

COVID-19 & Higher Education: Impact, Technology, and the Law

Legal Issues Related to Higher Education's Great Pandemic Pivot to Remote Instruction and Work¹

Primary Authors:

Jerry D. Blakemore

General Counsel, UNC Greensboro

Enyonam K. Williams

Assistant General Counsel, UNC Greensboro

Contributors:

Kristen S. Bonatz

Deputy General Counsel, UNC Greensboro

Toni G. Douglas

Associate General Counsel, UNC Greensboro

James E. Donnell

Elon Law Student, UNC Greensboro Office of General Counsel Winter Resident

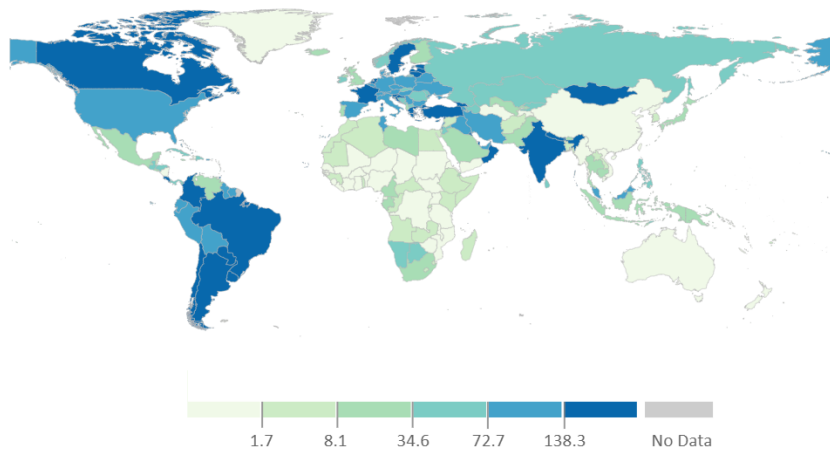
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Impact

In March of 2020, higher education, like every other sector of our nation, experienced a “Great Pandemic Pivot” from life as we once knew it to a life that required us to confront, in a relatively short period of time, unprecedented change, uncertainty, fear, and confusion. The COVID-19 pandemic began to take its toll on our country, and higher education was not immune. According to the Centers for Disease Control (CDC), by May 12, 2021 the United States experienced a total of 579,366 deaths. In addition, there were 32,571,814 known cases of COVID-19 in the United States as of that date, along with estimates that the actual number was double that amount.² The Institute for Health Metrics and Evaluation projected that 4,733,922 persons will die from COVID-19 by August 1, 2021 across the globe.³

Global cases of COVID-19 reported per 100,000 population in the past 7 days



CDC: May 12, 2021

The pandemic has not only impacted human lives but has also had a major impact on businesses. A 2021 survey by the Federal Reserve Bank revealed that 39% of small business owners in the U.S. did not expect their business to survive until sales return to “normal” without further government assistance.⁴ Moreover, the U.S. Airline industry lost an estimated 35 billion dollars in 2020.⁵

The pandemic is global in its scope and impact and has affected institutions of higher education worldwide; these include public and private, large and small, community colleges, professional schools, and vocational schools that produce licensed tradesmen and women. According to the United Nations International Children's Emergency Fund (UNICEF), more than 1 billion

² Centers for Disease Control and Prevention: COVID Data Tracker. https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths.

³ Institute for Health Metrics and Evaluation (IHME): COVID-19 Projections. <https://covid19.healthdata.org/global?view=total-deaths&tab=trend>.

⁴ Small Business Credit Survey: Report on Employer Firms. Federal Reserve Banks. <https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report>.

⁵ Leslie Josephs. “U.S. airlines’ 2020 losses expected to top \$35 billion as pandemic threatens another difficult year.” *CNBC Business News: Airlines*, January 1, 2021. <https://www.cnbc.com/2021/01/01/us-airline-2-losses-expected-to-top-35-billion-in-dismal-2020-from-pandemic.html>.

children, across 188 countries, are at risk of falling behind due to school closures aimed at containing the spread of COVID-19.⁶

According to the U.S. Census, there were approximately 77 million students⁷ enrolled in U.S. schools as of December 2019, the last date the U.S. Census bureau published data on student enrollment. This includes approximately 53.1 million students enrolled in kindergarten through 12th grade and 18.9 million college students. In regard to the state of North Carolina, recent statistics indicate that there are approximately 1.5 million K-12 students in public and charter schools who were subject to school closures as well as a mandatory shift from in-person to remote learning and instruction. The families of these 1.5 million K-12 students were impacted by at least a factor of two in that the adults in the families had their own unique circumstances when faced with taking on the added role of teaching assistant.

Higher education in North Carolina was similarly impacted with 239,987 students in the UNC System alone in Fall 2019. The lives of the faculty, staff, students, and their parents of the UNC System and its constituent institutions were adversely affected by COVID-19, requiring an immediate shift in instruction and learning; closures of institutions including residential housing and dining; the suspension of research and many elements of community engagement; and a reconsideration of athletic events and participation, as well as other social and educational activities.

We are uncertain of the short and long-term implications of the lack of access to educational instruction (in-person or remote learning), but we do know that the implications are far-reaching and negative. A recent McKinsey & Company study⁸ acknowledged that the pandemic caused learning setbacks for all students, but especially for students of color. This disrupted learning will certainly impact students' transition and preparation for higher education.

Not only will there be an increase in students who are unprepared for the rigors of higher education, but higher education is also responding to students with increased mental health challenges. Specifically, a November 2020 American Council on Education (ACE) survey of college and university presidents and chancellors indicated that the top two most pressing issues facing higher education that semester were the mental health of students and the mental health of faculty and staff.⁹ Concerns about mental health outranked the next biggest challenges college leaders identified, which were enrollment numbers and financial viability (long-term and short-term).

⁶ UNICEF Data: Education and COVID-19, September 2020. <https://data.unicef.org/topic/education/covid-19/>.

⁷ United States Census Bureau, RELEASE NUMBER CB19-190 "Census Bureau Reports Nearly 77 Million Students Enrolled in U.S. Schools," December 3, 2019.

⁸ Emma Dorn, et al. "COVID-19 and Learning Loss—Disparities Grow and Students Need Help." McKinsey & Company Insights, December 8, 2020. <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help#>.

⁹ Jonathan Turk, et al. "College and University Presidents Respond to Covid-19: 2020 Fall Term Survey, Part II." American Council on Education (ACE), December 10, 2020. <https://www.acenet.edu/Research-Insights/Pages/Senior-Leaders/College-and-University-Presidents-Respond-to-COVID-19-2020-Fall-Term-Part-Two.aspx>

This is the context upon which higher education lawyers throughout the country were required to identify and address a myriad of legal issues related to the delivery of educational services virtually. This includes but is not limited to instruction, student and employee discipline, the application of key federal higher education laws such as the Federal Educational Rights and Privacy Act (FERPA), Title IX, and federal and state constitution and regulatory issues (First Amendment, employment, and Public Records). Moreover, institutions of higher education were confronted with individual and class action lawsuits demanding tuition, housing, and dining refunds.

A critical component of context is the economic impact of COVID-19 on the nation's families, particularly the middle class which serves as the backbone of higher education student population. For example, the Pew Research Center reported that in the first three months of COVID-19, unemployment rose higher than it did in two years of the Great Recession. At its peak, more than 20 million¹⁰ Americans were unemployed during the pandemic. These families have made, and will be making, hard choices regarding whether, or where, to send their children to college. This presents a wide array of legal and policy choices for higher education, including allocation of limited resources for scholarships and financial need, possible changes in criteria for financial aid eligibility, and the application of financial and other resources to selected populations. Enhanced competition between institutions of higher education will certainly follow. Further, these institutions must consider how to avoid the disparate impact that often trickles down to vulnerable communities.

One of the most critical legal challenges that higher education faced during the pandemic, and is still exposed to, is whether the pivot to virtual instruction from in-person instruction was in and of itself a breach of contract. Did colleges and universities have an obligation to provide a certain type of educational instruction? Are there standards of instruction which simply cannot be met by virtual learning and teaching? Did our faculty have rights or obligations with respect to teaching modalities? What obligations does an institution of higher education have to provide a safe environment and who bears the cost of providing such an environment?

The legal landscape of issues was broad, generally without precedent, and fraught with liability. In short, every facet of higher education was impacted by the pandemic. The nation and the world were in uncharted waters and the ocean upon which higher education was sailing was filled with unknown and unprecedented legal and compliance exposure.

¹⁰ Rakesh Kochhar, "Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession," Pew Research Center, June 11, 2020. <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

The COVID-19 Pandemic and the Practice of Law:

The Experience of North Carolina's Public Higher Education Institutions

Chronology of Selected Events:

- March 10, 2020, North Carolina Governor Roy Cooper issued a State of Emergency for North Carolina to coordinate the state's response and protective actions to address COVID-19.
- March 11, 2020,¹¹ the World Health Organization (WHO) declared the SARS-CoV-2 (COVID-19) a global pandemic, precipitating the Great Pandemic Pivot.
- March 11, 2020, UNC System Institutions canceled class for one week (or extended spring break) to prepare for the transition to virtual learning.
- March 16, 2020 DOE issues guidance reminding education officials that they must protect students' civil rights while also protecting them from COVID-19.
- March 23, 2020, the UNC System required constituent institutions to transition from in-person instruction to a remote teaching and learning format.
- March 27, 2020, North Carolina Governor Roy Cooper issued a Stay-at-Home Order.

Key Legal Issues Associated with "The Great Pandemic Pivot"

Given the overwhelming and unprecedented impact of the pandemic, lawyers had to immediately determine what laws were applicable and whether and how they should be applied to these unique circumstances. Lawyers were required to assess whether any legal and regulatory obligations of colleges and universities changed or were waived. Specifically, higher education lawyers were called to provide opinions related to the application of the First Amendment, FERPA, Americans with Disabilities Act of 1990 (ADA), and other non-discrimination laws such as Title VII and Title IX. In addition to the myriad of federal laws that impact higher education, institutions of higher education also require advice related to collective bargaining agreements (where applicable), state and university employment policies and practices, and the interpretation of local health and municipal regulations and ordinances.

Although a few lawyers during this period subscribed to the school of thought that the circumstances were so unique that our legal obligations simply did not apply, and that the role of lawyers should be to help the clients address the immediate concerns without the constraints of current legal requirements. However, it is our belief that the more prudent approach is to advise clients on the basis of our current legal and regulatory obligations and to seek exemptions or waivers as circumstances dictate. The pandemic did not create a blanket exemption. There has been no trial court or appellate court that has excused, or in any way amended, our legal

¹¹ Ironically, on March 11, 2020, UNC Greensboro signed its current Zoom contract – a transaction which had been in the works and was unrelated to COVID-19. The University was prepared, but not because it prepared.

obligations as a result of the pandemic. Therefore, our legal, regulatory, and ethical obligations remain the same.

This point was clearly made by the U.S. Department of Education when it issued guidance on March 16, 2020 reminding education officials that they must protect students' civil rights while also protecting them from COVID-19.¹² Regarding regulatory requirements, the U.S. Department of Education extended temporary flexibility to institutions to continue educating students in the event of campus interruptions.¹³ For example, in North Carolina, the Board of Nursing provided significant flexibility to schools of nursing. Specifically, the Board gave the following direction and flexibility:

Each Program Director will be responsible for determining educationally sound modifications that are necessary, for identifying whether or not the program outcomes have been met, and for validating those students who meet the program outcomes and are eligible to apply to take the [state nursing exam].¹⁴

This enabled nursing students to provide critical nursing services without having precisely followed the pre-COVID requirements.

Given the challenges precipitated by the pandemic and our continuing obligations to comply with all relevant laws and regulations, technology becomes an even more important tool in our effort to serve our students, address the challenges of both remote teaching and learning, and to address the important issues associated with such a dramatic change in the workplace.

Technology and Privacy: FERPA, HIPAA, and Public Records

A. Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is the most important education law for the protection of student records. FERPA protects the privacy of student education records and imposes penalties for violation of student privacy rights. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. Although FERPA has been in existence for more than 46 years, it has never been applied to pandemic-like circumstances which required a quick pivot to remote learning forums.

¹² Fact Sheet: Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students. United States Department of Education Office for Civil Rights, March 16, 2020.

<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>.

¹³ "Information for Accrediting Agencies Regarding Temporary Flexibilities Provided to Coronavirus Impacted Institutions or Accrediting Agencies." United States Department of Education, Office of Postsecondary Education (Undated Memo). <https://www2.ed.gov/about/offices/list/ope/20-007covid19accreditorsfromomb317s.pdf>.

¹⁴ North Carolina Board of Nursing (Undated Memo). https://www.ncsbn.org/COVID19-Impact_NC-NursingPrograms.pdf.

FERPA protections include any record, stored in any medium, directly related to the student, and maintained by the institution. Specifically, FERPA-protected education records include, but are not limited to:

- Transcripts
- Financial aid and account records
- Class schedules
- Departmental and college files
- Electronic records, including email
- Disciplinary records
- Disability accommodation records
- **Photos and videos of students** (emphasis added)

The application of FERPA in a remote learning environment became particularly challenging with regard to student pictures, videos, and electronic records. For example, higher education lawyers were called upon to opine as to: 1) whether a Zoom class should be recorded, and if so, whether student consent was necessary, 2) whether other than the instructor and students could have access to the class recording, and if so under what circumstances, and 3) whether combining students from different course sections into one online discussion board violated FERPA. Answers to these questions are separate and apart from establishing the University's liability for "Zoom bombing," or failure of the virtual classroom technology generally (i.e. failure of technology during an exam or presentation, or an unintended deletion of written work).

The U.S. Department of Education provided guidance in March of 2020 on protecting student privacy during virtual learning.¹⁵ Specifically, it advised that a course recording that only shows the instructor is not a student record. An instructor may also distribute a course recording to students enrolled in the course without written consent from students who may appear in the video. However, FERPA compliance becomes an issue if an instructor releases a course recording to others *outside* the specific course where students are identifiable. FERPA consent is required in that case. Without the student's signed and dated written consent, the instructor should de-identify the student or edit out the student whose personally identifiable information (PII) will be disclosed.

Counsel may also be asked to advise on the issue of intellectual property ownership of course recordings. Does the instructor who prepared the lesson, led the class discussion, and recorded the (in-person or virtual) class, own the recording? The general answer, pre-pandemic, would have been yes, but some universities are revising their intellectual property policies to take that ownership back.¹⁶

¹⁵ U.S. Department of Education: Protecting Student Privacy [FAQs](#).

¹⁶ Colleen Flaherty. "Who owns all that course content you're putting online?" *Inside Higher Ed*, May 19, 2020, www.insidehighered.com/print/news/2020/05/19/who-owns-all-course-content-youre-putting-online.

B. Health Insurance Portability and Accountability Act of 1996 (HIPAA)

In the same way that FERPA protects student education records, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects the privacy of patients' medical information. Accordingly, lawyers who advise covered entities on their campuses found themselves preparing various documents to assist with the transition to telehealth services, as well as advising those providers on the appropriate uses and disclosures of protected health information, including protecting public health during a pandemic.¹⁷ In the effort to plan for and protect university campuses generally, universities were faced with balancing individual patient medical rights and protecting the campus community as a whole.

C. Public Records and Open Meetings

The pandemic presented unique issues regarding the application of federal and state public records acts. Prior to the pandemic there was little need to provide legal analysis related to remote instruction and learning. Zoom was an unknown entity on many campuses and little attention was paid to how this new platform might impact public records requirements. Therefore, counsel was presented with questions regarding access and protocols for recording meetings. Zoom meetings that are recorded and maintained would be considered public records that would need to be produced upon request. In addition, universities rapidly explored methods to virtually convene boards of trustees and other advisory bodies to meet the standards required by the open meetings act, without violating the confidentiality required in closed sessions or inviting disruption from the public.

D. Student Privacy Issues

The pivot to remote learning also prompted a rise in the use of technology to assist universities in monitoring academic integrity and student activities. Specifically, the use of test-taking software and wearable devices to track student social distancing or body temperature are on the rise at universities. The necessity to provide enhanced monitoring of students' academic and other activities raised new First Amendment issues, including whether to require that students wear devices for purposes of tracking student activities and conduct. An Educause poll taken at the beginning of the pandemic showed that 54% of universities were already using test-taking software, while another 23% were interested in using this software that tracked or locked browsers or used webcams to monitor students during exams.¹⁸ However, students have raised privacy concerns about having to allow proctors to scan their rooms before and during a remote exam. Moreover, residential students at one university signed petitions against a requirement that

¹⁷ Office for Civil Rights, U.S. Department of Health and Human Services "BULLETIN: HIPAA Privacy and Novel Coronavirus." February 2020. hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf.

¹⁸ Susan Grajek, "Educause COVID-19 QuickPoll Results: Grading and Proctoring" *Educause Research Notes*, April 10, 2020, <https://er.educause.edu/blogs/2020/4/educause-covid-19-quickpoll-results-grading-and-proctoring>.

they use medical adhesive to attach a device to their bodies that would track body temperature and their proximity to other students who may be infected with COVID-19.¹⁹

In the case of student athletes, lawyers advising institutions of higher education were required to consider not only the First Amendment implications of tracking and monitoring students, but also NCAA legislation. For example, the athletics department at UNC Greensboro was required to meet CDC regulations, state health department regulations, county public health regulations, and NCAA regulations. The good news from that list of regulators is that the Southern Conference adopted the NCAA regulations and did not impose any additional restrictions.

UNC Greensboro successfully utilized tracking devices²⁰ to monitor the social distance of its student athletes. Although the university required student athletes to use these monitoring devices, the requirement only took effect after discussions with student athletes, coaches, and senior management to get their buy-in for this strategy. Student athletes not only bought into this strategy, but did so enthusiastically. Specifically, they embraced the wearable devices as a means to ensure they could continue their athletic pursuits. This monitoring was coupled with regular testing for COVID-19 and the student athletes were strategically housed together, even before the NCAA implemented the now infamous “NCAA tournament bubble.”

Between June 2020 and March 2021, UNC Greensboro administered 3,495 tests to its student athletes and received 64 positive results. The University also tested coaches and staff who worked closely with the athletes, and of those tests, found only 10 positive results. As of March 2021, the University had a positivity rate of 1.25% for student athletes and staff in the athletics department—a remarkable accomplishment.

The data speaks for itself. The UNC Greensboro athletics program, which is comprised of 17 sports²¹ and serves approximately 225 student athletes maintained the primary functions of its athletic program throughout the pandemic, and it did so without major disruptions in program or significant harm to students and staff. Notably, the men’s basketball team did not miss any games because of positive players at UNC Greensboro, and the team even went on to play in the NCAA tournament. Testing and monitoring played a major role in this success, in fact, a senior executive of UNC Greensboro’s athletics department called the wearable tracking devices a “game changer.” Specifically, having the ability to analyze social distance data at the end of each day allowed coaches and staff to know who was training too closely together for 15 minutes or more, and as a result, the University was able to manage the spread of the virus on a real time basis.

¹⁹ Natalie Broda, “Oakland University asking students, staff to wear ‘BioButton’ to track COVID-19 symptoms.” *The Oakland Press*, August 9, 2020.

²⁰ Specifically, the University used Kinexon Safezone Technology devices.

²¹ UNC Greensboro does not have a football team.

First Amendment Applications

Transitioning to remote learning does not change higher education institutions' obligations under the First Amendment. Instead, we must consider how the First Amendment applies to the virtual education setting. For public institutions, First Amendment issues are always a prime consideration and for both public and private institutions, federal regulations protecting students from discrimination based on race, color, national origin, sex, or disability remain applicable.

Attorneys at institutions of higher education not only had to address First Amendment issues related to students and employees on campus, but they also had to transfer that analysis to the virtual setting. Wearing offensive symbols on masks, clothing, or displaying them in a Zoom background is generally protected by the First Amendment. Nevertheless, faculty can regulate this form of speech in classrooms in a way that university officials cannot in traditional public forums on campus. Universities have greater discretion for regulation in the classroom so long as those regulations are **viewpoint-neutral** and **uniformly applied**. Remote classroom settings have the same protections as in-person classrooms and faculty can lawfully adopt restrictions for these displays to avoid disruption. This is not the case with public forums outside the classroom where specific exceptions to First Amendment protections must be applied.

Employment Issues

University attorneys also had to consider a wide variety of employment-related challenges brought on by the pivot to remote learning. Managing remote workers proved to be a technological challenge to which universities had to adapt. Conducting - often emotional - meetings with respect to misconduct, separations, and reductions-in-force due to budget realities was particularly challenging when these occurred either through a computer screen or masked. Moreover, mediation and grievance procedures in the employment process also pivoted to zoom or web-conferencing, and many mediators had to become adept in the use of break-out rooms and management of the various parties, often located in different parts of a Zoom or web call.

In addition, updating telework policies to address new COVID realities caused universities to determine whether to limit where an employee's "home" for purposes of remote work could be located. Issues that needed to be explored and addressed included the tax implications of working from another state or country, and learning the application of other rules in these out-of-state and foreign jurisdictions. In addition, there are significant policy and university mission considerations that must be a part of the legal analysis for these employment related challenges. For instance, should employees at a tax-payer supported state institution be allowed to work from anywhere in the world for their own convenience? What should universities establish as time and place limitations on distance from the workplace? Should universities require employees to live in the community or state, or be within an hour or two of the university? Given the engagement mission of most universities, how should universities evaluate community engagement if employees are actually living in another country, another state, or outside of commuting distance to the community where they work?

Answering those policy questions has had an impact on employment searches, while budget realities also delayed hiring for some roles. Tried and true best practices continue to apply in these settings, and university attorneys who work in this area used the COVID pivot as an opportunity to review and revise current position descriptions to ensure that they accurately reflect the necessary technical skills and knowledge. This has benefits that exceed the pandemic. To ensure ADA compliance, for instance, having an updated position description makes it much simpler to develop reasonable accommodations and identify what truly are the essential functions of the job.

Practically, the “To Do” list with respect to technology and COVID protocols related to employment includes:

1. updating remote work policies, which involves:
 - a. considering whether there is a need to mandate in-person work as opposed to telework;
 - b. developing protocols to support telework with tools and processes for engagement; and
 - c. including processes for accommodations with regard to employees whose health conditions may entitle them to reasonable accommodations on the basis of disabilities.
2. developing training and professional development to support issues that surfaced as a result of the pandemic (i.e. general Zoom protocols (backgrounds), detailed training regarding these tools, and coaching on how to conduct performance appraisals when eye contact and empathy are conveyed through a screen);
3. remaining vigilant with respect to the ever-evolving public health and EEOC guidance with respect to vaccine mandates and recommendations and ensure university policies and processes are sufficiently malleable to manage a pivot when the situation requires.

Pandemic Related Litigation

In an environment already plagued with so many challenges, the higher education sector was also confronted with class action litigation resulting from the pandemic, which included litigating: 1) the manner in which instruction would be provided, 2) whether refunds would be available for housing, dining, and parking, and 3) whether students and employees could be required to take COVID-19 tests or receive vaccinations. Currently there are no fewer than 35 class action lawsuits pending related to the COVID-19 crisis seeking reimbursements for housing, dining, and the lost in-person learning experience generally. In addition, institutions in North Carolina, including the UNC System and a number of its constituent institutions, are the subject of class action matters regarding the decision to close, which ironically, plaintiffs admit in their pleadings, was the “right thing for [the UNC System] to do.”²² Nevertheless, class action

²² Complaint at 2. *Deena Dieckhaus, et al. v. Board of Governors of the University of North Carolina*, United States District Court for the Eastern District of North Carolina, Eastern Division, Case No: 4:20-CV-00069-BR.

plaintiffs now seek millions of dollars for alleged breaches of contract and unjust enrichment. This led UNC system institutions to seek immunity²³ against these actions from the NC General Assembly and it also forced many of those institutions to review and revise existing policies for housing, dining, and parking.

Title IX Issues

Title IX, like other federal laws, still applies during a pandemic, but how universities ensured these protections in a virtual setting became challenging. Universities were forced to consider whether and how Title IX applied to a virtual setting, what type of protections, communication, and protocols would be necessary, and how technology would be applied to addressing these concerns. Surprisingly, there have been very few Title IX hearings conducted in the virtual environment on UNC System campuses. Title IX reports at UNC Greensboro, and those of other UNC System institutions, have decreased in general during the past year. However, the Title IX offices remain fully functional during this pivot and conduct interviews via Zoom, teleconference, and in person, based on the preference and availability of the parties. Other issues of student conduct, however, have been successfully adjudicated via Zoom and UNC Greensboro is currently considering whether to continue offering the virtual format for adjudication of Title IX matters.

Increased Contract Review

Lawyers working to support universities during the pandemic also saw their workload increase with an onslaught of additional pandemic-related contracts to review. These ranged from an exponential uptick in software license agreements, to MOUs with county health departments to establish COVID-19 testing sites and later vaccine distribution sights on campus. A few North Carolina universities even contracted with local hotels to reserve quarantine rooms in the event they ran out of beds on campus. Counsel on university campuses have also been called upon to insert pandemic related language into facilities use agreements for events such as NCAA sporting events and university-authorized summer camps.

Conclusion

As we examine the legal issues associated with the great pivot to educating students virtually, it is important to keep in perspective the unprecedented impact of the COVID-19 pandemic. From a global perspective, Nobel Prize laureate Malala Yousafzai reminds us that COVID-19 has forced more than 1 billion students out of school. Maryland Governor Larry Hogan also provides an apt summary of the pandemic's national impact. He describes the impact on our nations as follows:

²³ N.C.G.S. §116-311

“This is like a hurricane that hits all 50 states every single day. And it continues in intensity. It doesn’t go away. It just keeps hitting, hitting, hitting.”

The impact of the pandemic is also measured in lives lost, families affected, and the economic and social costs on our nation and its institutions. This impact includes institutions of higher education. The good news is that higher education made the pivot, however, it would not have been able to do so without access to, and proper application of, technology. Making the pivot was critical to meeting the educational challenges that the pandemic presented. Nevertheless, operating within the parameters of federal and state laws, regulations and guidance, as well as university mission and policy, presented significant legal, policy, and operational challenges.

There were a myriad of issues, known and unknown, associated with “The Great Pandemic Pivot” that required counsel to rethink and re-envision the legal issues involved in providing educational services in a virtual setting. The pivot and the complexities associated with it required counsel to understand technology and to provide advice and counsel in a manner consistent with our ethical obligations as outlined in American Bar Association (ABA) Model Rule 2.1.²⁴ Specifically, we were required to go far beyond the technical requirements of the law and to take into consideration all of the factors affecting our client’s circumstances. ABA Rule 2.1 specifically speaks to the need to consider the moral, economic, social and political factors, that may be relevant to the client's situation. The pandemic has taught us that we must also add technology factors to this list.

²⁴ American Bar Association Model Rule 2.1: (Advisor) In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.