



## Lawyers New to Higher Education Online Course

October 8, 2020

# 08 Contract Administration

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## **CONTRACT ADMINISTRATION**

October 8, 2020

**Chris Melcher**

Vice President Legal Affairs/General Counsel  
Augusta University

### **POLICY STATEMENT**

This policy provides an overview of the process of negotiating and executing contracts involving the [Institution]. Unless specific example is provided below (see Process/Procedures), all contracts involving [Institution] **must** be executed in accordance with the terms of this policy.

### **REASON FOR POLICY**

This revised policy is designed to more clearly delineate the process and procedures required for the approval of contracts, as well as outlining the duties of individuals responsible for negotiating, reviewing or approving the contract.

### **AFFECTED STAKEHOLDER AND ORGANIZATION(S)**

This policy affects all [Institution] employees.

### **DEFINITIONS**

This policy uses the term “contract” to mean any document that creates an obligation, right, or liability for [Institution]. A contract may or may not involve the payment of money. Such a document may be called a Contract, an Agreement, a Memorandum of Understanding, a Letter of Agreement, or similar terminology. Examples of contracts covered by this policy include, but are not limited to, affiliation agreements, clinical service agreements, business associate agreements, collaborative agreements, continuing education agreements, consulting agreements, licensing agreements, material transfer agreements, and research agreements (sponsored and non-sponsored). This policy applies to the initial contract and to every amendment, renewal or extension of such a contract.

### **PROCESS & PROCEDURES**

The office/division/department (“originator”) responsible for implementing and managing the contract must conduct a due diligence review to evaluate the contract’s benefits and risks to [Institution]. The Office of Legal Affairs stands ready to assist and participate in all phases of contract drafting and negotiations. Following the preliminary review by the originator, a contract must be reviewed and approved by the applicable department chair/office head, and dean/vice president. Additionally, certain contracts require review by particular offices. Prior to final approval or execution of any contract

involving [Institution] the contract must be submitted to the Office of Legal Affairs for legal review and approval.

[Institution] will only be bound by written contracts reviewed and approved in accordance with this policy and executed by employees with written signature authority. A contract executed in conflict with this policy may be invalid as a matter of law, and, the President of [Institution] may determine such a purported contract to be void from inception. Failure to follow this policy may potentially result in individual personal liability for any person who signed the contract on behalf of [Institution].

Certain Contracts / Transactions Excepted From This Policy. Certain contracts, because of the parties involved or because of the contract's size or nature, are governed by other entities' contracting procedures or are otherwise excepted from this policy. The following are examples of contracts excepted from this policy.

- a. Purchasing Contracts. The authority to execute Purchasing agreements flows from the [State Authority] rather than from the Board of Regents or the President. Accordingly, Purchasing agreements are governed by the [State Authority] policies. ([State Authority] purchasing policies may be found at: [hyperlink] Purchasing contracts involve the expenditure of funds by [Institution] to procure supplies, materials, equipment and services. Examples of a Purchasing contract include an agreement for [Institution] to engage a consultant, to purchase office furniture, IT software or PC hardware, to rent a venue, or to hire a caterer; such contracts are handled by the Purchasing Department (Materials Management). In contrast, contracts where [Institution] is selling a product or service, such as an agreement whereby [Institution] provides one of its employees as a consultant to someone else, would not be a Purchasing contract. If necessary, either the Purchasing Department or the Office of Legal Affairs may assist in determining whether a contract should be handled by the Purchasing Department.
- b. Contracts by Affiliated Entities. Because our affiliated entities are legally separate from [Institution], a contract between an affiliated entity and an unrelated non-[Institution] third party should be executed in accordance with that affiliated entity's policies. Examples of such affiliated entities are [Institution] Health, Inc, [Institution] Research Institute, or one of [Institution]'s philanthropy foundations. However, a contract between [Institution] and an affiliated entity, such as [Institution] Health, Inc. or [Institution] Research Institute is subject to this policy.
- c. Certain Departmental Sales Transactions. Many [Institution] departments are authorized to provide certain services or products to customers, both internal [Institution] customers and external public customers. Sales of such services and products are provided as an adjunct to a department's instructional or research activities and support or relate to [Institution]'s mission. Departmental sales that are made not pursuant to a contract, but rather are simply invoiced, need not be routed for approval pursuant to this policy. However, such sales, must nevertheless be properly documented in accordance with applicable accounting standards and procedures.
- d. Standardized "Form" Contracts. Certain transactions are, relatively, routine in nature and involve the use of a standardized "form" contract that has undergone prior review and approval by the Office of Legal Affairs, and has no material or substantive changes to the pre-approved form, are not required to be routed to the Office of Legal Affairs for Approval. A few examples of such standardized "form" contracts and where they may be found are:

- (1) Faculty employment contract forms (found at the Board of Regents Academic Affairs Handbook, Section 4. “Academic Personnel”,
- (2) [Institution] House Officer Notice of Appointment Form (found at [Institution]’s Graduate Medical Education website;
- (3) [Institution] Residence Life Academic Year Housing Agreement (please contact the Director of Residence Life);
- (4) Athletic Competition Contracts; and
- (5) Clinical Trial Form Contracts.

Determinations about whether a contract is a “form” should be made in consultation with the Office of Legal Affairs. If you believe a contract should be treated as a standardized “form” contract, please contact the Office of Legal Affairs for assistance and review.

Negotiating and Drafting the Contract. The originator responsible for the preliminary review of a contract should be aware that [Institution], as a state entity, is prohibited from agreeing to certain provisions, such as attorneys’ fees, confidentiality, damages, indemnification, and intellectual property. See **Attachment A: Items To Consider When Drafting A Contract**. The originator responsible for conducting the necessary due diligence evaluation of a contract should also consult and be aware of the concerns and items generally considered due diligence. See **Attachment B: Due Diligence Considerations**.

Ethical Considerations. Everyone involved with a contract has a duty to disclose and manage any conflict of interest. For guidance, see below a summary of laws, policies and regulations regarding conflict of interest: <http://>

Routing the Contract. The originator is responsible for utilizing the approved routing form and securing the appropriate approvals prior to signature. See **Attachment C; [Institution] Contract Routing and Approval Form**. Once all necessary approvals have been obtained, the Contract Routing and Approval Form and at least two originals of the contract **must** be sent to the Office of Legal Affairs. The Office of Legal Affairs will review the contract for legal issues and forward it to the appropriate [Institution] official for execution, or return the contract to the originator with suggested revisions or questions. When any necessary changes have been made to the contract, the Office of Legal Affairs shall affix a stamp on the final contract near the signature line “Approved, Office of Legal Affairs” with the approving attorney’s initials printed by the stamp. No further changes shall be made to the contract once the stamp has been affixed.

Signing the Contract. All contracts involving [Institution] must be signed by an [Institution] official with the appropriate signatory authority. The President has the authority to sign all contracts for [Institution],

and the President has delegated that authority in part to various institutional officials. The list of [Institution] officials or departments that have been given signature authority is listed in the Delegation of Contract Authority. See **Attachment D: Delegation of Contract Authority**. An official with signatory authority from the President may not further delegate that authority to anyone else. If the appropriate official is unavailable to sign a contract, it must be routed for signature to the President or to another official with signatory authority.

As with all contracts, the [Institution] official who signs the contract has a duty to give due consideration to the meaning of the document, and the risk and benefits it may bring to [Institution]. He or she also has a duty to disclose and manage any conflict of interest. The official who signs the contract must return an original of the signed contract to the Office of Legal Affairs, as the repository of [Institution]'s original signed contracts.

Managing the Contract. The originator of the contract is responsible for managing the contract. This includes ensuring that [Institution] fulfills its obligations, that the other party fulfills its obligations, and that all necessary payments are timely sent or collected as appropriate. This also includes tending to any necessary renewals or amendments to the contract. The Office of Legal Affairs is available to assist with any questions or concerns that may arise in managing the contract.

Responsible Parties. The responsibilities each party has in connection with this policy are:

[Institution] Contact Person for Contract	Has primary responsibility for preliminary review of the contract, conducting necessary due diligence, and obtaining required information. Certifies to his/her best belief that the contract is in [Institution]'s best interest, is consistent with [Institution]'s mission, and that [Institution], and other contracting party if a non-profit organization, can meet their respective contractual obligations. Oversees routing the contract and its implementation and management after execution.
[Institution] Finance Division	Reviews all revenue producing contracts.
Division of Information Technology Support and Services	Reviews all contracts that involve information technology
Division of Sponsored Program Administration	Reviews all sponsored agreements.
Department Chair/Office Head/Center or Institute Director	Reviews and approves contract, representing that the contract is necessary and appropriate to the Department's/ Office's/Institute's mission and that such unit can meet its contractual obligations.
Dean/Vice President	Reviews and approves contract, representing that the contract is necessary and appropriate to the School's/[Institution]'s mission and that such unit can meet its contractual obligations.
Vice President for Academic and Faculty Affairs	Reviews and approves all contracts involving educational agreements with other universities, colleges or schools.

## **ELECTRONIC SIGNATURES**

[Institution] authorizes the use of preapproved electronic signatures, such as DocuSign, on contracts utilized in conjunction with this policy. [Institution] considers an electronic signature to be an electronic or digital signature executed by an individuals with the intent to be bound by, which is unique to the person using it, is capable of verification, and is under the sole control of the signatory. Under [State] law (State Uniform Electronic Transaction Act), an electronic signature is enforceable and is the legal equivalent of the authorized signer's manual signature.

Electronic signatures that do not incorporate security measures and which are typed, copied, pasted, drawn or embedded as an image into a document are not considered compliant with this policy and will not be recognized by [Institution] as a legitimate, authorized digital signature.

Individuals seeking to utilize an electronic signature must sign documents using software approved by [Institution]. The software must utilize signatory accounts that authenticate users by password, and produce a time stamp for the digital signatures,

The enforceability, construction, interpretation and validity of an electronic signature with be governed by the las of the State of [State] and the United States of America.

[Institution] may authorize the use of less formal means of electronic signatures or electronic approvals for internal [Institution] approvals, [Institution] routing form approvals, or for agreements between [Institution] and affiliated [Institution] entities. Use of less formal means of electronic signatures or electronic approvals shall be discussed with the Office of Legal Affairs and must be approved prior to implementation.

## **FORMS AND RELATED DOCUMENTS**

Attachment A: Items To Consider When Drafting A Contract

Attachment B: Due Diligence Considerations

Attachment C: Contract Routing and Approval Form

Attachment D: Delegation of Contract Authority

## **AUTHORIZING SIGNATURE**

[Name]

[Title]

Responsible Office: Legal Affairs

Originally Issued: [Date]

Revised:

## ATTACHMENT A

### ITEMS TO CONSIDER WHEN DRAFTING A CONTRACT

The Office of Legal Affairs has set out below various items that may arise in contract drafting and negotiation. To discuss these items or other issues, please call us at [Phone #].

#### ---Arbitration / Alternative Dispute Resolution

[Institution] should not agree to a clause that provides that any future disputes be resolved through binding arbitration or other form of alternative dispute resolution because [Institution] does not have the authority to limit the type or scope of judicial action that the State of [State] may bring or the type of relief that the State may seek.

#### ---Assignment

[Institution] generally does not agree to allow the other party to assign its rights under the contract to a third party. We suggest inserting the following language: “This Agreement shall not be assigned by either party without the prior written consent of the parties hereto.” Note that in research agreements involving [Institution] Research Institute, Inc., the contract should specifically provide that the parties consent to the subcontracting of the research to [Institution].

#### ---Attorneys’ Fees / Costs

[Institution] should not agree to a provision that awards attorneys’ fees and costs to the prevailing party in any dispute arising out of the contract because [Institution] does not have the authority to obligate the State to such future unspecified costs.

#### ---Complete Agreement (or Merger) Clause

The contract should contain a “complete agreement” clause, which incorporates all prior representations made during negotiations into the current contract and provides that the representations set forth in the contract are the only representations that bind the parties. We suggest inserting the following language: “This document contains the complete agreement between [Institution] and [other contracting party], who stipulate that they, including persons acting on their behalf, have made no representations with respect to the subject matter of this Agreement except such representations as are specifically set forth herein and that any other representation not contained in this Agreement is not binding.”

#### ---Confidentiality

The other contracting party may attempt to keep information that it provides to [Institution], and even the terms and condition of the contract itself, confidential. Generally, [Institution] may agree to use that care which it uses to protect its own confidential information not to disclose to any third party information provided to it by the other contracting party. However, the contract must clearly identify certain specific instances where such an obligation of confidentiality does not apply. One of these

instances involves information required to be disclosed by law, regulation or court order, including but not limited to the Open Records Act, which controls the disclosure of information once such information becomes a state record. If confidentiality is an issue, please contact the Office of Legal Affairs.

---Damages / Limitation of [Institution]’s Liability

[Institution]’s liability under a contract should be limited to the amount of monies that [Institution] receives from the other contracting party. We suggest inserting the following language: “In no event shall [Institution] be liable for any indirect, consequential, special or incidental damages whatsoever, for losses that may arise out of the performance of this Agreement, whether based in contract, tort (including negligence) or otherwise. Any damages arising under this Agreement for which [Institution] may be liable for any purpose whatsoever shall be limited to the monies actually paid by [other contracting party] to [Institution].”

---Damages / Limitation of Other Contracting Party’s Liability

It is generally unacceptable to [Institution] for the other contracting party to limit its liability for breaching the contract, to restrict the remedies or relief that [Institution] may seek in the event of a breach, or to disclaim express and/or implied warranties. If the other contracting party is attempting to limit its liability in these or other ways, please contact the Office of Legal Affairs.

---Delivery / Risk of Loss

If an item is to be delivered to [Institution], it is preferable that the contract provides that the item be tendered F.O.B. destination point. When so shipped, the risk of loss does not pass to [Institution] until the item is delivered to the pertinent [Institution] facility.

---Effective Date of Contract

Normally, a contract becomes effective when it signed by both parties. In some instances, a contract is worded such that the effective date of the contract is a date before the parties have actually signed the contract. Although this practice should be avoided if possible, if it is essential that the effective date of the contract be before the date that the parties have signed the contract, then the effective date should be referred to “as of” the date in question. Performance should not begin under a contract until the contract has been signed by all parties.

---Governing Law and Venue

The contract should state that: “This Agreement shall be governed and construed in accordance with the laws of the State of [State]. Venue for any action to enforce the terms and conditions of the Agreement shall be in [County, State].” If the other contracting party will not agree to the applicability of Georgia law and prefers that the law of another state govern, then the Agreement should remain silent on this issue. Also, [Institution] cannot agree to submit to federal court jurisdiction, regardless of where the federal court is located; doing so may constitute a waiver of [State’s] Eleventh Amendment rights under the U.S. Constitution.



### ---Indemnification / Hold Harmless / Exculpatory Clause

[Institution] does not have the authority to indemnify or hold harmless parties with whom it contracts and thus cannot agree to any contractual provision that attempts to impose such an obligation or otherwise attempts to limit the liability of the other contracting party. Similarly, [Institution] cannot agree to a provision that exculpates, or excuses, the other contracting party's fault or liability. In addition, if the other contracting party attempts in any way to limit its liability, such as only to acts of "gross" negligence and "willful" misconduct, please contact the Office of Legal Affairs.

### ---Independent Contractor Status

When [Institution] contracts with outside third parties, the contract should include language that makes clear that the parties are independent contractors. We suggest inserting the following language: "[Institution] and [other contracting party] shall be deemed to be and shall be independent contractors. Neither party is authorized or empowered to act as agent for the other for any purpose and shall not on behalf of the other enter into any contract, warranty or representation as to any matter. Neither party shall be bound by the acts or conduct of the other."

### ---Insurance

For insurance purposes, [Institution], as a state agency, is covered by [State]'s Department of Administrative Services' State Tort Claims Policy and General Liability Agreement. As such, [Institution] cannot agree to contractual provisions that require [Institution] to purchase private insurance policies, to obtain insurance from a particular carrier or in an amount acceptable to the other party to the contract, or to name the other party to the contract as an insured beneficiary. If the other party wants to reference [Institution]'s insurance coverage in the contract, we suggest inserting the following language: "[Institution] faculty members and other employees are covered by a self-insurance fund administered by the [State] Department of Administrative Services. This coverage has limits of not less than \$1,000,000 per occurrence and \$3,000,000 aggregate." You may also provide the other party with a copy of the Department of Administrative Services' Certificate of Insurance. To obtain a copy of the Certificate of Insurance, please contact the Office of Legal Affairs.

If appropriate, the contract should require the other party to obtain (or maintain) insurance and should specify that the other party provide written proof of insurance, satisfactory to [Institution], within ten business days of the execution of the contract.

### ---Intellectual Property / Patent Rights

[Institution]'s claims to intellectual property and patent rights should be protected. If these items are an issue in the contract being negotiated, the Office of Legal Affairs should be contacted.

### ---Late Payment Fees

[Institution] does not agree to pay a charge or fee for late payment. Accordingly, sections or provisions in a contract that would obligate [Institution] to pay a late fee should be stricken.

### ---Length of Contract

Ordinarily, [Institution] does not agree to enter into a contract longer than one year in duration. Exceptions to this may exist in certain circumstances, such as if the contract does not obligate [Institution] to pay money and gives [Institution] an unrestricted right to cancel the contract at any time. If you believe that it is necessary to enter into a contract for a period longer than one year, please contact the Office of Legal Affairs. Contracts may also be renewed. See Renewal of Contract below.

### ---[Institution] is not Contracting Party

[Institution] does not, nor do its schools or departments, have the legal authority to enter into a contract in its own name. [Institution] is a unit of the Board of Regents of the University System; the Board of Regents enters into contracts on [Institution]'s behalf. Accordingly, the contract should be drafted for "The Board of Regents of the University System of [State] on behalf of [Institution]." In addition, that phrase should be included over the signature line for the appropriate [Institution] official. See Signatory Authority of [Institution] Officials below.

### ---Non-Discrimination

[Institution] prohibits illegal discrimination and favors a diversified workforce. Accordingly, we suggest inserting the following language: "Neither [Institution] nor [other contracting party] shall discriminate against any person on the basis of age, disability, gender, national origin, race, religion, sexual orientation, or status as a veteran in the performance of this Agreement."

### ---Notice

The contract should contain the full name, title, address and telephone number of a designated contact person for the other contracting party.

### ---Payment

Particularly if the contract provides that the other party will pay [Institution], the contract should clearly establish the time, place and method of payment.

### ---Renewal of Contract

As noted above, contracts are ordinarily limited to a period of one year. Contracts may, however, be renewed. A contract should not automatically renew and it should not renew without [Institution] having to affirmatively indicate in writing its agreement to renew the contract. If you desire to renew a contract beyond its initial term, the following language should be inserted: "This Agreement may be renewed for additional periods of one year each if agreed upon in writing by both parties." Contracts requiring [Institution] to expend funds may not be renewed unless the necessary funds have been appropriated.

### ---Severability Clause

A severability clause allows a contract to remain enforceable if one or more of its provisions are found to be invalid. We suggest inserting the following language: "If any provision of this Agreement is held

to be illegal, invalid or unenforceable under present or future laws effective during the term of this contract, such provision is fully severable and this Agreement must be construed and enforced as if such illegal, invalid or unenforceable provision never comprised a part of this contract. The remaining provisions of the contract shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or its severance from this Agreement.”

#### ---Signatory Authority of AU Officials

The President of [Institution] has the authority to sign all contracts for [Institution] and the President has delegated that authority in part to various [Institution] officials. The Contract Signatory Authority list, which can be obtained from the Office of Legal Affairs, shows which officials have been delegated authority to sign what type of contracts.

#### ---Tax-Exempt Status

As a state institution operating under the Board of Regents of the University System of [State] (itself a public body of the State of [State]), [Institution] is ordinarily not required to pay income or sales taxes. Accordingly, any section of a contract that provides for taxes to be withheld from payments owed to [Institution] or sales taxes to be added to payments owed by [Institution] should be deleted.

#### ---Templates

Contract templates have been developed for both clinical and non-clinical research agreements. These may be accessed at the Office of Legal Affairs website, [hyperlink]. Standardized “form” contracts have been developed for certain relatively routine transactions, such as [Institution] faculty employment contracts (accessed at [hyperlink]), [Institution] house officer notices of appointment, and [Institution] student housing leases (contact the Director of Student Services).

#### ---Termination

If the contract allows early termination by the other contracting party, the contract should also provide that the other party shall pay all costs accrued by [Institution] as of the date of the termination, including non-cancelable obligations incurred prior to the effective date of termination. In addition, the other party shall repay to [Institution] any monies that it received from [Institution] for any obligations that the other party has not fulfilled at the time of termination.

#### ---Use of [Institution] Name

It is important to prevent the unauthorized use of the [Institution] name. A contract should provide that: “[Other contracting party] shall not use [Institution]’s name in any advertising or publicity material or make any form of representation or statement in relation to the work conducted under the terms of this Agreement that would constitute an express or implied endorsement by [Institution] of any commercial product or service, and that it will not authorize others to do so, without first having obtained written approval from [Institution].”

#### ---Warranties

[Institution] should not “warrant” or make guarantees in a contract. If this is important to the other contracting party, [Institution] can agree to language that states that [Institution] will use reasonable efforts to perform in accordance with the terms and conditions of the contract.

---“Whereas” Clauses

These clauses generally appear at the beginning of a contract. They often provide background information about the parties and the reason(s) the parties are entering into the contract. Such clauses may aid in establishing the intent of the parties and in interpreting the contract should a disagreement later arise.

## ATTACHMENT B

### **DUE DILIGENCE CONSIDERATIONS**

When [Institution] enters into a contract, it enters into a relationship with another party that offers potential risks and benefits. All [Institution] personnel involved with a contract should consider the implications of such a relationship before they negotiate, draft, approve, or sign the contract. Such considerations should, at a minimum, include:

- Does a contractual relationship with the other party support the mission of [Institution]?
- What are the potential costs and benefits of the contract? Are such costs and benefit of a one-time or recurring nature?
- Does [Institution] have the ability to fulfill what would be its obligations under the contract?
- Does the other party have the ability to fulfill what would be its obligations under the contract? Has [Institution] contracted with this party before? Have other entities that have previously contracted with this party been contacted?
- Does the individual who will sign the contract on behalf of the other party have the authority to do so?
- What are the consequences for [Institution] and the other party if either failed to fulfill its respective obligations?
- Could another unit within [Institution] or within a [Institution] affiliated entity provide the “to be contracted for” goods or services?
- Will the contract impact other units at [Institution] beyond the unit responsible for managing the contract? If so, have the appropriate personnel at those other units been notified and their views solicited?
- Will the contract impact [Institution] affiliated entities (such as [list affiliated entities])? If so, have the appropriate personnel at those entities been notified and their views solicited?
- How will the contractual relationship appear to the Board of Regents, other State agencies, and the general public?
- Will the contract serve in the best interest of [Institution]?

**ATTACHMENT C [Omitted]**

## ATTACHMENT D

### **DELEGATION OF CONTRACT AUTHORITY**

Board of Regents' Policies state that authority to enter into contracts on behalf of member institutions shall, with certain limited exceptions, vest in the president of each institution. Pursuant to these policies, the President of [Institution] has delegated contract signing authority to the officers and departments as described below, effective as of January 15, 2016. The delegation authority conferred by the President may be rescinded at any time by the President upon written notification. Any delegation to a person serving in a capacity described shall be automatically rescinded upon cessation of the delegee's service in their specified capacity. The delegation conveyed may not be further delegated to any other person, or increased in any manner or amount, without prior written authorization from the President.

The delegation authority described below is further limited by a monetary restriction on the authority to enter into contracts or execute contracts limited by the following dollar amounts:

President	Maximum Dollar Amount Permitted by Board of Regents
Executive Vice President	Maximum Dollar Amount of \$500,000
Senior Vice President	Maximum Dollar Amount of \$250,000
Vice President/Dean	Maximum Dollar Amount of \$100,000
Associate Vice President	Maximum Dollar Amount of \$50,000
Director	Maximum Dollar Amount of \$25,000

Any persons signing contracts or agreements on behalf of [Institution] must comply with all applicable policies and procedures regarding contracting and procurement, including the Negotiation and Execution of Contracts Policy.

<b>Office of Academic Affairs</b>	
Executive Vice President for Academic Affairs and Provost	Educational, Research and Faculty Affairs contracts, as well as any contracts that the President can sign not delegated to the Chief Business Officer
Vice President for Academic and Faculty Affairs	Educational Affiliation Agreements on behalf of any of the Colleges of [Institution]; contracts related to the [X] partnership; contracts related to study abroad programs; faculty consulting
Dean, College of Allied Health Sciences	Educational Affiliation Agreements on behalf of the College of Allied Health; faculty consulting agreements
Dean, Pamplin College of Arts, Humanities and Social Sciences	Educational Affiliation Agreements on behalf of Pamplin College of Arts, Humanities & Social Sciences; faculty, consulting agreements
Dean, Hull College of Business	Educational Affiliation Agreements on behalf of the Hull College of Business; faculty consulting

Dean, Dental College of Georgia	Educational Affiliation Agreements on behalf of dental students and residents; student loan repayment agreements on behalf of dental students; membership agreements on behalf of faculty practice plan; faculty consulting agreements; resident employment contracts for dental residents and fellows; clinical service agreements for dental faculty, residents and students
Dean, The Graduate School	Educational Agreements on behalf of The Graduate School; faculty consulting agreements
Dean, College of Education	Educational Agreements on behalf of the College of Education; faculty consulting agreements
Dean, Medical College	Agreements related to the provision of Clinical Services; House Staff Employment Agreements; Educational Affiliation Agreements on behalf of the Medical College; agreements related to the supervision of residency programs; faculty consulting agreements
Dean, College of Nursing	Educational Agreements on behalf of the College of Nursing; faculty consulting agreements
Dean, College of Science & Mathematics	Educational Agreements on behalf of the College of Science & Mathematics; faculty consulting agreements
Director of International Students and Postdoctoral Services	Department of Labor forms required to legally employ aliens; related letters of support as required by USCIS regulations; USCIS forms required to petition for temporary alien employment and to support permanent residency application of alien employee
Director of Professional and Community Education	Banquet expense orders for Continuing Education functions

<b>Administration and Finance</b>	
Executive Vice President for Administration and Finance/Chief Business Officer	Contracts involving areas under the Executive Vice President for Administration and Finance/Chief Business Officer
Executive Vice President for Clinical Affairs	Master Affiliation agreements with external clinical sites and related documents including agreements on behalf of Correctional Healthcare, War Veterans Nursing Home and Roosevelt Warm Springs Institute
Director/Chief Finance Officer/MCG	Contracts involving areas under the Chief Finance Officer/MCG

<b>External Relations, Communications, Development, and Office of the President</b>	
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Executive Vice President for External Relations and Chief of Staff	Contracts involving areas under the Executive Vice President for External Relations and Chief of Staff
Executive Vice President for Strategic Communication/CMO	Contracts involving areas under the Executive Vice President for Strategic Communication/CMO
Senior Vice President for Communications and Marketing	Advertising contracts, communications and marketing consulting contracts and applications for trademarks
Senior Vice President and Chief Development Officer	Gift agreements and donor contracts with [Institution], University Foundation, Medical College Foundation; Capital Campaign agreements related to services and events for the alumni, fund raising and advancement activities

<b>Legal Affairs, Risk Management, and Compliance</b>	
Executive Vice President for Legal Affairs and Risk Management/General Counsel	Contracts involving areas under the Executive Vice President for Legal Affairs and Risk Management/General Counsel
Vice President for Compliance/Chief Integrity Officer	Contracts involving areas under the Chief Integrity Officer

<b>Internal Audit</b>	
Director/Chief Audit Officer	Institutional audit services consulting contracts and institutional audit software licensing and maintenance agreements

<b>Athletics</b>	
Director of Athletics	Athletic Competition Contracts

<b>Student Life</b>	
Director of Housing and Campus Recreation	Student Housing License Agreements

<b>Research and Sponsored Programs</b>	
Senior Vice President for Research	Grant applications related to the conduct of sponsored research activities; agreements related to the conduct of sponsored research activities; non-disclosure and confidentiality agreements related to research activities
Associate Vice President, Research Administration and Director for Sponsored Program Administration	Grant applications related to the conduct of sponsored research activities; agreements related to the conduct of sponsored research activities; non-disclosure and confidentiality agreements related to research activities; material transfer agreements

Associate Vice President for Office of Innovation Commercialization	Non-disclosure and confidentiality agreements related to research activities; material transfer agreements; documents necessary for transfer, sale, or assignment of intellectual property rights
Director of Pre-Award Services Division of Sponsored Program Administration	Grant applications related to the conduct of sponsored research activities; agreements related to the conduct of sponsored research activities; non-disclosure and confidentiality agreements related to research activities; material transfer agreements
Director, Office of Innovation Commercialization	Non-disclosure and confidentiality agreements related to research activities; material transfer agreements

## **Session 16C2: It's Negotiable: Contract Terms and Mitigating Risk and Exposure to Colleges and Universities**

NACUA Annual Conference  
June 18-26, 2020

Art M. Lee  
Deputy General Counsel  
University of Arizona

Chris Melcher  
Vice President and General Counsel  
Augusta University

### University Housing (COVID)

[Contracts for COVID Housing](#) (NACUANET Thread<sup>1</sup>, May 2020)

[Option Contract for Student Residential Space](#) (NACUANET Thread, June 2020)

[COVID Clause in Housing Contracts](#) (NACUANET Thread, June 2020)

[Indemnification Provision in Housing Agreement](#) (NACUANET Thread, May 2020)

[Temp Housing and Medical Facility Contracts](#) (NACUANET Thread, April 2020)

### Class Actions re: Breach of Contract

Jim Keller, [Liability Considerations for Return to Campus in the Age of COVID 19](#) (NACUANOTE May 2020) (see p. 15 for summary of class action lawsuits)

[COVID 19 Changes to Learning Method and Tuition](#) (NACUANET Thread, May 2020)

### Risk Shifting

Jim Keller, [Liability Considerations for Return to Campus in the Age of COVID 19](#) (NACUANOTE May 2020) (see p. 8 for discussion of releases, waivers, and assumption of risk)

[Indemnification Provision in Housing Agreement](#) (NACUANET Thread, May 2020)

[Indemnity and Affiliation Agreements](#) (NACUANET Thread, April 2020)

[Waivers and Study Abroad](#) (NACUANET Thread, May 2020)

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<sup>1</sup> NACUANET threads are password protected and are accessible to NACUA members only.

## Force Majeure and Impossibility

[Force Majeure and Union Contracts](#) (NACUANET Thread, April 2020)

## Faculty

[Faculty Refusing to Sign Contract with COVID Provision](#) (NACUANET Thread, May 2020)

## Foreign Gift and Contract Reporting under §117 of the HEA

### [Notice from the Office of Management and Budget Approving U.S. Department of Education Information Collection Request under Section 117 \(April 13, 2020\)](#)

Notice from the Office of Management and Budget approving the U.S. Department of Education's Information Collection Request under Section 117 as revised on February 10th, 2020. Also included are a [summary of public comments and responses](#) and a [supporting statement](#). The supporting statement indicates that the Department will promulgate a new regulation through notice and comment rulemaking to establish a requirement that a true copy of a gift or contract be provided.

[NACUANET Post re: Foreign Gifts and Contract Reporting under § 117](#) (April 2020)

## False Claims Act

Andrew Schilling, [The False Claims Act, Higher Education, and the Risks for Research Universities](#) (NACUANOTE June 2020).

## Promises for a “Fair Process” in Student Conduct and T9 Proceedings: Does it Create and Enforceable K?

### [Doe v. University of the Sciences \(3d Cir. May 29, 2020\)](#)

Opinion reversing dismissal. Plaintiff is a former student at the University of Sciences (USciences) who was dismissed after USciences found him responsible for violating its sexual misconduct policy. Plaintiff alleged that USciences discriminated against him based on his sex in violation of Title IX when it investigated and enforced its policy against him but not against his accusers. He also alleged that USciences breached a contract with him by not providing adequate fairness guaranteed by the sexual misconduct policy. The Third Circuit held that plaintiff stated a Title IX discrimination claim because he plausibly alleged that USciences was improperly motivated by sex when it investigated him but not three female students who also allegedly violated the sexual misconduct policy. Plaintiff also stated a plausible breach of contract claim based on the policy's promise of fairness. Relying on Pennsylvania jurisprudence, the court held that the contractual promise of fairness requires at least a live hearing and an opportunity for cross-examination, and plaintiff alleged he was not afforded either.

### [Doe v. Johnson & Wales University \(D.R.I. November 26, 2019\)](#)

Memorandum and Order granting-in-part and denying-in-part Defendant's Motion for Summary Judgment. Plaintiff is a former student at Johnson & Wales University (JWU) who was expelled after JWU found him responsible for sexual misconduct. Plaintiff alleged that JWU violated Title IX and his contractual right to a fair process as provided by JWU's Student Code of Conduct. Specifically, plaintiff alleged several deficiencies in the procedural protections, including JWU's alleged failure to explain both the disciplinary process and whether or how he could call or question any witnesses. A reasonable jury could find that the "fair" process to which plaintiff was contractually entitled could include greater protections than he alleged he received. Regarding plaintiff's Title IX erroneous outcome claim, the court found that plaintiff did not demonstrate that gender bias was a motivating factor in JWU finding him responsible. The ratio of male to female students who are found responsible was not probative when the vast majority of complainants are female.

*Contrast*

### [Doe v. Trustees of Boston College \(1st Cir. November 20, 2019\)](#)

Opinion reversing and vacating the district court's award of a preliminary injunction for plaintiff. Plaintiff is a student at Boston College (BC). He alleged that BC breached a contractual obligation of basic fairness by not allowing him to cross-examine his accuser before it suspended him for violating BC's Student Sexual Misconduct Policy. The district court found that plaintiff showed a likelihood of success on the merits and granted a preliminary injunction preventing BC from enforcing the sanction against plaintiff. The district court erred by relying on a decision that concerned the application of federal due process requirements to a public university. BC's investigators followed the process as described in their own policy, which provided several procedural protections for both the complainant and respondent but does not allow either to cross-examine other parties or witnesses. **Massachusetts basic fairness law did not require that private universities comply with federal due process requirements,** and on multiple occasions state courts have approved procedures that do not allow for any kind of quasi-cross-examination. Notably, the First Circuit stated that the district court's decision did not respect the deference state law requires for private institutions' choices of discipline proceedings.