

HUSCH BLACKWELL

COVID-19 Contact Tracing and Campus Testing

Return-to-Campus Considerations Series Episode 1

Speaker	Statement
Deweese	<p>Welcome to Return-to-Campus Considerations. I am Mary Deweese and I'm joined by my colleague Ragini Acharya.</p> <p>Return-to-Campus Considerations is a limited series aimed at assisting institutions of higher education in preparing for the return of students, faculty and staff for the Fall 2020 semester, in light of the COVID-19 pandemic. This series will address legal issues and practical considerations that colleges, universities and other institutions of higher ed should keep in mind as they plan for and begin this semester.</p> <p>Both Ragini and I are associates at Husch Blackwell. I am in the Education PSC and I work in our Chicago office. Ragini is in the Healthcare Regulatory PSC and is based in Denver.</p> <p>We're excited to talk to you today about contact tracing and campus testing as our first installment of the Return-to-Campus Considerations series.</p> <p>We want to start today by talking about the basics of contact tracing. Contact tracing is a tried and true public health measure that's been used successfully in the past to combat communicable diseases. In the context of COVID-19, it's going to need to be executed on an even larger scale, given the unique challenges from the virus, including the fact that the virus can be asymptotically spread.</p>
Acharya	<p>Why should institutions of higher education care about contact tracing?</p>
Deweese	<p>That's a great question. Colleges and universities pose unique challenges for COVID-19, given that they have a unique culture. People are living together, working together, they are going to classes together and just generally are around each other a lot more than people are in ordinary communities. And therefore, the risk of transmission within colleges campuses and universities is a lot higher than it is in outside communities.</p>
Acharya	<p>So, if a college or university wants to develop, or is in the process of developing or has developed a contact tracing protocol, what should they be concerned about? What steps do they need to know?</p>
Deweese	<p>That's a great question. So, there's four main components of contact tracing. First, it's identifying and notifying those cases of COVID-19 that are confirmed or probable and then providing those cases with instructions on isolation and treatment, including keeping themselves away from others for a certain amount of time, and then also working with the local and state health</p>

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	<p>departments to have those people identified. Then you want to interview those people, those cases, to identify who they may have come into contact with, and then once those cases are identified, locating and notifying those contacts of their potential exposure and then interviewing them to determine if they have symptoms, offer testing and arranging care, to the extent those contacts have symptoms. You also want to provide instructions to these contacts on quarantine, because even if a contact hasn't had any symptoms, because of the risk of asymptomatic spread, contacts without symptoms still need to quarantine. And then, obviously, the last part would be to monitor the contacts for 14 days after exposure.</p> <p>So, in the context of this first step for contact tracing, how are cases identified in the first instance?</p>
Acharya	<p>So, as a general matter, persons who are positive for COVID-19 are identified through positive COVID-19 tests, but this relies on a person coming in to get a test and generally that would happen because they were having symptoms. And as a recent Department of Homeland Security (DHS) update found, approximately 40 percent of COVID-19 cases are asymptomatic and that even though that's such a high percentage of people who actually have no symptoms of COVID-19, they can still transmit COVID-19 to someone else who may then have symptoms. In fact, DHS has found right now that about 12 percent of cases are due to asymptomatic transmission and anywhere from 23-56 percent of cases are due to pre-symptomatic transmission, or that is, somebody becoming infected with COVID-19 due to exposure to somebody who has it but has not yet developed symptoms. And just as you were talking about, this asymptomatic transmission can be especially an issue on a college campus.</p>
Deweese	<p>So what are some strategies that can be used to address this asymptomatic spread problem?</p>
Acharya	<p>Great question. Because, as you probably identified by the question, if you're relying on students to come into the clinic with symptoms for your contact tracing protocol, it's not going to be as robust as you need it to be, due to the fact that many students aren't going to have symptoms. So there are a few different strategies that we have seen colleges and universities using and a few that we also can think through as practical matters that could work.</p> <p>The first is that different colleges and universities are requiring testing for all students prior to their return to campus. Some are requiring that a student has a negative COVID-19 test within 14 days prior to coming to campus, some say within 10 days, some say within 3, etc. Others are requiring this sort of initial return-to-campus testing, but doing it on campus. And then there are other institutions of higher education that are requiring regular testing, and this might be kind of a universal testing for everyone, regardless of symptoms on</p>

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some sort of periodic basis. It could also be random testing, regardless of symptoms. And then you could also do sort of an in between, where you have students self-monitor their symptoms and if they're feeling symptoms, require a test even if the symptoms aren't high enough for the student to have gone to the health center in a non-pandemic world, let's say.

So, these are all strategies and different ways to look through your testing protocol that really tie into making sure that your contact tracing system is as robust as it can be.

Deweese That's really good advice. Are there any other recommendations from the CDC or any other organizations that should be considered for institutes of higher education?

Acharya	<p>Yes. As a preliminary matter, we really recommend that you consult with your local and state public health boards, whether that's your state department of public health or a county agency, local hospitals, etc., because they might have the most updated recommendations that are really more specific to the area you're in and what sort of outbreak your local area is experiencing.</p> <p>The CDC currently does not recommend entry testing of all returning students, faculty and staff, and this is because they say it's unknown if this sort of entry testing, that means one initial test at the beginning of the semester, will provide any additional reduction in person-to-person transmission beyond what would be expected with other measures, such as wearing a mask, social distancing, etc. But the CDC has recommended testing for COVID-19 on an initial and periodic basis for early identification of asymptomatic individuals in settings where COVID-19 may spread rapidly. And that could very well be a college campus, particularly if you're highly residential.</p> <p>And again, these are just recommendations from the CDC. They're not binding guidance, they're just one more thing to think through. And again, we recommend you consult with your local and state public health agencies as well, to see what they are recommending regarding initial testing, periodic testing, random testing, universal testing, etc.</p> <p>Now, if you are going to adopt a testing protocol, particularly one that goes beyond the testing of students, faculty and staff who are coming forward with symptoms asking to be tested, there are some legal considerations. You might be faced with students and employees who are questioning what the university's authority to require testing is.</p>
Deweese	<p>That sounds a lot like people that are fighting against vaccines and diagnostic screening.</p>
Acharya	<p>Great point. It may very well be that these testing requirements, and even contact tracing as a whole, is somewhat analogous to proof of vaccination and diagnostic screening requirements that many universities already have. We</p>

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	<p>know that state law in the K-12 context even, you know, states can require that before students come to school, they have to have a proof of vaccine. And there are exceptions for this on certain grounds, it varies by state. But in many ways, an initial testing requirement to show that you have a negative COVID-19 test is not that different than requiring students to show that they have a negative TB test or something like that.</p> <p>But another consideration, especially for our public universities, is that they have to comply with the Fourth Amendment.</p>
Deweese	<p>So, I know that the Fourth Amendment requires that the government searches be reasonable, but what does this mean in terms of COVID-19? Does the university warrant to conduct a COVID-19 test?</p>
Acharya	<p>Great point. You're right, the Fourth Amendment requires that a search has to be reasonable, and usually that means the government has to have a warrant and probable cause before doing searching. There are exceptions to this requirement, though, and just to back up a second, for a public university, a test is a search. A medical test, a diagnostic test like this is likely, very likely to be considered a search, so the search either has to be supported by a warrant or it has to fit an exception. And one of the big exceptions for when the government or a public university doesn't need to have a warrant is that there is knowing and voluntary consent for the search. So, if your students and staff consent to being tested and to participate in contact tracing, then you don't need a warrant and there is no Fourth Amendment violation. One thing you need to think through is whether this consent is truly voluntary, if it's conditioned on your return campus. If your return to campus is conditioned on you giving consent.</p> <p>There is no one clear answer to this question. It's very fact specific. For example, what other options do your students have? Can students who don't want to return to campus take online classes, etc.? So it's just something to keep in mind and, really, to work through with your legal counsel.</p> <p>The other exception that doesn't require consent is what's known as a special-needs exception. And this says that a warrantless, suspicionless search, that means you can, in this context, test someone without even having any idea whether or not they might be positive for COVID-19. They don't need to be showing symptoms, etc. That sort of warrantless, suspicionless search may be reasonable where a special need beyond like a law enforcement need makes the warrant impractical and there's a legitimate government interest that outweighs the Fourth Amendment intrusion. It just means, in this context, that the college's or university's interest in mitigating the spread of COVID-19, and I'm using the word mitigate and not prevent because we know that there's nothing that can guarantee that this will be prevented, but the school's interest in mitigating that spread outweighs the intrusion on your individual privacy</p>

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	<p>interest that happens through a test.</p> <p>Different circuits have different balancing tests. In the 7th Circuit, one of the concerns, one of the factors you need to consider in this balancing test is the efficacy of the particular means used to address what the government has issued as a problem. So here, it is how do you make sure that the test is effective at mitigating the spread of COVID-19? And that relates back to something we discussed earlier, which is that the CDC has said that it is unknown if entry-only testing will be effective at mitigating spread, but that initial periodic testing may be more effective. And again, the CDC is just one recommendation. There are others out there, so you need to really think through what your testing protocol and what your contact tracing protocol – how that is kind of narrowly tailored to mitigate the spread of COVID-19. So to the extent that you can make sure testing is minimally invasive, and there’s different sorts of tests out there, the more you can make them minimally invasive, the better.</p> <p>Private universities have to consider whether there are challenges to their legal authority to do this sort of testing as well, but if you’re a public university, you are going to especially want to consider making sure you get knowing and voluntary consent or to make sure that your testing meets this balancing test where it’s actually going to be effective at mitigating the spread of COVID-19 and it’s narrowly tailored to meeting that need.</p>
Deweese	<p>So have there been any Fourth Amendment or other similar challenges in the context of IAG or is this something that’s completely unknown territory?</p>
Acharya	<p>This is a really novel situation. There is just, to be frank, no guarantee how a court is going to rule if a college or university is sued relating to a testing program. But in the K-12 context, we know that there are specific court decisions on when it is reasonable to do a suspicionless test for drugs, let’s say, and courts have found that drug tests that are for athletes only versus for drivers, etc., there are all sorts of considerations.</p> <p>And there is also some case law in the government as a whole, like state government’s, federal government’s authority to require vaccinations or require quarantine even. Historically, there’s some really low case law, but for the most part, no, there’s really not a lot of legal precedent for what’s going on here, particularly specific to a college or university or specific to any sort of educational institution responding to a public health crisis. That said, if you’re concerned about your legal liability by having a testing program, you also need to be concerned about your legal liability if you <i>don’t</i> have one. If you have no measures put in place to mitigate spread, there is a concern there that you are not doing enough for what’s on campus. And this doesn’t mean you need a testing program or need contact tracing. There might be other things you do, it might be social distancing, it might be masks, it might be going online for the</p>

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	semester only, but you just want to show that you carefully thought through your testing program, consulting not only with legal counsel, but also with public health experts.
Deweese	So, what should institutions of higher ed do to implement contact tracing and campus testing programs?
Acharya	That's a really good question, and I think the most important thing is to have a solid set of policies and procedures that can be implemented and monitored and updated as necessary. These policies and procedures should address several important items. First and foremost, they need to address the processes around isolation for cases and quarantine for close contacts and also include definitions for these.
Deweese	So when you say definitions, how might a college define close contact and what considerations should they have in mind when they're thinking of that definition?
Acharya	<p>All the colleges across this country are very different and they need to take into account their unique environments, unique settings. So small universities might differ in their definitions than a big university. For example, a close contact may be defined by how close you are in proximity to another person and for how long a period of time. For example, you may define it as something as simple as being within six feet of a person for 15 minutes or more. And then also defining what is <i>not</i> a close contact is also important. So incidental exposures, like walking by somebody in a hallway or using the same desk or equipment, or being just in the general same area as them shouldn't be considered a close contact for certain universities. But like I said, every university is different and they need to take into account their unique characteristics when they develop their policies on this.</p> <p>Another thing that the policy should address is setting up a workforce and training that workforce on contact tracing and testing protocols. The workforce needs to be able provide its individuals with education and information so that they can fully understand what's happening with respect to the pandemic within the college environment.</p>
Deweese	So what information does the workforce need to be able to give cases and close contacts?
Acharya	That's a good question. Most important, I think, is how to quarantine and isolate, and also for cases and contacts to understand how to monitor themselves for illness and symptoms. Also, very important is to understand, cases and contacts need to understand, that it is still possible for them to spread the infection to others, even if they do not feel ill. Like we've said before, asymptomatic spread is a thing with COVID. It's an issue and it's something

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	<p>that, particularly in the college environment with the constant close contact of the people that live there and work there, something that they really need to be mindful and careful of.</p> <p>Another thing that the policy should consider is clinical consulting and case reporting. They need to make sure that if there is a testing protocol in place, it's something that can actually be implemented by the college or university, whether that's in-house or the college or university is using external providers or labs. The college should make sure it has a pool of providers in place for clinical consultation by telemedicine, to the extent it's using external providers. And then in addition, it's going to require – effective contact tracing requires timely and complete case reporting by the public and commercial labs and medical care providers, and making sure that these reports are linked to the Health Department's case management systems. And then also, these policies should make sure that they address what's going to happen in terms of facilities for quarantine and isolation.</p>
Deweese	<p>That's a really interesting point. I've seen colleges and universities doing different – have in place different formats for what they're going to do with students who are in isolation and quarantine. And you know, some of this actually came up several years ago now during the H1N1 pandemic, which was obviously much smaller in scope than we're seeing right now, but a few colleges and universities around the country did have to help students quarantining and we're seeing again now that universities and colleges on a much broader scale now have to have a plan for quarantine and isolation. And I think a big question that I've seen, especially for, you know, this mainly involves our residential dorms, is what do you do with students? What do you do with roommates? So are you keeping the quarantined student in the dorm, kind of in their room and that you're giving their roomie another place to go to, or are you just doing vice versa, that sick students who are exposed, students are kind of put somewhere else for their quarantine period? Or, is there a protocol that where roommates who've both been exposed because they're sharing a room together so they're both having to quarantine and then they can do it within the dorm? And to the extent that colleges are using external, outside the dorm plans, where are getting those external rooms? Are they renting space in hotels? Are they setting aside entire separate dorms on campus for quarantine?</p> <p>And then we've also seen this – how do you get food to these students who are quarantining? Who is going to be delivering their meals from campus meal services and does that person have appropriate PPE to give them the meals, etc.? So, the truth is, there are a lot of considerations with planning for students who are going to be isolating and quarantining, and there's no one right way to do it. But colleges and universities really need to think through what's the best option for their campus.</p>
Acharya	That's a great point, and in line with that, in kind of in our next item that we'd

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	<p>want to have addressed is, communication is going to be of utmost importance in communicating these types of policies to the students and to the staff and faculty will be really important. And in that line, the university should consider either appointing one person or a team of people to be responsible for responding to COVID-19 concerns. The students, staff and faculty should all know who this person or group of people are and how to contact them, and the policy should make it be accessible to the students and staff and faculty such that they have easy access to know what these lines of communication are.</p> <p>In addition, the IAG should continue to engage, not only within this community, but externally as well, with local community leaders and local state and local government to make sure it has the most up to date information. It can even leverage local media outlets, host a hotline or have another way for the public or the outside of campus individuals to contact the campus to gain more information. But basically, this all falls under the main umbrella of understanding that the more communication you have and the more you know, the better chance you have.</p> <p>Another thing the universities need to think about is deciding what kind of contact tracing methodology they going to use. They could start with something as simple as self-reporting, which may work for a very small university or a very small college, but more likely, something along the lines of low-tech tracing, which would involve assigning seating in classes or libraries or labs to make sure you have a record of where students sit within classrooms and where students live within dormitories, to really keep consistent tabs on who their consistent contacts are.</p> <p>Another option would be to implement an app of some sort, or some sort of digital tracing that using GPS or Bluetooth technology.</p>
Deweese	Doesn't that raise some privacy concerns?
Acharya	<p>Yes, and I'm really glad you brought that up. Another thing that the policy should address is how to develop and implement these effective digital apps or tracing mechanisms, but be privacy-compliant at the same. In addition to that, these privacy concerns also need to take into account what state law says. For example, Kansas requires that participation in any contact tracing apps have to be voluntary and that the apps may not collect information through cell phone tracking and not use any information through cell phone tracking. And they can only be used for contact tracing purposes. Any information that is collected must be kept confidential. So for all of these types of things, the policy should address the privacy concerns on the front end rather than worrying about inadvertent disclosures on the back end.</p> <p>Again, and taking all of these points together, I think it's important to keep in mind that the COVID-19 landscape is changing on a day-to-day basis. We get new information from CDC very frequently, and so it's important that the</p>

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	<p>policies are kind of a working document, a living document, and that they are updated on a routine basis, reviewed and assessed to see if they still work. And obviously, as we've said before, it's very important to check in with your local counsel and your state and local health departments for more information that could be specific to your area and university.</p>
Deweese	<p>Thank you so much for joining us. We hope you found the information we shared with you today useful. Again, we are Mary Deweese and Ragini Acharya. Please reach out to either of us if you have any questions. Our contact information is on the slides accompanying this audio, or if you're listening audio-only, you can find our contact information online at huschblackwell.com.</p> <p>And please be on the lookout for the next installment in the Return-to-Campus Considerations series.</p>