

Will lawsuits for tuition refunds succeed? It depends, experts say

Colleges may be able to undercut the legal challenges by arguing against the request for class-action status, but they can't make students return to campus.

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In mid-March, as New York University frantically moved classes online, students at its Tisch School of the Arts began asking about tuition refunds. Some were put off by the response, which included a video of its dean, Allyson Green, dancing to R.E.M.'s 1991 single "Losing My Religion."

Green, a choreographer, explained in the accompanying email that the song helps her "keep going in times of distress." But students saw it as tone-deaf, coming at the end of a long explanation of why Tisch was not refunding tuition.

The resulting backlash added fire to a movement already underway to get NYU to refund at least some of students' tuition, arguing that online classes are inadequate. It has included at least three petitions with more than 15,000 signatures in all, email and social media campaigns, and, as of May 8, two proposed class-action lawsuits.

"The online learning options being offered to NYU students are subpar in practically every aspect," said one of the legal complaints. It goes on to say that the remote instruction is "in no

way the equivalent of" the in-person experience students
"contracted and paid for."

That language may sound familiar to colleges throughout the U.S. The State University of New York's Student Conduct Institute counted more than 100 lawsuits against colleges because of COVID-19 as of May 19, most of which ask for the return of tuition and other fees. The same law firms are often behind multiple lawsuits of this type, suggesting they see them as a moneymaker. At least one law firm is actively seeking out students online to serve as plaintiffs in those lawsuits.

But education law experts aren't convinced. Although anyone who pays tuition has standing to sue, these lawsuits generally argue that the move to online-only education breaches schools' contracts with their students. Because it's not typical for colleges to require a formal, written tuition contract, courts will have to use other documents to decide what schools have promised — and those documents are unlikely to promise in-person education. Even if plaintiffs leap that hurdle, courts may refuse to certify the cases as class actions, which could defeat the claims before they're heard.

"There are five or six (lawsuits) filed every day," said Derin Dickerson, a class-action defense attorney with the law firm Alston & Bird in Atlanta. "I think every institution of any significant size is going to be sued under this theory, until the plaintiffs start losing some of these cases and plaintiffs' lawyers ... realize that it's not worth their investment."

Can they get class-action status?

The lawsuits are filed as proposed class actions, meaning they bring together lots of tuition-payers — usually students, but sometimes their parents — who didn't get a full semester in person. They don't complain that colleges shut down in response to the

coronavirus; in fact, some praise schools' responses. But they argue that online education is not the experience plaintiffs paid for, and therefore that the schools breached an agreement.

In the absence of a written contract, the important question is which documents lay out what students can expect for their money, said Michael Holt, a partner at law firm Fisher Phillips in Fort Lauderdale, Florida.

"In a lot of cases, the evidence of that is going to involve things like course catalogs, or whatever the overall guiding document is that lays out what students have to do in order to get a particular degree," said Holt, a former higher education administrator.

Courts may also look at school policies stating the institution's obligations when closing in response to a disaster. However, these are not universally present, Holt said, and their language is not standardized. Even if there is such a policy, typical contract language would expressly say students aren't entitled to refunds, added Audrey Anderson, counsel with Bass Berry & Sims in Nashville and a former general counsel of Vanderbilt University.

Colleges may be able to cut off these lawsuits before courts reach those issues, experts said. That's because the real fight is about whether the plaintiffs filed the right kind of lawsuit. The cases are all proposed class actions, which organize students or parents into groups who say they all suffered the same injury at the hands of the same school.

But Dickerson said plaintiffs may be in very different situations, depending on who is paying the tuition — for instance, students or parents — or whether they're studying a subject that can't easily be moved online. If that's true, the plaintiffs are not similar enough for a class action, which is grounds to dismiss the case.

Plaintiffs' lawyers could deal with this by sorting the students into subgroups within the class action. That comes with its own problems, said Neal Hutchens, a professor of higher education at the University of Mississippi.

"As soon as you start differentiating the plaintiff class in that way ... are they really appropriate to certify as a class?" said Hutchens, who also has a law degree.

And if there's no class, the students would have to pursue individual lawsuits, which are much less profitable for their attorneys.

"The whole fight in these cases is going to be whether or not the plaintiffs can get class-action status," Anderson said. "Because if they can't get a class certified, the lawyers aren't going to be interested in representing the plaintiffs anymore anyway."

Who decides the value of online learning?

Even if plaintiffs overcome that difficulty, courts may find themselves with a challenge: deciding whether online education is an adequate substitute for in-person education. Courts tend to be uncomfortable making rulings that could be perceived as value judgments, especially when they have no special expertise in the subject.

"That, in terms of a contract claim, starts to be in an area where courts may be reluctant to get in too much, because then you start getting into evaluating the quality of online versus in-person learning," Hutchens said.

He added that "there's an incredible amount of worry" in higher education about what the movement for tuition refunds means for the fall term. Colleges — which for the most part remain unsure

whether they can safely reopen for fall — rely on tuition to cover operating costs.

But students may choose not to come if they won't be able to attend in person. That's bad news for schools already reeling from coronavirus costs.

"Parents and students, they're going to be pretty reluctant in the fall to shell out large amounts of money to not be there," he said.

"That's the financial realities that institutions are looking at."