

Top Eight Action Items for Educational Institutions to Avoid, Prepare for, and Resolve COVID-19 Class Actions

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Dozens of class action lawsuits have been filed against educational institutions since March and more are expected. Although each lawsuit attacks a specific institution's individualized response to the COVID-19 pandemic, the lawsuits generally allege breach of contract, along with common law unjust enrichment and conversion tort claims.

All segments of higher education are targets. Students are commencing class actions against members of the Ivy League, flagship state universities, and smaller liberal arts colleges. Similar claims may eventually reach private elementary schools, parochial schools, and college preparatory academies. These lawsuits threaten to add to the already significant financial shock hitting higher education.

As each educational institution has its own policies, procedures, and culture—which have in turn informed their respective responses to the present crisis—no two class action lawsuits will proceed in the same fashion, even if the plaintiffs' underlying complaints are similar. Nevertheless, there are a number of generally applicable, concrete action items that institutions can consider in the present moment to help to alleviate the disruption to their schools and mitigate potential financial, reputational, and litigation risks, not only in defending such actions, but as they prepare for an unpredictable return to educating students in the fall.

1. Evaluate Existing Contractual Protocols and Procedures

This is the first step in any potential contract dispute. Each school should conduct a thorough review

of the policies and procedures governing its contractual relationship with its students in light of the present circumstances. Of particular importance are provisions detailing the type of educational environment to be provided by the institution, force majeure clauses, disaster and emergency protocols, and dispute resolution procedures. Having a firm grasp on the institution's contractual responsibilities to its students, the discretion afforded to administrators and instructors on managing the educational environment, and the proper avenues for addressing disputes is imperative.

2. Update Enrollment Documentation and Student Handbooks with Supplemental Provisions

Given that COVID-19 has forced educational institutions to adapt to the public health crisis as it unfolds, institutions' policies and procedures should be amended to correspond with the "new normal." As instructors do their level best to recreate the traditional classroom experience through electronic media (conducting Zoom lectures, virtual office hours, and web-based study groups), new policies and procedures should be drafted to specifically address these new virtual campus environments. Data privacy and Family Educational Rights and Privacy Act-specific provisions are of particular importance as institutions shift from brick-and-mortar classrooms to online learning environments. Clearly laying out the applicable educational standards, and taking measures to ensure the privacy of students' personal information, is a sound practice from both an educational operations and risk-mitigation perspective.

3. Collect, Organize, and Disseminate Guidance from State and Local Governments and Accrediting Bodies

Colleges and universities have been monitoring new emergency orders, laws, and directives from a variety of supervisory bodies in charting their courses through these new circumstances. These directives are constantly evolving along with the pandemic. Chronologies illustrating what instructions were received from what authorities when will be invaluable to demonstrating that an institution did everything possible to instruct and protect its students and employees. Institutions that have received federal funding under § 3504 of Part IV of the CARES Act should identify ways to distribute relief funds to student demographics sustaining particularly adverse effects from the disruption to physical learning environments.

4. Require Professors, Instructors, and Administrators to Document COVID-19 Responses

In light of the ever-shifting circumstances impacting particular colleges and universities, and their corresponding subunits, institutions should encourage employees to formally document the reasons why particular courses of action were selected. Such documentation should detail how the institution is substantially performing its obligations to students by striving to provide them with an educational experience resembling a traditional classroom as closely as possible given the unprecedented circumstances, while illustrating the risks associated with alternative options. Having records illustrating the difficult decisions presented to institutional personnel will assist if any responsive actions are challenged in legal proceedings at a later date.

5. Carefully Manage Mass Communications to Students, Parents, and Alumni

All mass communications directed to students from an institution, or even particular colleges/schools/departments, regarding responses to the COVID-19 pandemic should be reviewed

by the institution's in-house legal department, in consultation with outside counsel. These communications should be inspected with an eye toward open, direct communication, while also preserving the school's flexibility in light of the evolving circumstances. Institutions should also assess public-facing marketing materials (such as websites, brochures, class listings) for any statements that could arguably be misconstrued as misrepresentations regarding the nature and character of educational offerings. The institution's specific statements regarding in-person educational experiences should be evaluated closely.

6. Review Students' Spring Semester Evaluation Feedback

Most colleges and universities offer their students an opportunity to provide anonymous feedback on their instructors' performance and overall classroom experience at the end of each semester. Student opinions on their educational experience are always important, but they are especially so in the current environment. Identifying and resolving novel issues presented by the mass virtual teaching environments being conducted by colleges and universities may allow schools to proactively address these concerns and preempt issues from developing into something bigger down the road.

7. Assess Tuition Rate Structures in Light of New Circumstances

Colleges and universities face high fixed costs (primarily in the form of employee salaries), and many fees (such as tuition) are necessary to keep the institution running effectively. However, institutions should evaluate whether variable costs can be mitigated and whether appropriate adjustments should be made available to students.

8. Plan a General Litigation Defense Strategy

Before being served with a complaint, institutions should consider and plan for their high-level defense strategy in responding to a lawsuit challenging its response to COVID-19. How important is it to have claims adjudicated in a particular forum? Is private dispute resolution an option that may be preferred by students and the institution (notably, a number of potential cases were filed anonymously, with plaintiffs listed as "John Does" or "Jane Does")? Should claims related to COVID-19 be resolved on a class-wide basis for all students, or are individualized proceedings preferable? Would particular legal defenses be best presented at the outset of litigation, or is some limited discovery preferable to place the institution in a strategically advantageous defense posture? How aggressive a litigation position is the institution willing to take vis-à-vis its future alumni? Thinking through such procedural and strategic issues in advance will allow an institution to act more decisively when the lawsuit does arrive.

Whether class-action plaintiffs' lawyers will find any traction in the courts for these novel legal claims against colleges and universities remains to be seen. Until the defense bar achieves a series of victories, the higher education industry should expect the lawsuits to keep coming. Proactive, strategic planning, with an eye toward potential litigation proceedings in the future, can avoid operational disruptions, mitigate an institution's financial risks, and ensure that schools are able to deliver the best educational experience to their students as practicable in the current crisis.

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