



Show Me The Money! Is Your Enrollment Contract Enforceable Against A Tuition Refund Demand?

Insights

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2020 has been a tumultuous year, but it has taught us to better prepare for the future and how to better enable schools to maintain their operations in the face of these unprecedented challenges. As schools faced shutdown orders from state and local jurisdictions, they needed to quickly shift to an online learning environment. Most schools reopened this fall offering a combination of in-person and virtual instruction.

While schools have been navigating this “new normal,” numerous high-profile lawsuits have been filed against colleges and universities demanding that these schools return tuition dollars because remote learning is not as valuable as an in-person education. K-12 schools have not been immune to similar demands for tuition refunds during the shift to distance learning. With the continued threat of potential school closures, how can your school best protect itself against the unknown while still maintaining a positive relationship with your school community?

Be Aware Of The Potential Legal Claims

Over 60 colleges and universities are facing class action lawsuits from students who are suing for breach of contract due to the lack of in-person education and the loss of access to on-campus facilities. While these cases are in the early stages, courts have been reluctant to dismiss the students’ claims. This sets up the potential for costly, lengthy, and very public litigation.

Similarly, K-12 schools have seen parents demand tuition refunds and threaten to bring breach of contract claims, arguing that they are entitled to a refund where the school did not deliver what was promised in the school’s handbooks, brochures, websites, and in verbal representations. Parents also argue that the contract is impossible to perform during the ongoing pandemic as they expected in-person instruction and not that their children would learn remotely from a video conference that a parent needs to supervise. These facts have led parents to claim they should not be held liable for the full amount of tuition.

In ensuing litigation, liquidated damages provisions will be analyzed to determine whether it would be unconscionable to hold the parent to the full amount of tuition due given these circumstances. Your school may have already faced these types of demands for tuition refunds or requests from parents to be excused from the current academic year’s contract. Your school may also be questioning the enforceability of your enrollment contract. This year’s unique challenges should be

used to evaluate your school's current enrollment contract and strengthen the language in that contract to prevent further uncertainty and defend against potential legal claims.

Eliminate The Element Of Surprise In Your Enrollment Contracts

Including specific language in the enrollment contract that addresses potential scenarios will eliminate the element of surprise and put your parents on notice of their obligations under the contract. A force majeure clause, which excuses a party's performance of its obligations under the contract when certain conditions arise (epidemics, pandemics, war, terrorist attacks, acts of God, etc.), should be reviewed and modified to meet the needs of the school in the event of such unforeseen circumstances.

It is also important to evaluate your agreement's cancellation and termination clauses to clearly specify the deadlines and refund amounts, if any. The enrollment contract can also specify if refunds will be given based on certain events (rather than timing) such as a family relocation due to a parent's job, or an unexpected illness or disability. By having clear cancellation provisions, it is more likely that a liquidated damages clause, which provides an agreed upon sum to be paid if a party breaches the agreement, will be enforced by a judge.

Schools should also review their contracts to ensure that it is in their school's sole discretion to make educational decisions, including determining the methods of instruction, such as the format, location, and option to implement distance learning. Enrollment contracts that contain these types of clear and specific provisions will better protect schools from potential claims and prevent arguments by parents that they were not aware of the parties' respective rights and remedies under the agreement.

Looking Beyond 2020

As we enter the new year, and new enrollment contracts are issued, now is the time to review your school's enrollment contract and be prepared to address potential scenarios to limit risk and exposure. What should you do?

- 1. Include clear and specific language regarding your school's ability to determine the method of learning;**
- 2. Review force majeure clauses to enhance the flexibility of the school in the event of unforeseen circumstances;**
- 3. Determine whether your jurisdiction requires the school to mitigate damages and the review the enforceability of a waiver of mitigation obligation;**
- 4. Review termination provisions and the monthly payment timeline;**
- 5. Consider refunds based on significant events;**
- 6. Implement tuition insurance or refund plans; and**
- 7. Consider tuition credits for periods of closure or deferral of enrollment, if appropriate.**

Clear expectations will go a long way in reducing your legal risks. By reviewing your contracts each year, you can re-visit areas that have not worked out as previously planned. Schools should seek guidance from their Fisher Phillips attorney as to how to revise their enrollments contracts during these unprecedented times.

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