

Can colleges enforce rules designed to prevent coronavirus spread?

Schools are asking students and staff to adopt new behaviors and practices on campus, but it's not clear what they can do if people don't comply.

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Purdue University's plan to reopen this fall expects all community members to socially distance on and off campus. But more than 90% of staff, faculty, postdocs and graduate students think undergraduates won't do it.

That number comes from an early June survey of more than 7,200 people by Purdue's faculty senate. Its chair, Deborah Nichols, a professor in the Human Development and Family Studies department, said the university was not clear on how it would enforce those safety requirements.

"We did ask several times. And we have gotten, 'Well, the first step is to educate. And if you educate them, people will listen, and let's start there,'" Nichols said. "And I kept saying 'Well, that's not reassuring.'"

Purdue's Office of Marketing and Media did not respond to Education Dive's requests for comment.

Reassured or not, campuses are facing those questions as they plan whether to reopen this fall. Although many — like Purdue — are making safety rules for students, it's not clear how they will

approach enforcement. Particularly with regard to off-campus behavior, institutions have a limited ability to control what students do. And mechanisms that would give them some control, such as requiring students to sign formal contracts, risk sending the message campuses aren't safe.

"Virtually every institution I'm working with is at least considering something (like a waiver or contract)," said James Keller, partner and chair of the higher education practice at law firm Saul Ewing Arnstein & Lehr in Philadelphia. "But (they're) concerned about the optics and whether that's consistent with their institutional values."

A softer approach

Around 60% of institutions were planning in-person fall semesters as of early July, according to The Chronicle of Higher Education, which is tracking fall plans for more than 1,110 campuses. Another 26% were planning hybrid models, which would include a mix of online, in-person and blended classes.

Administrators who plan to reopen their campuses have been creating detailed health and safety protocols for doing so. Purdue's plan, for example, calls for social distancing in classrooms, ending on-campus instruction at Thanksgiving, aggressive disinfection and contingency plans in case of a major outbreak. Importantly, all students, faculty and staff are being asked to sign and follow the Protect Purdue Pledge, which requires them to wear masks, socially distance, get flu shots and wash their hands often.

No government agency requires schools to make these rules, said Audrey Anderson, counsel at Bass, Berry & Sims in Nashville, Tennessee, and a former general counsel of Vanderbilt University.

"You don't have a law you can use that says, "Students and faculty, we're doing this because the law requires it," she said. "But there are lots of things ... we require of students and faculty even though the law doesn't necessarily require it."

That might include safety rules in dorms or science labs, she said. Keller added that these codes of conduct generally can extend off campus, if behavior there can impact the institution.

So far, schools seem to be taking one of two approaches. Some are amending existing honor codes, housing contracts or other documents to require behavior that prevents the spread of the virus. Other institutions, such as Purdue, are laying out those expectations in new documents and asking students to sign them.

Colleges may be reluctant to overtly require students to sign contracts or waivers, because it could communicate that they expect to expose students to the virus, or come off as too authoritarian for a community of young adults. Neal Hutchens, chair and professor in the higher education program at the University of Mississippi, expects schools to start gently.

"I think institutions really are not wanting to have those kinds of standoffs with students," he said. "What they're hoping is that through outreach and education and being part of a community, people will want to cooperate."

Unclear risks

If schools think these rules matter, they'll eventually have to enforce them, Hutchens said. And if that becomes necessary, Keller said schools would have to argue that such pledges are enforceable contracts. Having a student's signature on these documents could help.

"You can say it's just part of your code of conduct," he said. "But if you actually got into a legal fight with a student who says, 'I refuse to wear a mask,' a legal hook to enforce that provision would be, 'No, this is a contractual relationship.'"

Enforcement might vary according to the institution and what information was included in its pledge. But because students will also be paying for a semester of instruction, penalties are unlikely to include being barred from classes altogether. Anderson suggested scofflaws might be moved to online-only classes, just as students can be removed from on-campus housing for housing contract violations.

Schools have a strong incentive to create some kind of right to enforce coronavirus-related restrictions. The institution may be held liable in hundreds of cases in the event of an outbreak. That's an expensive prospect for colleges already suffering financially because of the pandemic. Schools have asked Congress for protection from liability, but that's not a sure thing.

There may also be concerns about lawsuits from students, faculty or staff who feel their rights are being violated by coronavirus safety requirements. As an attorney, Anderson was skeptical about the viability of claims that requirements to wear a mask violate individuals' constitutional rights. But, she said, public universities are bound by the Constitution and could be vulnerable to a claim that social distancing rules violate students' First Amendment right to freedom of assembly. They may also be vulnerable to political backlash in the state legislatures that control their budgets.

Private universities are free of those constraints, though they're still bound by other federal laws.

In Keller's experience, schools are more concerned about lawsuits over coronavirus infections. Uncertainty is part of the problem. This kind of lawsuit alleges the school failed to take reasonable care with campus safety — yet it's not clear what constitutes reasonable care, or how America's public health crisis will look come fall.

That lack of certainty is why institutions are pushing elected officials for liability protection, and asking students to sign documents that could be interpreted as contracts. The documents don't show that schools are taking reasonable care. Rather, legal experts said, they end-run around the problem by making it difficult for students to bring a viable claim. If they do sue, the school could use the document to argue that the student agreed to assume the risk or, in the case of a waiver, agreed not to sue.

"It's very hard to manage the risk when we're not even sure what the risks are," Keller said

In the end, campuses that reopen may have to accept they're running living laboratory experiments, Anderson said.