



**OFFICE OF  
GENERAL COUNSEL**

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**Before the**

**United States Senate  
Committee on the Judiciary**

**On**

**Examining Liability During the COVID-19 Pandemic**

**May 12, 2020**

Chairman Graham, Ranking Member Feinstein, and members of the committee, thank you for inviting me to testify at this hearing on liability concerns during the COVID-19 Pandemic and the impact of those concerns on higher education as we move towards re-opening our campuses in the coming weeks and months. I am a lawyer who has been on the campuses of higher education institutions for twenty-two years. Since 2018 I have served as the General Counsel for Texas Christian University in Fort Worth, Texas. Before that, I was the General Counsel for the University of Mississippi in Oxford, Mississippi, for fifteen years, after serving for five years as a staff lawyer for Ole Miss. My national perspective on higher education has been informed by six years of board service, including a year as Chair, for the National Association of College and University Attorneys that includes more than 5,000 lawyers representing member institutions.

I am here testifying today at the request of the American Council on Education, the major coordinating body for higher education, representing more than 1,700 public and private, two- and four-year colleges and universities and related higher education associations. I hope to share with you today something about the role of higher education in our economy, the impact of COVID-19 on higher education, and the need for certainty around the standard of care corresponding legal liability for the spread of the virus as higher education seeks to return to something that resembles normal operations in the coming weeks and months.

## **Higher Education Is An Economic Engine Necessary For Recovery.**

There are more than 4,000 two and four-year, public and private, non-profit colleges and universities in this country educating nearly 24.5 million undergraduate and graduate students.<sup>1</sup> These institutions employ nearly 4 million Americans across campuses in every state and congressional district.<sup>2</sup> Colleges and universities generate total revenues of about \$650 billion (in 2016-17 according to Department of Education data) providing a corresponding economic impact in their host communities.<sup>3</sup>

In host communities across America, institutions small and large often are the largest local employers. They are primary drivers in local economies: robust economic engines, evergreen purchasers of goods and services, and stable employers for their regions and communities. For example in Texas, about 14,500 people work at the University of Texas Austin's main campus, making it the area's largest employer. According to an Institute for Economic Impact study, UT Austin generates annually \$8.2 billion in business activity and \$2.4 billion in personal income. Spending by UT Austin's students provide an annual economic boost of \$823 million into the local economy.<sup>4</sup> In FY 2017-18, Texas A&M University employed more than 7,000 faculty and staff, with a payroll of \$791.8 million. The total Texas A&M impact on the Texas economy amounted to \$3.1 billion in added income, which is equivalent to supporting 35,504 jobs.<sup>5</sup> In a number of states, such as California, Iowa, and Maryland, universities are the largest employers. In my former home state of Mississippi, the University of Mississippi alone was the second largest employer in

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<sup>1</sup>See "Integrated Postsecondary Education Data System," US Department of Education, National Center for Education Statistics, Institute of Education Sciences, <https://nces.ed.gov/ipeds/trendgenerator/>.

<sup>2</sup> See "Integrated Postsecondary Education Data System," US Department of Education, National Center for Education Statistics, Institute of Education Sciences, [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_314.30.asp?current=](https://nces.ed.gov/programs/digest/d18/tables/dt18_314.30.asp?current=).

<sup>3</sup> See "Integrated Postsecondary Education Data System," US Department of Education, National Center for Education Statistics, Institute of Education Sciences, <https://nces.ed.gov/ipeds/trendgenerator/>.

<sup>4</sup> "Impact on Austin," University of Texas, <https://www.utsystem.edu/sites/default/files/news/ImpactSheetAustin0611.pdf>.

<sup>5</sup> "The Economic Value of Texas A&M University on the State of Texas in Fiscal Year of Analysis 2017-2018, Executive Summary," Emsi, February 2019, [https://ppo.tamu.edu/PPO\\_v19/media/Media/PDF%27s/Economic%20Impact/Statewide\\_TexasA-M\\_ExecSum\\_1718\\_Final.pdf](https://ppo.tamu.edu/PPO_v19/media/Media/PDF%27s/Economic%20Impact/Statewide_TexasA-M_ExecSum_1718_Final.pdf).

the entire state. Unlike many industries that may only impact one region or another, the tentacles of higher education's economic impact reaches everywhere throughout the country, in cities and towns large and small.

But higher education is not just an economic engine in macroeconomic terms or for host communities. Education transforms lives, bending the arc of families' stories towards inter-generational economic stability, prosperity, and even health. Individuals with a postsecondary degree earn more, pay more taxes, and are more likely than others to be employed, according to the College Board's *Education Pays 2019*.<sup>6</sup> For instance, in 2018 those with a bachelor's degree (and no advanced degree), working full time, earned \$24,900 more than those with only high school degrees, and paid an estimated \$7,100 more in taxes.<sup>7</sup>

Having a college degree is associated with reduced unemployment, a healthier lifestyle, lower health care costs, and higher levels of civic engagement. Indeed, on any measure of wellness that demographers can devise, college graduates fare significantly better than those who did not go to college.

In terms of American competitiveness and leadership, American colleges and universities remain the envy of the world, with universities leading the way in innovation, answering practical questions to help protect us from this pandemic and the next. In 2017-18, the Department of Education's Digest of Education Statistics reported higher education institutions spent about \$61 billion on research, \$19 billion on public service, and \$79 billion on hospital services.<sup>8</sup>

Here's the point: encouraging, enabling and supporting higher education's return to its critical role in the United States economic engine and the fabric of our country's communities is an essential

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<sup>6</sup> Ma, Jennifer, et al, "Education Pays 2019, the Benefits of Higher Education for Individuals and Society," Trends in Higher Education Series, College Board, 2019, <https://research.collegeboard.org/pdf/education-pays-2019-full-report.pdf>.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> "Digest of Education Statistics," US Department of Education, National Center for Education Statistics, Institute of Education Sciences, 53<sup>rd</sup> Ed. 2017, <https://nces.ed.gov/pubs2018/2018070.pdf>.

component of reopening America, growing the economy, and preserving employment for hundreds of thousands of Americans in the public and private sectors.

### **Impact Of The Pandemic On Higher Education.**

Our nation's higher education institutions of all types – large and small, public and private, two-year and four-year, residential and commuter – join the rest of America in wanting to resume something close to normal operations as soon as possible. But all colleges and universities are facing unprecedented challenges as a result of the COVID-19 pandemic: closed campuses, wholesale shifts to online instruction, and enormous unforeseen expenses and revenue losses. The impact on the operations and revenues of many colleges and universities has been catastrophic.

The pandemic is causing massive disruption to students and their families as well. Many are grappling with sudden changes to their financial circumstances. Because of uncertainty, fear, and new financial realities, higher education expects significant, potentially unparalleled, declines in enrollment, both from students who do not come back, and those who will never start. The American Council on Education is predicting that institutional enrollment for international students will drop by 25% and that general enrollment will drop by 15% for the 2020-2021 academic year. This will cause colleges and universities across the U.S. to lose approximately \$23 billion.

For some institutions, this crisis already poses an existential threat, with the potential for closure on the horizon. The CARES Act was an important step towards ensuring that students, especially the most vulnerable, have their basic needs addressed. Similarly, federal funds to support colleges and universities will help keep institutions operating, even as they attempt to plug massive holes in their budgets.

But the amount of money provided thus far does not come close to filling the gap. According to Moody's, the total support to institutions provided in CARES will only be "equal to around 1 percent of total university expenditures," and higher education "continues to face significant

financial challenges heading into fiscal year 2021, including potential losses of tuition revenue, state funding, endowment income and gifts.”<sup>9</sup> Universities around the country are announcing furloughs and massive budget cuts to deal with lost revenues already realized or anticipated.

So efforts to stimulate the economy must necessarily include the more than 4,000 degree-granting, two-year and four-year, public and private colleges and universities.

**America Needs Colleges and Universities to “Be Back” ASAP, But Uncertainty About Standards Of Care And Legal Liability Are Barriers To Sensible, Rapid, and Robust Re-opening.**

As Congress wrestles with what sort of financial relief efforts are needed to address the pandemic’s harm to higher education and other sectors of the economy to date, the next challenge of reopening our campuses is running into headwinds of uncertainty around the standards of care that courts may apply to the hundreds if not thousands of institutional decisions that will be made on each campus to enable and support re-opening.

**America’s colleges and universities are expansive operations**

When we think about higher education, we typically think about professors and students. We think about large lecture halls or classroom instruction. We also think about research labs. And rightly so. It was, for example, at the University of Pittsburgh that Dr. Jonas Salk’s polio research team ran the largest national controlled field trial in history, culminating in a polio vaccine that in 1955 *Newsweek* called “a summit moment in history.”<sup>10</sup> Our universities’ research labs, in Texas and around the country, are as likely as Dr. Salk’s to lead America, and perhaps the world, to the COVID-19’s eradication.

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<sup>9</sup> Schwartz, N., “Moody’s: \$14B Stimulus Funding Unlikely To Cover Colleges’ Coronavirus Expenses,” *Education Dive*, April 2, 2020, <https://www.educationdive.com/news/moodys-14b-stimulus-funding-unlikely-to-cover-colleges-coronavirus-expe/575410/>.

<sup>10</sup> “Salk Legacy,” University of Pittsburgh Graduate School of Public Health, <https://publichealth.pitt.edu/home/about/vision-mission-history/salk>.

But America's colleges and universities are more than classrooms and research laboratories. They are expansive operations where millions of people live, work, and learn, and millions more alumni, parents, scholars, and visitors attend events as varied as ballet performances, academic symposia, and baseball games. To understand the challenges colleges and universities face in returning to residential, in-person instruction, or returning to something approaching normal operations, we must reflect on the variety of things we do on college campuses, using the two campuses where I have worked for as examples.

Running a campus is much like running a small city, and if one reviews the Department of Homeland Security's *Guidance on the Essential Critical Infrastructure Workforce*,<sup>11</sup> colleges and universities are engaged in every sector of critical infrastructure necessary to support communities where millions of Americans live, learn, and work. For example, many universities operate full-service utility companies: pumping, treating, storing, and distributing water; managing and treating wastewater; generating and distributing power; and dealing with waste removal and recycling. Universities manage robust telecommunications and computing networks. Colleges and universities are in the multi-modal transportation business. Universities employ security forces, often with law enforcement power.

Universities are also like small cities in that they must ensure students have access to all the things they need to live and learn. So universities are landlords, providing housing to thousands of students and even some faculty and staff. Universities are in the food service business, and we own and operate retail shops, convenience/sundry stores, coffee shops, laundry services, and bookstores. We operate student health clinics and counseling centers. We operate gyms and

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<sup>11</sup> "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response," U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency, Version 3.0, April 17, 2020, [https://www.cisa.gov/sites/default/files/publications/Version\\_3.0\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_4.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.0_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_4.pdf).



swimming pools, daycare centers and demonstration schools, museums and public gardens, and jogging and biking trails.

Universities also provide outward facing services to the community, particularly related to the clinical instruction necessary to prepare the next generation of nurses and doctors, educators and counselors, speech pathologists and nutritionists. Universities operate laboratory schools and healthcare systems, clinics and service centers, all providing essential services to the public. Universities provide economic support to other business ventures through county extension services, small business development centers, business incubators, and research parks.

Colleges and universities are also in the tourism and entertainment business, serving as cultural hubs and travel destinations in their own right, hosting sporting events and concerts, theater productions and debates, weddings and funerals. Two of the largest venues in Fort Worth, Texas are on TCU's campus. In Mississippi, my former home state, university football games were the largest public gatherings in the state. Many universities provide auxiliary services to support and facilitate campus guests and visitors. For example, the University of Mississippi even owned and operated the local airport, as well as a golf course and a hotel and conference center.

To support all of this broad array of activities and to keep the massive physical plant and infrastructure in-shape, colleges and universities directly employ tens of thousands of skilled workers in various trades, from electricians and linemen to plumbers and HVAC technicians; from landscapers and painters to carpenters and fabricators. Colleges and universities constantly employ design professionals and outside contractors. Both Texas Christian University and Ole Miss spent more than \$1 billion in new construction and renovation over the last fifteen years.

So what's all this got to do with standards of care, and concerns about COVID-19 ? My torts professor at the University of Virginia, Saul Levmore, taught us that uncertainty about the standard of care creates a "cliff problem." When we know there is a liability "cliff", some line that it would be catastrophic to step across, but we do not know exactly where the edge of the "cliff" is, then uncertainty will lead to avoiding the ground near the cliff altogether.

Applying the analogy to this context, if we do not know what COVID-19-related precautions the law ultimately will have expected of America's colleges and universities as each makes the hundreds and perhaps thousands of decisions necessary to prepare for and implement campus re-openings, we have no way of making bold, but reasoned and reasonable, reopening decisions. In that circumstance, a prudent approach may be to avoid the risky activity altogether.

Across America and throughout its varied sectors, trying to determine whether and to what extent to re-open an enterprise in our present context presents a classic "cliff" problem. We are facing something novel, something we have never faced before. In the current moment, we believe we know one thing for certain: if and when we re-open, there will be no way to assure that no one will bring the virus onto our campus. Spread is foreseeable, perhaps inevitable. With that knowledge, what is our standard of care for detecting and preventing COVID-19 spread? Will an institution be held responsible for spread within the university community? What does the "reasonable person" standard require of us? There is no playbook. There are no best practices. There are no widely accepted or well-defined standards of care.

In determining how and whether to reopen, all businesses face uncertainty with respect to the standard of care. But for colleges and universities, we do not face the uncertainty associated with a single business activity, like whether and how to open a restaurant. Colleges and universities face scores of "cliff problems," requiring hundreds of decisions and operational steps to prepare for the complexities of operating a campus.

For example, in the last few days, some campuses like the University of California San Diego and the University of Arizona have announced massive testing schemes as a part of their return to campus. Is comprehensive testing of students and employees the standard of care? What if an institution does not have access to or cannot afford that kind of testing? This will certainly be the case for hundreds of institutions across the country – small, tuition dependent private colleges, under resourced public two-year community colleges, and four-year regional universities. Other campuses have announced that they will not resume full campus operations in the fall, with a full semester of primarily distance learning. There are no current state or local orders that require either



mass testing or prohibit classroom learning in the fall. But these institutions are staying away from the “cliff.”

To fully reopen a campus will require hundreds of decisions like these, maybe thousands. Each will be made without a COVID-19 crystal ball, without established best practices, and amidst learnings – and, yes, trial and error, as we evolve towards known and accepted standards of care. At TCU and on campuses around the country, academic leaders are considering questions like: What can we require of our employees, students, or our guests in terms of testing and monitoring? If we monitor, what is the standard of care for privacy concerns? Can we use technology to establish a student’s movements or with whom the student has had close contact? Must all campus housing be converted into single unit occupancy, or are there “reasonable” alternatives? Would a “reasonable institution” turn away students to limit the density of housing? How many beds would a “reasonable institution” reserve for isolation or self-observation? How would a “reasonable institution” respond when someone on campus tests positive? How much community spread would trigger closing campus for live instruction as we did in the spring?

What about athletics? Can we ask student-athletes, coaches, sports medicine staff, student-trainers and student equipment managers to practice and prepare for a fall football season, requiring close contact with scores of others? If so, what sort of testing and monitoring protocols must be in place? And how to handle public events, like athletics competitions, such as a college football game with tens of thousands in attendance?

What about the classroom? What are the protocols for laboratory and clinical experiences that require hands-on instruction? Should we limit class size to 50 students? 25 students? Some number based on occupancy rates of the classroom, laboratory, or lecture hall? How often must we clean surfaces to meet the standard of care? Which surfaces?

What about research labs? What is the standard of care for returning to work, and what are the opportunity costs in lost innovation if we do not?

How do we handle students or employees at greater risk? Can we **require** employees to return to work? If someone who is able to work remotely wants to do his or her job on campus, can we let them?

There is no end to questions like these. The bottom line: in what circumstances will institutions be held liable when people are exposed or contract the virus on campus? That's quite a "cliff," and the uncertainty has a chilling effect on how quickly and completely campuses resume something like full operations.

Moreover, without some clarity on the standards of care and some liability protections, universities, like other businesses, will face huge transaction costs associated with COVID-19 spread claims, and the additional financial pressures will almost certainly lead to the permanent closure of institutions already stressed by the lost revenues and additional costs associated with COVID-19's impact on operations.

Higher education is not an industry that is typically involved in seeking changes to the laws defining civil liability. But the current moment – which is unlike anything in our lifetimes – requires action. We need some temporary, targeted protection from liability for illness or spread of illness. We do not propose protection from liability for bad actors or for gross negligence, but if our country needs its colleges and universities to walk towards that "cliff" – and make no mistake about it, American needs this, those of us who will make the hard calls for colleges and universities need to know we will be able to see the edges: we need liability protection where institutions have made good faith efforts to comply with local and state public health mandates and orders.