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COVID-19: Responding to Requests for Tuition Refunds

The COVID-19 pandemic forced higher education institutions to quickly pivot their traditional, in-person classes to a distance-learning model. Institutions have met this challenge through a variety of tools designed to keep students on track to successfully complete their coursework. Institutions also have closed their dormitories and dining services because of governmental orders prompted by the risks presented by the virus.

This fundamental shift in the operations of higher education institutions has raised a myriad of questions regarding whether, or to what extent, the institution should provide refunds for tuition or other costs, such as room and board, meal plans, and activity fees.

Many institutions have decided to provide a pro-rated refund for unused ancillary items (e.g., room and board), but not for tuition because coursework continues through distance learning. Other institutions, citing an inability to provide refunds for economic reasons, have declined to provide any form of a refund.

A nascent effort has emerged among student groups to request refunds for a myriad of items, including tuition. The core theory underlying tuition reimbursement demands is an assertion that distance learning is an inadequate substitute for in-class instruction. While some of these demands have been made by students who are in majors that require in-person coursework (e.g., theater, laboratory sciences, etc.), others have been made by students who are enrolled in classes that do not require classroom instruction or hands-on training.

Demands for tuition refunds, while still in the early stages, must be taken seriously. They present a host of liability and reputational risks for educational institutions, including, most significantly, potential class action liability. Any institution that receives a demand for a refund should consider a variety of factors before formulating an equitable response, including whether a refund would apply to the student body as a whole or just to students who are in academic programs that are less amenable to distance learning.

Legal and Institutional Concerns

A student's obligation to pay tuition and ancillary items is based in contract. From a purely legal perspective, an institution's tuition and enrollment contracts, if any, as well as its policies and procedures, provide the proper starting point in evaluating a refund request.

When considering tuition refunds, the institution should consider the nature of the distance-learning instruction that is provided to the student making the request. If the instruction will enable the student to complete the course requirements necessary to proceed to the next

level or graduation, then the institution is arguably continuing to perform its contractual duties, and tuition should be paid in the ordinary course. This analysis, of course, varies from institution to institution, depending on the terms of its existing refund policies. It also differs between students in different courses of study because certain disciplines necessarily require in-person activities. For those students, the curriculum may need to be adjusted in order to continue to provide the requisite instruction.

Institutions also should consider whether an applicable force majeure provision or the doctrines of impossibility of performance or frustration of purpose impacts the parties' contractual rights. The application of such a clause or doctrine may eliminate the institution's liability or, alternatively, relieve students from their obligation to pay tuition. It should be noted that economic disadvantage or hardship presented by COVID-19 alone will not provide an institution with a contractual defense to a claim for tuition reimbursement.

Finally, the wider context in which tuition reimbursement demands arise should be accounted for when reviewing a request. Many students and their families are experiencing a loss of income or serious illness due to the ongoing COVID-19 crisis. The manner in which an institution responds to a tuition-refund request should therefore account for how it will impact the relationship among the institution, its student body, and the community at large. A response, although legally justified, that does not set the right tone could cause long-lasting reputational harm, thereby threatening enrollment for years to come. Institutions should provide measured responses that account for this unprecedented situation and provide a short explanation of the underlying rationale for the institution's decision.

Funding Sources

Many higher education institutions are not financially able to offer refunds even if they wanted to do so. These institutions continue to face significant operating costs, such as faculty

and employee pay, while revenue sources other than tuition are unavailable. Even institutions with large endowments are likely to be financially strained because the uses of endowment funds may be restricted.

Institutions that are considering refunds should identify potential sources of recovery to offset losses caused by COVID-19.

These sources do not, to date, provide direct reimbursement for tuition and related refunds. But they may help defray refund-associated costs through funds that are available to cover other losses or expenses caused by COVID-19. These sources may include federal and state programs that continue to be enacted in response to this unprecedented crisis. For example, the recently enacted CARES Act allocates \$14 billion for higher education institutions to assist students and cover costs associated with the pandemic response, including reimbursement for the costs associated with transitioning to distance learning for qualifying institutions. Congress also authorized the Small Business Administration to offer loans to qualifying entities (usually those with under 500 employees) that are eligible for future forgiveness if certain criteria are met.

Institutions also should review their insurance programs to determine if there is any coverage available for COVID-19 related losses. While most policies may provide no or very limited coverage due to virus/pandemic exclusions or other limitations, institutions should nonetheless review their insurance programs to ascertain the coverage that may be available to them.

Conclusion

Demands for tuition refunds must be taken seriously, given the significant potential risk exposure they present. Although we are not yet aware of any lawsuits, such claims, including class actions, are clearly foreseeable. How an institution responds to a refund demand or when formulating a policy for refunds can have serious implications later.



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