVID-19 risk a breach of any covenant or event of default.
- Insurance considerations: An institution likely has a number of insurance policies, such as business interruption insurance, event cancellation insurance, general liability policies, directors' and officers' policies, and workers' compensation, all of which should be reviewed carefully to determine if there is insurance coverage for losses arising from COVID-19. Special exclusions for pandemics may apply. We address insurance coverage in detail in a separate memorandum.
- Other considerations: Colleges and universities will have to make other decisions as the pandemic develops, including (i) planning for faculty, staff, and students to return to campus, including plans to address physical or mental health impacts from the virus and to minimize the spread should the virus return; (ii) determining how best to obtain financial support, including from government stimulus packages; (iii) addressing the particular needs of international students; and (iv) responding to requests from state or local governments for use of campus space to house first responders or COVID-19 patients.

Each of these topics is discussed in more detail below.

## **1. How can the governing board fulfill its duties and alleviate legal risk?**

As university management is well aware, both public and private institutions are governed by a board (whether a Board of Regents, Board of Trustees, Board of Overseers, Board of Governors, or Board of Visitors).<sup>1</sup> The proper exercise of the fiduciary duties board members owe to the institution, including duties of care, loyalty, good faith, and obedience, is particularly important during a crisis, and a board's failure to provide adequate oversight to an institution during the COVID-19 pandemic may trigger lawsuits.<sup>2</sup> Although most universities educate their trustees on their fiduciary duties, it would be advisable to revisit these obligations to ensure that board members continue to provide strategic oversight as administrators navigate the myriad of issues that have arisen, and will continue to arise, during the pandemic. In particular:

- The duty of care requires a board member to act in a careful, informed way as a reasonably prudent person would, which includes regularly attending meetings, reading board materials, asking questions, participating actively in board discussions, and remaining reasonably informed about the institution.<sup>3</sup> This duty holds true particularly during a crisis.
- The duty of loyalty requires a board member to act in the best interests of the institution and not to put any personal or other interest ahead of the institution.<sup>4</sup> A board member should always disclose any interest that is relevant to a board decision and recuse himself or herself from any vote if needed.
- The duty of good faith can be considered a subset of the duties of care and loyalty. It requires a board member to avoid an intentional dereliction of duty or conscious disregard for one's responsibilities.<sup>5</sup>
- The duty of obedience similarly can be considered a subset of the duties of care and loyalty. It requires a board member to ensure that the institution is operating in furtherance of its stated purposes (as set forth in its governing documents) and is complying with the law.<sup>6</sup> In light of some of the novel issues arising from the coronavirus pandemic, board members may need additional information to enable them to adequately provide guidance and direction to the administration.

In exercising their duties, board members may reasonably rely on the advice or opinions of experts, including university officials, legal counsel, financial consultants, medical professionals, or other persons with professional expertise.<sup>7</sup>

Although board duties do not change in times of crisis, the demands facing the boards are greater, and the boards' responses to those demands will be scrutinized more closely. Boards should consider their general procedures for monitoring the COVID-19 crisis and responding to specific emergencies, along with their handling of the institution's finances in these turbulent times.

#### **A. General Procedures**

Because individual board members of higher education institutions are rarely sued personally, there is a dearth of case law in the higher education context on the duties of board members, particularly in times of crisis. Instead, experts, including former FBI Director Louis Freeh, who conducted the independent investigation into the Jerry Sandusky scandal at Penn State, follow guidance from Delaware courts on what boards of directors of corporations generally should do in times of crisis, and import those standards into the higher education context.

The Delaware courts first established standards for board oversight in *In re Caremark International Derivative Litigation*.<sup>8</sup> There, shareholders claimed the board was liable for oversight failures after a four-year investigation of the company by the U.S. Department of Health and Human Services and Department of Justice into alleged violations by company employees of federal and state laws applicable to health care providers resulted in a multiple-felony indictment. Although the court did not find evidence of liability, it held that boards have oversight and monitoring responsibilities, which include a duty to attempt in good faith to ensure adequate reporting systems to allow appropriate

information to come to the board's attention in a timely manner so that it may satisfy its other fiduciary duties.<sup>9</sup>

Just last year, the Delaware Supreme Court held that board members may be held liable for breach of fiduciary duty for failing to exercise their oversight responsibilities. In *Marchand v. Barnhill*, in connection with a bacteria (listeria) outbreak at Blue Bell Creameries, Inc., an ice cream manufacturer, the court allowed a claim for breach of fiduciary duty to proceed against the Blue Bell board based on the board's "utter failure to attempt to assure a reasonable information and reporting system exists" for food safety after a listeria outbreak.<sup>10</sup> Among other things, the Blue Bell board allegedly failed to implement any system to monitor the company's food safety performance and compliance, and had no regular process or protocol that required management to keep it apprised of food safety issues.<sup>11</sup>

Based on this guidance, the governing boards of colleges and universities should make sure they have procedures in place to ensure they are getting relevant information about the COVID-19 pandemic in a timely manner so they may satisfy their other fiduciary duties. Such procedures could include:

- Identifying a specific group of officials at the college or university responsible for keeping the board apprised of COVID-19 developments. This could be a COVID-19 task force, with representatives from various departments such as finance, operations, and legal. Board members should have the contact information for these officials, and they should be able to direct questions to these individuals. The information provided by officials should include updates on current government regulations and advisories, including from the White House Coronavirus Task Force, CDC, NIH and Department of Education, as well as updates on internal issues affecting the educational institution. Universities could also ask members of their community to self-report any coronavirus-related illnesses or deaths confidentially to a central contact so that officials can better assess the impact of the virus on their populations.
- Setting periodic board meetings during the pandemic for the board to obtain updates about the crisis, although the noticing, scheduling, and format of such meetings will depend on the institution's bylaws. To avoid inundating university staff with requests for information, universities could consider creating a special committee of the board to delve deeper into the COVID-19-related issues and provide recommendations to the larger board. Amendments to the bylaws may need to be made if there are in-person quorum requirements or other restrictions that would preclude remote board meetings. Adjustments for confidential voting on particular matters such as new board members, certain disciplinary or financial matters, or other sensitive issues may also be needed.
- Having an official send periodic communications to the board with updates about the pandemic. A special meeting could be utilized whenever the board (or a special committee) needs to be consulted or act on a time-sensitive matter.

- Documenting through the minutes, board resolutions and other official board actions the implementation of policies and procedures.
- Retaining and/or relying on outside experts, including lawyers, financial professionals, or medical professionals, if it is deemed reasonably necessary to address a problem arising from the pandemic. In so doing, it will be important to structure such discussions in a way to protect privilege in the event of litigation.
- Having board members recuse themselves from any issues in which they have a particular interest. For instance, if board members have children currently at the university, and the institution is deciding whether to issue partial refunds for tuition or room and board, it would be advisable for board members who could personally benefit from such a reimbursement to recuse themselves so as to minimize any risk that the board action could be seen as not disinterested and impartial.

Taken together, the implementation of measures along these lines will help to ensure that the institution receives proper oversight and will help to mitigate against any claims based on allegations that board members breached their fiduciary duties.

## **B. Institution's Finances**

Given the substantial impact that COVID-19 already is having on financial markets and the finances of individual colleges and universities, the board should specifically consider its duties with respect to the finances of the institution. Boards generally are asked to approve the institution's annual budget, approve major expenditures by the institution, including bond issuances, and oversee the institution's endowment.

With respect to the budget, boards should consider asking for a budget update in light of the COVID-19 pandemic, understanding that even updates are unlikely to capture the full financial impact of a crisis that is still unfolding. Not only are schools facing the loss of substantial revenue, including from the potential return of room and board fees, event cancellations, and potentially lower enrollments, but they are also facing a number of new costs, including those associated with safety supplies for staff and remaining students, securing vacated buildings and property, potentially packing and shipping belongings back to students, and moving instruction online. Additionally, with the decline in the stock market, and canceled reunions at many schools, funding from alumni donors on which most schools rely may decline. Proceeding with spending based on a budget that no longer matches reality could be construed as a breach of the duty of care.

Although we do not anticipate many colleges and universities will be seeking bond financing in the current market, if the institution decides to undertake a financing transaction, it should have information as accurate and timely as possible, including updated financial information, projections, and budgets. That is true for any major transaction or expenditure requiring board approval during this time period. The board also should consider retaining bankers and financial experts as needed to assist them to evaluate the benefits and risks of a transaction or expenditure in this market.

An institution's management of its endowment is generally governed by the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") and the Uniform Prudent Investor Act ("UPIA"). The UPMIFA itself, adopted by almost all states, imposes fiduciary obligations with respect



to the school's endowment, including duties of loyalty and care. Managing the endowment during this time of economic turmoil can be compared to managing endowments during the 2008 recession. The board can and should rely on financial experts to steward the endowment's assets during this volatile time period.

## **2. Are there any special considerations for public institutions?**

Before we discuss the various risks that colleges and universities are facing as a result of the COVID-19 pandemic, it is important to keep in mind certain differences between public institutions and private institutions. Public institutions, as arms of a state or other governmental branch, have unique defenses and obligations that are relevant to a risk analysis. We discuss four here: (i) sovereign or governmental immunity, which may affect the institution's liability to private plaintiffs alleging a claim; (ii) obligations under open records acts, which may affect how the institution documents its reaction to the pandemic; (iii) reliance on government funding, which may limit the ability to take certain actions and create additional pressure to cut costs; and (iv) governmental reporting requirements, which may affect the need to implement monitoring systems.

First, as arms of the government, public institutions, unlike private institutions, have sovereign or governmental immunity from various types of claims.<sup>12</sup> Under the Eleventh Amendment of the Constitution, absent a recognized exception such as congressional abrogation or waiver, state universities and colleges cannot be sued in federal court by a private plaintiff.<sup>13</sup> More broadly, all public universities and colleges, whether run by a state or local government, typically have some form of governmental or sovereign immunity that protects them from certain claims. Approximately 20 states have a "tort" claims statute, and approximately 25 more states have statutes governing claims against state or public entities and employees.<sup>14</sup> A state's constitution also can be the source of sovereign immunity.<sup>15</sup> Although the scope of sovereign immunity will vary significantly by state, public institutions and officials typically will be immune from certain claims subject to defined exemptions. For example, under Oklahoma's Governmental Tort Claims Act, government institutions cannot be held liable for a "tort," broadly defined as "a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma," unless the tort was committed by employees acting within their "scope of employment."<sup>16</sup> Even then, there are 37 enumerated exceptions to liability, and the tort must be recognized under Oklahoma law.<sup>17</sup> California law is similar and places restrictions on the timing and relief that can be obtained from public entities.<sup>18</sup> Generally, claims against California entities must be filed within six months for personal injuries or damage to personal property and one year for breach of contract or damage to real property. Most other claims are not permitted against public entities. In addition to creating immunity from certain claims, these laws also limit damages, shorten statutes of limitations and/or the time to make a claim, and create special procedures, such as notice and demand procedures, that must be followed by a litigant before filing suit.<sup>19</sup>

Second, public institutions, unlike private institutions, are subject to requests under the Freedom of Information Act and similar state open records statutes (collectively, "FOIA"). Public institutions should therefore be aware that any number of documents a member of the public deems relevant to the COVID-19 crisis, including financial records, contracts, meeting minutes, emails, and complaints from students or parents, may be sought under a FOIA request and potentially have to be disclosed. Public institutions may claim various exemptions to disclosure, including "deliberative

process,” attorney-client privilege, and privacy exemptions,<sup>20</sup> but any FOIA request will impose burdens on a public institution to respond and typically require some sort of disclosure.

Third, public institutions, unlike private institutions, are funded in part by the government. In fact, through 2018, state colleges and universities received more than 50% of their funding from government appropriations.<sup>21</sup> As state and local governments have to allocate their limited budgets to addressing the COVID-19 crisis, including the related impacts such as rising unemployment, funding for higher education likely will decrease. In the past, public institutions have made up for reduced government appropriations through tuition, but COVID-19 likely will reduce enrollment at universities and colleges, particularly by international students. Partly because of enrollment uncertainty, Moody’s recently lowered its higher education outlook to negative.<sup>22</sup> When analyzing how to address particular risks, public institutions should assume that government appropriations will decrease.

Finally, public institutions have additional government reporting obligations and work requirements for employees that may be implicated by the coronavirus. State institutions that transition to remote working arrangements, for instance, may still be required by government agencies to ensure that employees are being productive and working from home, which may necessitate the implementation of monitoring procedures. Similarly, these institutions may need to find creative ways to permit employees with specified and limited personal sick days who may need additional time to address personal or family illnesses or other needs. It may be necessary to implement monitoring systems that not only keep track of employees’ productivity, in accordance with government requirements, but also ensure that the members of their community are healthy and feel supported by their professional community.

### **3. What are the risks related to students, and how can they be alleviated?**

Students and their parents have already started to file actions against higher education institutions and their governing boards as a whole (not individual board members) arising from the COVID-19 pandemic.<sup>23</sup> On March 27, 2020, parents of students enrolled at the University of Arizona, Arizona State, and Northern Arizona University, which have moved all classes online and encouraged students to stay home, filed a class action seeking to recover fees for room and board in the Spring 2020 semester that the university has failed to return.<sup>24</sup> This section discusses this and other risks of liability to students.

#### **1. Room and Board**

Room and board fees make up a significant portion of the money students pay to colleges and universities.<sup>25</sup> A recent periodical estimated that “auxiliary services” offered by 800 U.S. colleges around the country accounted for a total of \$44 billion in annual revenue.<sup>26</sup> With campus closures and students moving out of on-campus housing, colleges and universities have been faced with requests for refunds of fees already paid for these auxiliary services, especially room and board fees. Some estimates show refunds could amount to more than \$15 million at certain schools.<sup>27</sup> These refunds would likely place further strain on the economic condition of the institution. The question is whether schools are legally required to provide these refunds.

Colleges and universities should turn first to their room and board agreements to determine if a refund is contractually required. The agreements themselves may permit cancellation or require



refunds. For example, one university's 2018 room and board agreement provides that "[a] student will be released from this Agreement with no charges when proof of one of the following circumstances is submitted to Housing: . . . b. Involvement in University-sponsored academic programs such as student teaching, study abroad, or internship, *that makes it impossible for Student to commute from the campus.*"<sup>28</sup> (emphasis added). While this provision likely was not intended to include a pandemic, it may be triggered when students are involved in school-sponsored academic programs online from their own homes, which makes it impossible for them to commute to campus. In addition, the legal doctrines of frustration of purpose and impossibility discussed in detail in our alert, "***US Outlook: Novel Legal Challenges from the New Coronavirus,***" available [here](#), may provide other legal bases for students to seek refunds under these contracts.

In addition to breach of contract claims, students and parents may bring equitable claims, such as unjust enrichment or conversion, arguing that they paid for a full semester of meals or housing, that the institution provided only a partial semester, and that the institution wrongfully withheld the monies associated with the goods and services not provided.

The best legal defense by an institution is the contract language. For example, if the contract specifically provides that refunds are not required, that provides a strong defense, even to equitable claims. Most schools refusing to refund these fees claim that it is impossible to do so. As discussed in detail in our alert, "***US Outlook: Novel Legal Challenges from the New Coronavirus,***" however, financial impossibility often is not a defense. Bankruptcy is the procedure to address financial impossibility. Schools that do not have budgets for refunds may consider reductions in tuition or fees for a following semester in exchange for students and parents not pursuing refund claims (although if the student is a senior a credit for future study will of course not be possible). Of course, even if schools have a valid legal defense to refunding fees, they may decide as a policy matter that it is wise to do so.

The calculation of any refunds will also require scrutiny. For instance, some schools may seek to argue that a large percentage of the payments go toward fixed costs, such as dining hall and dorm maintenance and upkeep, which have already been incurred, and thus a smaller reimbursement is warranted. Schools also offer varying meal plan options, such as a monthly allotment, reimbursable meal cards and other variables. A blanket refund based on the proportion of the school year left may thus over- or under-compensate some students and their families. Care will need to be taken to ensure that any approved reimbursement plans accurately and fairly address these issues.

## 2. Tuition and Quality of Education

As colleges and universities have closed their campuses, most have shifted to online learning. Relatedly, in attempting to respond to increased stress and the abrupt change in classroom dynamics, many schools have offered pass/fail grading scales for courses.<sup>29</sup> While accommodations like these may be in the best interest of schools and their students, colleges and universities should be careful in crafting policies that continue to offer high-quality academic services that their students have paid tuition to receive.

As it relates to the *quality* of instruction that students receive from their colleges, some courts have held that schools cannot be sued for what is known as "educational malpractice."<sup>30</sup> These impermissible claims may sound in either tort or contract.<sup>31</sup> Regardless of the form of the claim, their

defining feature, and what makes them unsuccessful, is that they challenge the adequacy, methods, or quality of a university's academic services.<sup>32</sup>

On the other hand, courts have permitted claims based on contracts that relate to specific services offered to students or obligations of the school that are not ultimately provided.<sup>33</sup> For example, where a student alleged that a college offered a specific number of lectures and a final examination, neither of which were provided because a professor went on strike, the student was permitted to proceed on a claim for breach of contract against the college.<sup>34</sup> Similarly, where a student alleged that his university had made specific promises to “safeguard students from academic misconduct,” his complaint for breach of contract was sufficiently stated based on allegations that a professor had improperly stolen the student's academic theories.<sup>35</sup>

To state a claim, “the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor.”<sup>36</sup> Because these contracts may be implied from websites, brochures, policies, or other statements made by a college, the specific agreements between colleges and their students will vary.<sup>37</sup> Moreover, the line between a challenge to academic quality and one for a specific contractual representation may not always be clear. However, to avoid potential liability for failing to provide bargained-for academic services, schools should try to keep their courses and other educational services as consistent with those services pre-COVID-19 as possible. For example:

- All classes that were offered for the semester should still be provided even if they are now offered through online learning.
- If courses offered a specific number of lectures, every effort should be made to offer the same number of lectures or classes online.
- If students were told that a course would be graded, at a minimum, they should be given the choice to receive a grade.
- If students were offered specific services like tutoring, every effort should be made to continue to provide those services remotely.
- Procedures to enforce the standards of academic honesty and integrity for online learning should be implemented.
- Students should be allowed to graduate or receive honors or other commendations if they would otherwise have met the university requirements. If a course is changed to pass/fail, a student should not be disadvantaged by circumstances out of their control.

Of course, it may be impossible to continue to provide the same level of instruction. For example, laboratory or technical courses requiring hands-on applications or design may be impossible online. Multiple schools have reported student requests to withdraw from such courses due to campus closures. As with room and board, the college or university should look at the contracts governing academic programs. They likely provide disclaimers or contain provisions that allow the school to cancel or change a course.

### 3. Student Safety

As COVID-19 has spread across the country, universities have reacted in different ways based on the circumstances at their individual campuses.<sup>38</sup> Many institutions have shifted to online instruction and encouraged students to stay home in an effort to protect students' safety.<sup>39</sup> In certain limited situations, students may remain on campus. For example, a number of schools including Harvard, Princeton, Northeastern University, and the University of North Carolina Chapel Hill allowed students to remain living on campus until the end of the spring semester if they meet certain criteria including: (i) facing housing or financial insecurity; (ii) being international citizens whose home countries meet certain CDC levels; and/or (iii) passing health screenings and establishing that no other practical alternative is available.<sup>40</sup> Many international students from affected areas or without the resources to return home have remained on college campuses. For instance, there were reportedly 1.6 million Chinese students studying abroad when the pandemic broke out, and 1.4 million are still abroad, with the United States having the largest number at about 400,000.<sup>41</sup> As universities provide support to students who have remained on campus, including housing, food services, transportation and other services, they also must work to ensure that adequate safety protocols including social distancing and extra cleaning procedures are implemented.

When, and under what circumstances, schools should reopen will bring another layer of complexity to these issues. For instance, if the Trump Administration lifts its 30 Days to Slow the Spread advisory after April 30th or certain states remove the Safer-At-Home requirements, there may be pressure on university officials and trustees to permit important annual events such as graduation and alumni reunions. A few institutions have even brought students back to campus and the number may increase as restrictions are eased.<sup>42</sup> Universities will need to weigh claims that the virus has sufficiently dissipated to permit a return to normal life against the risks that the university community could still be at risk, and buttress any decision they make with sound reasoning and documentation in the event of a legal challenge. And with medical experts already predicting a second or third wave of the virus, potentially in the fall after a hot weather pause, universities should start preparing contingency plans now so as to mitigate the human and financial toll as well as to limit exposure since claims of exigent circumstances will likely have less resonance in the face of widely publicized scientific prognostications and data from other countries about the virus' evolution.

With respect to the legal duties owed to students to protect their safety, courts have split on whether or not a college or university has a special relationship with its students such that the school owes a duty of care to the students.<sup>43</sup> However, in 2018, the California Supreme Court held that colleges owe a duty to protect students from the risk of foreseeable violence during curricular activities.<sup>44</sup> A student at UCLA was stabbed by another student who the school knew to suffer from hallucinations and mental health issues.<sup>45</sup> Disapproving of earlier California case law that declined to impose duties on colleges, the California Supreme Court recognized a limited special relationship between colleges and their students that "extends to activities tied to the school's curriculum, but not to student behavior over which the university has no significant degree of control."<sup>46</sup> The "unique features of the college environment" supported imposing tort duties on colleges to protect students from foreseeable risks. For example, colleges provide living spaces for students, they offer social and cultural opportunities, and many college students are living away from home for the first time while at college.<sup>47</sup> These features give colleges "superior control over the environment and the ability to protect students." Where other states have imposed tort liability on colleges, it tends to be in scenarios where the college had greater control over the student, *i.e.*, on campus rather than off campus.<sup>48</sup>

These cases suggest that colleges and universities should act as if they owe a standard of care to students on campus, including students attending classes and living in dorms owned or operated by the college or university, to protect them from foreseeable risks. The COVID-19 virus could be considered a foreseeable risk.

What a college or university can do to avoid tort liability is a more difficult question. Although there are few clear answers when it comes to defenses from tort liability, colleges and universities should monitor at least two sources of information for insight into what is and is not reasonable, and what may prove to be evidence of reasonableness in future litigation: (1) the actions taken by other colleges and universities,<sup>49</sup> and (2) governmental regulations and guidance regarding COVID-19.<sup>50</sup> Neither will serve as a complete defense to negligence; however, both will be strong evidence of reasonableness.

First, industry standards are commonly examined for the reasonableness of actions taken by tort defendants.<sup>51</sup> For example, a bathtub manufacturer prevailed at summary judgment on a claim for negligent design by offering expert testimony detailing (1) the industry standards, (2) manufacturing efforts to ensure the standards are met, (3) and compliance audits after the manufacturing process is complete and the plaintiff was unable to show how the manufacturer's actions were inadequate.<sup>52</sup> As a result, what similar higher education institutions (based on size, location, and demographics) are doing to address the COVID-19 pandemic likely will be relevant to what is reasonable, and university leaders can continue to share best practices directly with each other and through meetings of such associations as the IAUP and AAU and AAUA.

Second, compliance with safety statutes is evidence of reasonableness. For example, the Centers for Disease Control and Prevention ("CDC") has issued guidance to U.S. higher education institutions for the preparation for and response to COVID-19.<sup>53</sup> Many states and cities also have issued general guidelines. Following these guidelines can help establish the exercise of reasonable care. Still, the evidence is not dispositive. For example, in an action for negligence based on a fire in a warehouse, a court held that even though fire sprinklers in the warehouse were in compliance with relevant regulations, that, in and of itself, was insufficient to establish the warehouse owner exercised due care in preventing fires.<sup>54</sup> Similarly, in a negligence action resulting from a child falling out of a common area window, an apartment building could not defeat summary judgment with evidence that it "met all applicable fire, building and safety codes" because "one may act in strict conformity with the terms of such enactments and yet not exercise the amount of care which is required under the circumstances."<sup>55</sup>

It will likely be left up to a factfinder to decide what the proper standard of care was in light of all the evidence. However, by following industry standards and abiding by government regulations, universities can build a strong record of reasonable action.

#### **4. Student Property**

Finally, an immediate impact of the COVID-19 campus closures has been a trend of university directives that students must vacate the premises within a short period of time.<sup>56</sup> Such rapid changes have often left students scrambling to arrange for the move-out or storage of their possessions.<sup>57</sup> This may leave vulnerable certain student possessions, as items are left—unintentionally or out of exigency—in student housing units, or damaged as a result of rapid orders to vacate. Colleges and universities should take care to mitigate the legal risk of student claims arising from harm to, or

displacement of, student property, as well as privacy concerns raised by exposure of students' personal belongings.

Should student property be damaged or misplaced, students may bring several claims against universities. *First*, students may assert a breach of the implied warranty of habitability, for which many jurisdictions recognize damages in tort.<sup>58</sup> In entering into a residential lease with the university, students can claim to expect an implied warranty of habitability, including a secured space in which one's possessions may be safely kept. Any items damaged in the immediate course of the move, due to a university's immediate directive to vacate, may give rise to such a claim.<sup>59</sup> *Second*, and by the same token, students may attempt to bring suit for housing code violations if their belongings are lost or stolen in the course of a rapid move-out, on the theory that university actions have rendered their housing units unfit or unsecured during the days when they were still inhabited.<sup>60</sup> *Third*, and relatedly, evacuating students may bring negligence claims (or negligence *per se*, based upon underlying statutory housing code violations), stemming from a university's alleged mismanagement of a rushed move-out directive. *Finally*, any initiative by universities to take upon themselves the duty of keeping student possessions in secure storage through the COVID-19 shutdown should be handled with care, as the volume and pace of storage needs is likely to outstrip a university's normal capacities, and again any lost or stolen property may give rise to further negligence claims.

College students have constitutional protections including expectations of privacy in their college dormitories, which could be violated if university officials sort through and pack up their personal effects.<sup>61</sup> On the other hand, schools may have policies in place which would allow them to enter student housing. Courts have recognized that "if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'educational atmosphere,' then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."<sup>62</sup> Universities should look to existing policies before entering student dormitories, and to the extent new policies are needed to address the current housing situation, take care to tailor the policy to protect constitutional norms while achieving university objectives during the crisis.

#### **4. What are the risks related to employees, and how should they be addressed?**

While some school employees may be exempted from state and local Safer At Home mandates, there is the potential that coming to work could increase their risk for exposure to COVID-19. Colleges and universities, like all employers, should take extra precautions to ensure that their workers qualify as necessary personnel under governmental orders, provide clean, safe working environments for their employees who come to work, and stay informed of the rapidly changing regulations and recommendations of government. Requiring an employee to come into work when they are not truly essential personnel may expose employers to liability for violating a safety regulation.<sup>63</sup> Furthermore, even if workers are properly deemed essential personnel, private schools may be covered by OSHA regulations that require an employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>64</sup>

When employees are required to come in to work, employers should take steps to ensure they are working in safe workplaces – arrange for regular cleaning of offices and especially high contact



areas; stock the office with soap, sanitizer, and other cleaning supplies; and instruct employees to stay home if they are feeling ill. Most importantly, university employers should offer guidance and take steps consistent with government recommendations. By following relevant government orders and recommendations related to COVID-19 safety precautions, employers will have strong evidence that they took reasonable steps to protect their employees.<sup>65</sup>

As for employees who cannot come to work for reasons related to COVID-19, we have addressed employers' obligations under the Families First Coronavirus Response Act in detail in our client alert, "*Questions Clients Are Asking About The Families First Coronavirus Response Act*," available [here](#).

## 5. What are the risks arising from contracts with third parties, and how can the university best position itself?

Universities and colleges have a wide variety of contracts that may be affected by the COVID-19 crisis. For example:

- Institutions may have contracts with third parties to provide food services, which have little value if campuses and dining halls are closed.
- Institutions may sublease space on campus to retailers or service providers that will have difficulty making lease payments if there are no students to buy goods and services.
- Institutions may have contracts with third parties to own or operate housing under a ground lease between the third party and the institution, with the third party having the rental agreements with students. Those contractual relationships all will be affected if an institution tells students not to come back to campus.
- Institutions may be in the middle of construction contracts performed by third parties that may now have difficulty performing or that the institution finds are no longer needed.
- Institutions may have various lending arrangements—bond financing arrangements, loans, or revolving credit facilities—with financial covenants or payment terms that the institution may have difficulty meeting if tuition revenue decreases, state funding is cut, or the institution has to refund room and board fees.
- Institutions may have contracts for events, such as sports events, speaking engagements, and summer camps, that have had to be canceled.

We have addressed many of the legal issues raised by these situations in-depth in other client alerts. In particular, the contractual doctrines of force majeure, frustration of purpose, and impossibility may be invoked by a contracting party if it can no longer perform under the contract, if performance becomes too burdensome or expensive, or if the contract no longer has value. Those doctrines are discussed in detail in our alert, "*US Outlook: Novel Legal Challenges from the New Coronavirus*," available [here](#). In addition, legal issues faced by lenders and borrowers under loans or



revolving credit facilities are discussed in detail in our alert, “*Questions for Borrowers and Lenders Amid Coronavirus Outbreak,*” available [here](#).

There are two issues not addressed in those alerts that bear discussion here:

First, as discussed above, students may have contracts with third parties if the university or college has partnered with a private company to provide goods or services on campus, such as housing, dining, or parking. The contract is then between the student and the third party—not between the student and the institution. But because the institution typically interfaces with the student on behalf of the third party, such as by collecting housing applications or rent payments pursuant to an operations or services agreement, the institution may be drawn into contractual disputes. For example, a privately owned and operated housing facility may decide to stay open during the crisis and refuse to provide rent refunds to students, even if the school has directed students to stay home, canceled in-person classes, closed dorms that it owns and operates, and refunded rent to students living in those dorms. Parents may contact the school to complain and ask the school to take action. The school should be careful in these situations. Unless there is special language in the ground lease or other agreement between the school and the private landlord allowing the school to force the private landlord to take certain actions, any action the school takes on behalf of students could be construed as interference with contractual relations. Any negative statements about the private landlord could be construed as business defamation or, depending on what type of school support is required by the contract with the private operator, breach of contract. If complaints or inquiries are directed to the school, officials should explain the factual nature of the contractual relationship and direct the complaints or inquiries to the private company.

Second, more and more universities and colleges are relying on bond financing, especially for large construction projects.<sup>66</sup> When bonds are issued to fund a particular construction project, the proceeds must be used to fund the project, and the bonds are generally secured by the project assets (such as a building). Public universities also may issue general obligation bonds not tied to a specific project to fund operations. Those bonds may be secured by the full faith and credit of the university or a lien on state appropriations.

With bond financing, rather than having one or more banks or financial institutions as their creditors, universities and colleges have bond investors as their creditors, which typically are mutual funds, pension funds, and insurance companies. These investors could be numerous and widespread, and they are represented by a bond trustee pursuant to a trust indenture. Indentures have similar financial covenants and payment obligations as those contained in loans and credit facilities, discussed in our alert, “*Questions for Borrowers and Lenders Amid Coronavirus Outbreak,*” available [here](#). The discussions of the different types of financial covenants, what constitutes a breach, and defenses to a breach generally apply to bond financing.

With the creditors composed of a large group of investors represented by a trustee, however, what happens in the event of a breach of a financial covenant or payment obligation may be different than a situation with one or a small group of creditors. Trustees generally do not like to take controversial actions, such as filing a lawsuit, without direction from the bondholders, and organizing a group of bondholders may take time. In addition, the trust indenture may prohibit the trustee from taking certain actions without approval of a requisite percentage of bondholders.

You should always carefully review the applicable trust indenture and any related documents, such as an underlying loan agreement, for the rights of the trustee and the bondholders in the event of a breach of a financial covenant or payment obligation. In general, specific events of default defined in the indenture trigger the rights of the trustee and bondholders. Breaches of financial covenants promising certain financial performance metrics do not necessarily constitute events of default. That is because the indenture may provide the breach is curable. For example, some indentures allow the borrower one year to improve financial performance before the breach of the financial covenant becomes an event of default. A majority of bondholders also may be able to waive a breach of financial covenants. If debt service payments can be made from reserve funds and bondholders believe financial performance can improve, they may decide to waive a breach of a financial covenant to see if the situation improves.

A breach of payment obligations, such as the failure to make a scheduled principal or interest payment, generally constitutes an event of default under most indentures. When there is an event of default, a trustee ordinarily has the power to declare the bonds immediately due and payable and to exercise rights to the secured collateral. The trustee (rather than bondholders) generally is the one vested with authority to act, although the bondholders provide direction to the trustee, have approval rights, and may have rights to act individually if the trustee does not act. When the secured collateral is a specific construction project, such as a building, the trustee generally has the right to sell or assign its rights in the project, and use the proceeds to repay the bonds. Of course, rights in a construction project on campus can have less value because an on-campus building must be used for certain limited purposes that the school controls. This factor may be particularly significant for public-private partnerships, where a public institution has contracted with a private entity to build, own, and operate a construction project. The private entity is the one obligated to repay the bonds, and it has no assets other than its rights in the construction project. In those instances, the trustee and bondholders may drag the public institution into the dispute, forcing it to decide if it can and will take voluntary actions to assist repayment of the bonds. A variety of factors will affect this decision, including the risk of legal liability, the cost of the voluntary actions, and the benefits of the on-campus project to students, faculty, staff, and other constituents.

## **6. Can insurance help to mitigate business interruption or other issues?**

Colleges and universities may have a number of insurance policies applicable to issues arising from COVID-19, such as business interruption insurance, event cancellation insurance, general liability policies, directors' and officers' policies, and workers' compensation. In particular, business interruption policies are expected to see an increased number of claims. These are specialized policies that may protect universities and businesses from lost revenue and profits when operations are affected by damage to property that impairs or prevents normal operations. Universities should be mindful that these policies may contain specific exclusions that could be implicated by COVID-19. A detailed discussion of potential coverage under these various policies is contained in our client alert, *"US Outlook: Insurance Coverage Questions Amid COVID-19 Outbreak,"* available [here](#).

## **7. What else should we be thinking about?**

The topics discussed above cover a number of the major questions facing higher education. Of course, there are other questions and issues that are subsets of these topics and may gain more importance as time goes on. Moreover, as indicated above, as universities, like the nation, move

toward gradual reentry in the months ahead, there will be a number of issues for which universities should prepare. As set forth below, issues that may arise in the short to medium-term are campus health and safety precautions, financial measures, and increased demands for educational institutions to open up their facilities to service coronavirus-related needs.

**Campus Health:** In the wake of a pandemic that is expected to claim more lives than the Korean War and World War I, universities may find themselves confronting a variety of potential needs from their communities, including heightened physical and mental health services. Many students, professors, administrators and staff likely will have been infected or know someone – a close friend, parent, relative, mentor – who has been afflicted by or succumbed to the virus. Students from particularly hard hit countries or communities may face added emotional or financial stresses. As a result, students and staff may return to campus with heightened anxiety, depression, feelings of grief and isolation, alcohol and/or drug dependency or other issues which universities likely will need to address. Other community members inflicted with COVID-19 may experience lingering effects on their lungs or exacerbated pre-existing conditions which may require additional health care. And with millions of people losing jobs and businesses, there will undoubtedly be increased demands for financial aid, as well as anxiety and fear about the future. As part of the reentry planning process, universities may need to consider bringing on additional resources to address these needs. And of course if the coronavirus breaks out again in the fall, universities – now better equipped to identify and test for virus symptoms – may find themselves with numerous positive cases before any new closures occur, prompting the need for emergency quarantine and other processes to contain the spread and track a carrier’s contacts. All of these response measures should be thought through by university administrators and board members and be fully in place to best position the university to effectively respond to another outbreak.

**Safety Precautions:** As a related matter, when schools reopen in the summer or fall, they will need to consider whether, and how best to promote, sound safety habits to minimize the risk of a recurrence of the coronavirus should it return, as some experts fear. As the recent spread of COVID-19 during spring break among students of the University of Texas at Austin highlights, students in close proximity to each other can be easy carriers and spreaders of the virus, even if, as a general matter, they are not the most vulnerable to severe illness.<sup>67</sup> Moreover, increasing scientific evidence shows that 25% to 50% of carriers of the virus may be asymptomatic.<sup>68</sup> As part of their reentry process, universities should consider how best to address these challenges, including encouraging students to practice safe habits, such as frequent hand washing, not sharing drinks or congregating in large numbers, etc., understanding that social distancing is neither practicable nor desirable on a long-term basis. Of particular concern is the difficulty certain educational institutions may have in monitoring and regulating largely independent but quasi-affiliated organizations, such as fraternities and sororities, eating clubs/finals clubs, where risk-producing behaviors may be heightened. The rigorous cleaning protocols that many institutions have established for surfaces and equipment may need to be maintained on a going-forward basis, as well as the purchase of a large supply of personal protective equipment (“PPE”) in the event of an outbreak. These resources may require additional funding at a time when many institutions are struggling to recover from the unexpected loss of significant revenue streams.

Should an outbreak arise, or severe illness or death on campus occur, allegations may arise that a university failed to implement adequate procedures to minimize the risk of an outbreak and/or keep students safe – this time with full knowledge of the risks. It is thus advisable for university leadership

to implement clearly defined and understood protocols prior to reopening campuses. A key issue will be whether educational institutions, in the face of another outbreak, should adopt the same strategy of emptying out their campuses or change course. Notably, the Governor of New York has raised questions as to whether in retrospect it was wise to send young healthy students who potentially could be carriers of the virus back home to older parents and other relatives, rather than having them shelter in place or decamp to other venues. Educational institutions should consider all potential responses anew as they plan for a second or third wave of the virus, potentially as soon as the fall.

**Financial Stimulus:** The bipartisan \$2 trillion economic relief package to respond to the coronavirus pandemic includes about \$30 billion in an Education and Stabilization Fund for K-12 and higher education, which will be overseen by the Department of Education. About \$14 billion of that fund will be made available to colleges and universities – far less than the \$50 billion requested.<sup>69</sup> In addition, at least 50 percent of the allocations institutions receive must be used to provide emergency financial aid to students, such as grants for food, housing, course materials, technology needs, healthcare and childcare.<sup>70</sup> The remaining \$7 billion – less than 1 percent of the estimated \$640 billion universities expended before the coronavirus outbreak – can be used for operational expenses such as defraying lost revenue, refunds for room and board, online learning expenses and other expenditures.<sup>71</sup> The bill also provides relief to students by permitting them to defer payment on student loans for six months.<sup>72</sup>

Given the likely shortfall in the allocation to higher education, and discussion on Capitol Hill about additional stimulus to reboot the economy, university leaders may wish to work through their industry associations and government relations offices to continue to raise the needs of educational institutions and to seek additional funding. For example, universities have requested an additional \$13 billion for research operations.<sup>73</sup> Additionally, there may be regulatory fixes that need to occur, such as whether partial reimbursements of room and board or the loss of work-study opportunities should be factored into current or future financial aid packages and whether the time-period for federal research grants can be lengthened.

**International Students:** The large number of international students among many student bodies may pose particular challenges for colleges and universities as they prepare to reopen. With many foreign students paying full-tuition,<sup>74</sup> colleges and universities may suffer added financial strain if fewer international students return or enroll in American schools. Administrators will need to consider how to continue to recruit and attract such students, especially if recruits will not be able to visit campus or meet in person with alumni, as well as how to address budget shortfalls if tuition revenue from international students declines. Some international students who were able to get home when college campuses closed may face travel restrictions returning to the United States. Even if restrictions are eased in the summer, they may be required to return several weeks early in order to quarantine themselves before moving freely on campuses. Universities will have to consider whether, and in what manner, to provide facilities for such students to isolate themselves and ensure that there are no risks to the university community.<sup>75</sup> In addition, for those who may not be able to return at the start of school, colleges and universities will have to consider what adjustments they will or can make. At the urging of higher education, the Department of Homeland Security temporarily relaxed restrictions on the number of online courses international students may take without jeopardizing their visa status or financial aid.<sup>76</sup> Universities are required to report any modifications they have made. However, it is not clear how long these relaxed rules will be in effect, or whether a particular country's travel restrictions will be taken into account. University administrators may thus have to navigate a

variety of complex issues to address the circumstances of certain segments of their international student body. And with one-third of international students hailing from China, and increased incidents of discrimination against Asians being reported in the aftermath of the coronavirus outbreak,<sup>77</sup> colleges and universities will need to pay particular attention to the climate issues on campus to ensure a welcoming environment for all members of the community.

**External Requests:** Finally, as hospitals become overwhelmed with COVID-19 patients, colleges and universities may increasingly be asked to consider requests to house patients, first responders or exposed individuals who require a period of isolation or to host testing sites on their campuses. Yale University, for instance, reportedly initially turned down a request from the Mayor of New Haven to house police officers and firefighters who were asymptomatic but may have been exposed to the virus or are awaiting test results.<sup>78</sup> The response prompted public criticism from the Mayor who touted the University of New Haven’s willingness to provide facilities for that purpose. Now, however, changing course, Yale announced that it plans to provide 300 beds to first responders and hospital personnel, as well as using its laboratories to provide expedited COVID-19 testing.<sup>79</sup> Other institutions, including the University of Oklahoma and Sacred Heart, are also providing host facilities to help alleviate the burdens on hospitals. These noble decisions to serve the broader public good carry inherent legal risks, which should be fully understood and evaluated, even if educational institutions decide in the end that those risks must give way to the urgent, often life-threatening, needs of the communities around them.

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In sum, colleges and universities are facing significant and novel challenges arising from the coronavirus pandemic. Quinn Emanuel is uniquely qualified to help you navigate these issues, as our expertise set forth on our website [here](#) makes clear. If you have any questions about the issues addressed in the memorandum or would like assistance in evaluating your legal positions, please do not hesitate to reach out to us.

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<sup>1</sup> See Ass’n of Governing Boards FAQ, at <https://web.archive.org/web/20181101095747/https://www.agb.org/faq/is-a-board-of-trustees-the-same-as-a-board-of-regents-what-is-a-board-of-governors>.

<sup>2</sup> Ass’n of Governing Boards, Statement on the Fiduciary Duties of Governing Board Members, July 24, 2015, at [https://agb.org/sites/default/files/u27174/statement\\_2015\\_fiduciary\\_duties.pdf](https://agb.org/sites/default/files/u27174/statement_2015_fiduciary_duties.pdf) (“Statement on Fiduciary Duties”).

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> See, e.g., *id.* at 4; *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64-67 (Del. 2006).

<sup>6</sup> Statement on Fiduciary Duties, *supra* note 2, at 8.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> 698 A.2d 959 (Del. Ch. 1996).

<sup>9</sup> *Id.* at 968-72.

<sup>10</sup> 212 A.3d 805 (Del. 2019).

<sup>11</sup> *Id.* at 809.

<sup>12</sup> See, e.g., *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 782 S.E.2d 436, 438 (Ga. 2016) (internal citations and quotations omitted) (“The Board of Regents is the state agency vested with the governance, control, and management of the University System of Georgia. [citation omitted]. Therefore, ... the board is an agency of the state to which sovereign immunity applies.”); *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 782 (6th Cir. 2015) (Board of Governors of Wayne State University is immune from suits alleging violation of the False Claims Act.).



<sup>13</sup> See *Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974) (Eleventh Amendment is a bar to suit in federal court); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 56 (1996) (Congressional abrogation of Eleventh Amendment immunity).

<sup>14</sup> <https://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx>.

<sup>15</sup> *Id.*

<sup>16</sup> 51 O.S. §§ 152(14), 153(A).

<sup>17</sup> 51 O.S. §§ 153(A), 155.

<sup>18</sup> See Cal. Gov. Code § 810-996.6.

<sup>19</sup> See, e.g., 51 O.S. §§ 154, 156, 157.

<sup>20</sup> See, e.g., U.S. Dept. of Justice, FOIA Guide, 2004 Edition: Exemption 5 (<https://www.justice.gov/oip/foia-guide-2004-edition-exemption-5>); *State Journal-Register v. Univ. of Illinois Springfield*, 994 N.E.2d 705 (Ill. App. 2013) (analyzing exemptions under the Illinois Freedom of Information Act for documents relating to the resignation of three university coaches).

<sup>21</sup> State Higher Education Executive Officers Association, State Higher Education Finance: FY 2018 at 18 ([https://sheeo.org/wp-content/uploads/2019/04/SHEEO\\_SHEF\\_FY18\\_Report-2.pdf](https://sheeo.org/wp-content/uploads/2019/04/SHEEO_SHEF_FY18_Report-2.pdf)).

<sup>22</sup> Jeremy Bauer-Wolf, *Moody's Lowers Higher Ed Outlook to Negative Amid Coronavirus Crisis*, Education Dive, Mar. 18, 2020 (<https://www.educationdive.com/news/moodys-lowers-higher-ed-outlook-to-negative-amid-coronavirus-crisis/574414/>).

<sup>23</sup> Liability for wrongful acts against students lies with the governing board as a whole and not individual members. See *Regents of Univ. of California v. Superior Court*, 3 Cal. 3d 529, 539 (1970) (“Thus, liability for wrongful acts lies with the corporation called the Regents of the University of California, not with its individual members.”) (internal citations omitted). Of course, individual board members owe fiduciary duties to the institution, but these are not lawsuits by the institution.

<sup>24</sup> *Rosenkrantz v. Arizona Board of Regents*, Case No. 2:20-cv-00613-JZB (D. Az. Mar. 27, 2020).

<sup>25</sup> <https://www.insidehighered.com/news/2020/03/13/students-may-want-room-and-board-back-after-coronavirus-closures-refunds-would-take> (The 2019 Trends in College Pricing report by College Board “states that students at a public four-year universities paying in-state tuition spend on average 43 percent of their budgets on room and board fees. For out-of-state students, room and board makes up 27 percent of budgets, and for students at private four-year colleges, 24 percent of budgets are room and board fees.”)

<sup>26</sup> <https://www.bizjournals.com/dallas/news/2020/03/21/coronavirus-north-texas-colleges-room-board.html>

<sup>27</sup> *Id.*

<sup>28</sup> Publicly available at

[https://www.unh.edu/housing/sites/www.unh.edu/housing/files/media/2018\\_room\\_and\\_board\\_agreement\\_final\\_december.pdf](https://www.unh.edu/housing/sites/www.unh.edu/housing/files/media/2018_room_and_board_agreement_final_december.pdf)

<sup>29</sup> See, e.g., <https://universitybusiness.com/coronavirus-shift-pass-fail-college-distance-remote-online-learning/> (discussing various pass/fail course options).

<sup>30</sup> See e.g., *Barchiesi v. Charlotte Sch. of Law, LLC*, No. 3:16-CV-00861, 2017 WL 3573823, at \*5 (W.D.N.C. Aug. 17, 2017) (“Any inquiry into the quality or value of the services provided in return for Plaintiffs’ tuition and fees constitutes an impermissible foray into education malpractice.”).

<sup>31</sup> *Gupta v. New Britain Gen. Hosp.*, 239 Conn. 574, 591 (1996) (“The jurisprudential considerations that shed doubt on the viability of the tort of educational malpractice also inform our analysis of a contract claim based on inadequate educational services.”).

<sup>32</sup> *Cherlin v. Los Angeles Cmty. Coll. Dist.*, 212 Cal. App. 3d 382, 389 (1989) (“For policy reasons, however, the law refuses to hold a public school system liable to a student who claims he was inadequately educated.”); *Zinter v. Univ. of Minnesota*, 799 N.W.2d 243, 246–47 (Minn. Ct. App. 2011) (“Where the court is asked to evaluate the course of instruction or the soundness of the method of teaching that has been adopted by an educational institution, the claim is one of educational malpractice.”) (internal citations and quotations omitted).

<sup>33</sup> See e.g., *Ross v. Creighton Univ.*, 957 F.2d 410, 414-17 (7th Cir. 1992) (A student-athlete alleged that he was offered tutoring services given his “deficient academic background.” The student-athlete sufficiently alleged that the school “made a specific promise that he would be able to participate in a meaningful way in [the curriculum] because it would provide certain specific services to him” which the school breached “by renegeing on its commitment to provide those services.”).

<sup>34</sup> *Zumbrun v. Univ. of S. California*, 25 Cal. App. 3d 1, 10 (1972) (Student successfully stated claim for breach of contract against university where the complaint “spell[ed] out a contract obligating defendant USC to give the course ‘Sociology 200’ consisting of a given number of lectures and a final examination in consideration of the tuition and fees for the course paid by plaintiff.”).

<sup>35</sup> *Johnson v. Schmitz*, 119 F. Supp. 2d 90, 96 (D. Conn. 2000) (Complaint adequately alleged breach of contract against university where the plaintiff “d[id] not claim that [the university] failed to ‘provide an effective manner or course of instruction.’ [citation omitted]. Instead, he claims that Yale failed to deliver on its express and implied contractual duties



to safeguard students from academic misconduct, to investigate and deal with charges of academic misconduct, and to address charges of academic misconduct in accordance with its own procedures.”).

<sup>36</sup> *Ross*, 957 F.2d 410, 416–17 (7th Cir. 1992).

<sup>37</sup> *Zumbrun*, 25 Cal. App. 3d at 10 (“The basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.”); *but see Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 829 (2007) (“Universities frequently publish numerous catalogues and bulletins, but not all statements in these publications amount to contractual obligations. Whether a given section of the bulletin [or catalogue] becomes part of the contractual obligations between the students and the university ... must depend upon general principles of contract construction.”) (internal citations and quotations omitted).

<sup>38</sup> <https://www.insidehighered.com/news/2020/03/12/why-are-some-colleges-closing-over-virus-concerns-while-others-stay-open>

<sup>39</sup> <https://www.insidehighered.com/news/2020/03/12/why-are-some-colleges-closing-over-virus-concerns-while-others-stay-open>

<sup>40</sup> <https://www.princeton.edu/content/covid-19-coronavirus-faqs-undergraduates>;

<https://www.harvard.edu/coronavirus/faq#dining-housing>; <https://news.northeastern.edu/coronavirus/impact-on-faculty-staff-students/>;

<https://housing.unc.edu/covid-19-faqs-specific-campus-residents-move-out>

<https://housing.unc.edu/covid-19-faqs-specific-campus-residents-move-out>

<sup>41</sup> <https://www.nytimes.com/2020/04/05/world/asia/coronavirus-china-students.html>

<sup>42</sup> <https://www.nytimes.com/2020/03/29/us/politics/coronavirus-liberty-university-falwell.html>

<sup>43</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 40 (2012) *Comm. 1* (“Courts are split on whether a college owes an affirmative duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements, often relying on other aspects of the relationship between the college and its student to justify imposing a duty. Conversely, a number of the cases declining to recognize a duty speak in narrow, fact-specific terms that do not rule out the possibility of recognizing a duty in other contexts.”)

<sup>44</sup> *Regents of Univ. of California v. Superior Court*, 4 Cal. 5th 607, 633-34 (2018).

<sup>45</sup> *Id.* at 613.

<sup>46</sup> *Id.* at 625.

<sup>47</sup> *Id.*

<sup>48</sup> See e.g., *Stanton v. Univ. of Me. Sys.*, 773 A.2d 1045 (Me. 2001) (university owed duty to student-athlete as business invitee who was residing in dormitory to provide information about appropriate precautions for personal safety); *Univ. of Md. E. Shore v. Rhaney*, 858 A.2d 497 (Md. Ct. Spec. App. 2004) (holding that a college, as landlord, owed duty of reasonable care to student residing in dormitory), *aff’d on other grounds*, 880 A.2d 357 (Md. 2005); *Nero v. Kan. State Univ.*, 861 P.2d 768 (Kan. 1993) (declining to impose duty on university solely because of its role as school but concluding university had duty of care as landlord for student living in dormitory).

<sup>49</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 13 (2010) (“An actor’s compliance with the custom of the community, or of others in like circumstances, is evidence that the actor’s conduct is not negligent but does not preclude a finding of negligence.”)

<sup>50</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 16 (2010) (“An actor’s compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent under § 3 for failing to adopt precautions in addition to those mandated by the statute.”)

<sup>51</sup> See *Breitfeller v. Playboy Entm’t Grp.*, No. 05-cv-405, 2006 WL 1639830, at \*2 (M.D. Fla. June 8, 2006) (“While industry standards may be evidence of a duty, an entity cannot be found negligent for the nebulous proposition that they failed to adhere to industry standards or failed to adopt them as policies.”); *Pierce v. Platte-Clay Elec. Co-op.*, 769 S.W.2d 769, 772 (Mo. 1989) (“[E]vidence of industry standards is generally admissible as proof of whether or not a duty of care was breached. However, compliance with an industry’s own safety codes or standards is never a complete defense in a case of negligence.”).

<sup>52</sup> *Howard v. Omni Hotels Mgmt. Corp.*, 203 Cal. App. 4th 403, 430 (2012).

<sup>53</sup> <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-ihe-response.html>.

<sup>54</sup> *Charter Oak Fire Ins. Co. v. Nat’l Wholesale Liquidators*, 279 F. Supp. 2d 358, 361 (S.D.N.Y. 2003) (“And although the sprinklers were code compliant, such compliance does not, of itself, establish due care as a matter of law.”).

<sup>55</sup> *Amos v. Alpha Prop. Mgmt.*, 73 Cal. App. 4th 895, 901 (1999).

<sup>56</sup> See, e.g., Gary Robbins, “Campus coronavirus blog: USD tells students to move out four days early,” *San Diego Union Tribune* (March 16, 2020), available at <https://www.sandiegouniontribune.com/news/education/story/2020-03-16/sandiego-college-covid-19-news-roundup> (“The University of San Diego on Tuesday evening told residential students to

move out of their dorms by late Wednesday, four days ahead of schedule. The change reflects rapidly deepening concern about the coronavirus.”).

<sup>57</sup> See Anagha Srikanth, “Coronavirus is closing schools—but many students don't have a place to go,” *The Hill* (March 12, 2020), available at <https://thehill.com/changing-america/respect/poverty/487226-schools-out-because-of-coronavirus-but-not-all-students-have>.

<sup>58</sup> *Stoiber v. Honeychuck*, 101 Cal. App. 3d 903, 918–19 (1980) (“Manifestly... a tenant may state a cause of action in tort against his landlord for damages resulting from a breach of the implied warranty of habitability.”)

<sup>59</sup> See also Restatement (Second) of Property, Land. & Ten. § 5.4 (1977) (“Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if, after the tenant's entry and without fault of the tenant, a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair, or caused suddenly by a non-manmade force, makes the leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation within a reasonable time after being requested by the tenant to do so.”).

<sup>60</sup> See, e.g., Cal. Civ. Code § 1941.1 (deeming a dwelling “untenable” if it does not have “unbroken windows and doors”).

<sup>61</sup> *Medlock v. Trustees of Indiana Univ.*, No. 1:11-CV-00977-TWP, 2013 WL 1309760, at \*3 (S.D. Ind. Mar. 28, 2013), aff'd, 738 F.3d 867 (7th Cir. 2013) (“[T]he Court recognizes that a student's university dormitory room is essentially 'a home away from home' and is protected from unreasonable government intrusion.”); *Beauchamp v. State*, 742 So. 2d 431, 432 (Fla. Dist. Ct. App. 1999) (“We reverse the trial court because Mr. Beauchamp did have an expectation of privacy in his dormitory suite. Such a room is comparable to a motel room or a room in a boarding house.”).

<sup>62</sup> *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 729 (M.D. Ala. 1968)

<sup>63</sup> Restatement (Third) of Torts: Phys. & Emot. Harm § 14 (2010) (“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”)

<sup>64</sup> 29 U.S.C.A. § 654.

<sup>65</sup> See *Abbott v. Bragdon*, 912 F. Supp. 580, 591 (D. Me. 1995) (By implementing CDC guidelines and comporting with their recommendations regarding HIV/AIDS, dentist could safely treat patient with HIV. The court held that it “must defer to the CDC, and conclude[d] that if Defendant implements the CDC recommended precautions, treatment of Plaintiff in his office poses no direct threat to the health or safety of others.”)

<sup>66</sup> Alex Katsomitros, “The Emerging University Bonds Market,” *World Finance*, Apr. 20, 2018 (<https://www.worldfinance.com/markets/the-emerging-university-bonds-market>).

<sup>67</sup> <https://www.nytimes.com/2020/04/01/us/coronavirus-texas-austin-spring-break-cabo.html>

<sup>68</sup> <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>

<sup>69</sup> <https://www.insidehighered.com/news/2020/03/26/disappointed-college-leaders-and-student-debt-advocates-look-next-round-stimulus>

<sup>70</sup> <https://www.acenet.edu/News-Room/Pages/Coronavirus-Stimulus-Bill-Allocates-14-Billion-to-Higher-Education-Higher-Education-Community-Says-More-Is-Needed.aspx>

<sup>71</sup> <https://www.insidehighered.com/news/2020/04/02/live-updates-latest-news-coronavirus-and-higher-education>

<sup>72</sup> <https://www.nytimes.com/2020/03/25/us/politics/colleges-universities-coronavirus.html>

<sup>73</sup> *Id.*

<sup>74</sup> <https://www.businessinsider.com/foreign-students-pay-up-to-three-times-as-much-for-tuition-at-us-public-colleges-2016-9>; <https://www.nytimes.com/2012/02/05/education/international-students-pay-top-dollar-at-us-colleges.html>

<sup>75</sup> <https://www.chronicle.com/article/With-Coronavirus-Keeping-Them/248201>

<sup>76</sup> *Id.*

<sup>77</sup> <https://www.wsj.com/articles/new-york-city-sees-surge-in-coronavirus-hate-crimes-against-asians-11585828800>

<sup>78</sup> <https://www.nhregister.com/news/coronavirus/article/Mayor-New-Haven-asks-for-coronavirus-help-Yale-15162606.php>

<sup>79</sup> <https://yaledailynews.com/blog/2020/03/28/yale-to-clear-space-for-first-responders/>