

# 7-POINT ACTION PLAN: HOW EDUCATIONAL INSTITUTIONS SHOULD PLAN FOR 2021 AND BEYOND

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There is no doubt that 2020 brought huge challenges for schools. As we near the end of the first semester and plan for the rest of the 2020-2021 school year and beyond, there are some lessons we can learn, some processes to adapt for the future, and some changes in the law that must be addressed within your school. This article will discuss seven of those processes for your 2021 planning.

## 1. COVID-19

Without a doubt, the pandemic will remain your biggest challenge in the new year. Schools will need to continue to monitor state, local, and CDC guidelines for what some epidemiologists say will be a significant growth in COVID cases in the next few months. Even though your community is tired of masking, testing, disclosing, and distancing, you must continue the school's good practices even when faced with pressure by various people within your community who disagree with the safety procedures. You may need to remind some parents of your cooperative parent clause if they begin engaging in negative community actions to pressure the school to relieve some of the processes, such as wearing masks.

In addition, even if you have not engaged in testing so far this school year, consider whether random COVID testing may be helpful for the community. There are many different types of testing and having a random sampling of student and employees on a regular basis may help you to figure out where the problematic behaviors or exposures are occurring. Most schools absorb the costs,

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so you will want to ensure you have a donor or space in your budget. You should have a good consent and waiver for any such processes as well.

Finally, you should consider that some people may want distance learning to be here to stay. Your schools have engaged in substantial training and investment to deliver excellent content to those unable to return to school. As COVID-19 inevitably wanes and you want your campus to return to normal operations, you may find more requests for accommodation by students and employees to engage in distance learning or working. Before you just say no or before you freely allow it, you should discuss the implications of such processes with counsel under the ADA and other employment laws.

## 2. Enrollment Agreements

Every school should take a second look at their enrollment contracts yearly to determine whether there are provisions that should be adjusted, eliminated, or added. This year, in particular, your school should consider adjusting several provisions to reduce claims or requests for refunds. Your agreement should make clear that your school makes the decisions on the when, how, and where the educational process is being delivered.

Your agreement should also waive any claims that the school has failed to mitigate its damages if the student does not remain enrolled the full year. It should make clear that the force majeure provision is more than simply a provision that permits the school to close when disaster strikes.

It should also provide for clear flexibility in how the school delivers education. It should include clarity regarding parents' consent to the recording of the student's and parents' image, voice, and name and use of such recordings for reasons that the school deems appropriate.

Finally, you should consult with your school counsel about the pros/cons of a waiver of claims. These issues are discussed in more depth in [a companion article published this month](#).

### 3. Employment Agreements And Handbooks

COVID drove many changes to handbooks (resulting in most schools adopting COVID-19 addenda for employee and student handbooks before the start of the year). Some of those provisions should be incorporated into the permanent handbook provisions, such as distance learning protocol and expectations, including COPPA provisions; recording of image, voice, and identity and the range of the school's use of such recordings; a much more robust communicable disease policy and protocol; and tweaks to your social media and boundaries policies to account for more potential outreach and/or one-on-one communications with adults.

### 4. Gender Identity Issues

While you are considering handbook changes, your school should assess the impact of [the U.S. Supreme Court's June 2020 decision in \*Bostock v. Clayton County\*](#) on gender identity on your community. It is clear that under federal law, employers (including schools) may not discriminate on the basis of gender identity. There are several considerations to think through.

First, if your school is a religious institution, how does this ruling impact your ability to enforce religious principles that may conflict with an employee changing their gender identity? Does the ministerial exception in [the Supreme Court's decision in \*Our Lady of Guadalupe v. Morrissey-Berru\*](#) impact the analysis?

Second, if your school is not religious, how must you implement, communicate, and train on these changes? Third, how does this ruling (or any other state or local laws) impact your obligations to students?

All of these issues should be assessed so your school can establish an appropriate policy and internal procedures for managing gender identity requests. This may mean that your school should use different pronouns, names, adjust the dress code, think through field trip accommodations, bathroom usage, sports, and many other issues. This is an area that schools should seek counsel through the entire process, including training for the community.

## **5. Social Justice Issues**

It is clear that 2020 reignited a movement for social justice, including in schools. Many schools were surprised to find that members of their community, long silent on inequities, have now spoken up about a variety of topics. These include how disciplinary processes were handled in the past; how students are selected for important resume building positions, such as school president or conduct committee appointments; the makeup of the community, including its faculty and administration; and how the school's curriculum may be viewed as lacking or not properly portraying many important historical events.

Schools should be prepared to continue with this journey for many years and to seek guidance from outside professionals to help establish their process in a way that will be deemed just and fair by the community.

Administrators must understand that these issues are hard to balance because, as your school adjusts to being more inclusive and sets goals for admissions or hiring, others may feel excluded, which could lead to discrimination claims. The recent Harvard admissions case and others filed in its wake reflect that any changes in your processes to be more inclusive must be drafted carefully and implemented appropriately with advice of counsel.

Moreover, students and employees need to be guided on how to talk about social justice and racial justice issues sensitively, consistent with the school's mission, values, and expectations. Putting appropriate policies in place these discussions and expectations will be a helpful starting point, recognizing that all such processes should be subject to adjustment and revision as your community's expectations and needs grow.

## **6. Residual Impact Of Receiving A PPP Loan**

Any school that received a PPP loan became obligated to comply with Section 504 of the Rehabilitation Act and Title IX of the Education Amendments, among other laws. Until the PPP loan is fully paid or forgiven, these obligations continue and impact admissions, accommodations, how you address discrimination complaints, and other decisions your school may make. If you have used the money to pay mortgage interest, for

example, your school's obligations extend for the life of the building. If you are unsure of your obligations or processes that should change within the school, you should consult your school counsel.

## 7. Pay Equity

We are beginning to see more claims for pay equity issues in school. [As outlined in our recent Alert](#), pay equity claims will likely rise under a Biden administration given that work began in these areas when Biden was vice president. The implementation of the Paycheck Fairness Act and the expanded reporting of compensation information in the EEO-1 will provide information and incentives for more claims. Pay equity claims often result from a failure of the school to have a standard process in establishing and assessing pay, benefits, and other perquisites of employment. Often, stipends, car allowances, deferred compensation, and other benefits may skew the picture when comparing employee salaries.

Should you have questions or need assistance in managing any of these issues, contact your Fisher Phillips lawyer, [the author](#), or any member of our [Education Practice Group](#).