

Tuition Reimbursement Lawsuits Threaten University Financial Stability

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As the number of COVID-19 infections increased throughout March and April of this year, government shutdown orders and public health concerns forced colleges and universities throughout the United States to move students from on-campus housing and cancel in-person instruction for the remainder of spring semester. Since then, an increasing number of students have filed lawsuits seeking damages arising from COVID-19 restrictions such as tuition reimbursements and other education-related costs.

According to the College Board, the average annual cost in 2019-2020 for tuition, fees and room and board at a four-year private college averaged \$49,870 versus \$21,950 at a four-year in-state public college. While many colleges and universities have offered students pro-rated refunds for room and board, nearly all have resisted calls to make full or partial tuition reimbursements to their students.

As of today, tuition reimbursement lawsuits have been filed against more than 25 American colleges and universities. The Plaintiffs in these cases argue that "virtual" (online) educational programs have deprived students from recognizing the benefits of in-person instruction, access to campus facilities, networking opportunities, student activities, and other advantages and services for which they had already paid tuition and fees.

The key issue for decision will be whether online or remote instruction is inherently less valuable than the in-person instruction that the students were offered – and accepted – in exchange for hefty tuition bills and related costs. In *Dana Bunch v. University of South Carolina*, No. 2020-CP-4002330 (S.C. Fifth Judicial Circuit, filed May 13, 2020) the Plaintiffs point to a 2017 Brookings Institution analysis of online instruction to support the position that remote or online instruction is less valuable than in-person learning. The Plaintiffs include the following conclusions from the Brookings Report:

- Taking courses online reduces student grades by 0.44 points on the traditional four-point grading scale, a 0.33 standard deviation decline relative to taking courses in-person.
- Students taking a course in-person earned roughly a B- (2.8) grade on average while online students averaged a C (2.4).
- Taking a course online reduces a student's GPA the following term by 0.15 points, with larger drops of 0.42 points and 0.32 points respectively in the next term's grades for courses taken in the same subject area or for courses in which the online course is a prerequisite.
- Online instruction increases the probability that a student will drop out of school as students are approximately 9% less likely to remain enrolled in the semester after taking an online course.

See *Eric Bettinger and Susanna Loeb, Report: [Promises and Pitfalls of Online Education](#)*, dated June 9, 2017 (last visited May 27, 2020).

Admittedly, the Brookings' Report was conducted nearly three years ago and based upon a very limited sample size in a non-COVID-19 era. While the Report shows that the sample population of online students in the test received marginally

lower grades, the study does not consider or draw any conclusions as to what may happen if “all” students took the same courses online. Colleges may also argue that when the entire student body is enrolled in remote or online classes, as is likely the case for institutions currently shuttered by COVID-19 restrictions, the grade distribution will likely be similar to that of in-person instruction. Colleges and universities may also point to an increased emphasis on the quality of remote instruction as evidence that students are receiving the best possible education under the circumstances. Moreover, the higher education institutions will argue that students are likely receiving instruction from the same professors using the same (or substantially similar) materials in accordance with the syllabi prepared for in-person instruction, and that participation in on-line instruction will not affect credit schedules and/or graduation timelines and that students are receiving the appropriate credits for the courses that they successfully complete. Finally, colleges and universities may invoke affirmative defenses such as the doctrines of impossibility or impracticability of performance, as well as (if supported by the enrollment agreement or other applicable contract) force majeure provisions which may potentially excuse contractual non-performance or allow for an alternate or modified means of performance.

Eckert Seamans will continue to monitor this important and complex issue and to identify the legal challenges and opportunities facing colleges and universities during and after the current health crisis.

This COVID-19 Legal Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact authors Michael J. O'Brien at 215.851.8532 or mobrien@eckertseamans.com, Benjamin A. Beliles at 804.788.7743 or bbeliles@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.