

COVID-19 and IHEs: How to Balance Student Need with the Financial Health of Higher Education

*Julia Low**

INTRODUCTION

Over 100 class action lawsuits have been filed against colleges and universities based on contractual claims and tort theory requesting tuition reimbursements due to virtual classes and campus closures from the COVID-19 pandemic.¹ With so many colleges and universities losing money in 2020 due to a decrease in tuition revenue and enrollment, room and board, and even sporting events, a blanket tuition reimbursement to all students would be disastrous to these institutions.² Layoffs, forced early retirement, and other budget cuts loom.³ On the other hand, students are receiving less services and in-person instruction than expected.⁴ The disparity of the in-person college experience and the virtual experience is compounded by certain aspects of student identity.⁵ Despite the various federal government stimulus bills providing

* J.D., New England Law | Boston (2022).

¹ Matt Birnbaum, Spencer C. Weiler & Philip Westbrook, *Public Institutions of Higher Education, Students' Lawsuits, and the COVID-19 Pandemic*, 377 EDUC. L. REP. 1, 1-3 (2020).

² Emma Dill, *'If the Students Don't Come Back, We're Dead in the Water': Loss of Sports Spells Trouble Far Beyond Athletics Departments*, THE CHRON. OF HIGHER EDUC. (May 12, 2020), <https://perma.cc/DDG8-H2T2>; Emma Whitford, *Pandemic's Fall Financial Toll Adds Up*, INSIDE HIGHER ED (Jan. 12, 2021), <https://perma.cc/QG6G-45JY> [hereinafter Whitford, *Pandemic's Financial Toll*].

³ Emma Whitford, *Here Come the Furloughs*, INSIDE HIGHER ED (Apr. 10, 2020), <https://perma.cc/7WUQ-3BP2>.

⁴ Douglas Belkin, *College Students Demand Coronavirus Refunds*, THE WALL ST. J. (Apr. 10, 2020, 6:00 AM EST), <https://perma.cc/FCA9-W2AN>.

⁵ See Nicholas Casey, *College Made Them Feel Equal. The Virus Exposed How Unequal Their Lives Are.*, THE N.Y. TIMES (Apr. 4, 2020), <https://perma.cc/LB7R-WWA9>.

billions to colleges, legitimate concerns still exist about equity of instruction.⁶ With the dreary financial future of higher education on the other side of that scale, scholars are struggling to find a solution.⁷ In an already unprecedented year for institutional financial health, a blanket tuition reimbursement due to COVID-19 would devastate higher education; but, alternative options such as tuition crediting, a refund of fees for in-person services, and additional federal government funding could strike a balance between the competing interests.⁸

Part I of this Note will discuss the lawsuits pending against institutions of higher education (“IHEs”) and the common claims students are filing seeking reimbursement of tuition and fees as a result of online learning in the pandemic.⁹ Part I will also highlight the differences between colleges and universities and the varying language used in student handbooks and other promotional materials that are being used as the basis of the plaintiffs’ contract claims.¹⁰ Part II will discuss the changes in college students’ experiences as a result of online learning, as well as the current financial status of undergraduate universities due to the COVID-19 pandemic.¹¹ Part III will highlight how crucial it is that each institution have a student compensation plan unique to the needs of its student body and institution.¹² Finally, Part IV will propose reimbursement of fees for services that can only be utilized in person, tuition crediting for future use, and a federal government bailout as a potential solution to these competing interests.¹³

⁶ See generally Elissa Nadworny, *Congress Gave Colleges a \$14 Billion Lifeline. Here’s Where It’s Going*, NPR (May 18, 2020, 5:00 AM ET), <https://perma.cc/MW5J-6URF>; DOUG SHAPIRO & JUANA SÁNCHEZ, *Ep. 36: The Fall Enrollment Picture and Peril for Post-Traditional Students*, on THE KEY (Inside Higher Ed 2021).

⁷ See generally Andrew DePietro, *Impact of Coronavirus (COVID-19) on College Tuition and Finances*, FORBES (June 2, 2020, 7:02 PM EDT), <https://perma.cc/F4R7-ZVUH> (referencing the various ways IHEs are trying to make up for lost revenue).

⁸ See generally Scott Carlson, *Higher Ed Faces a Long and Uneven Recovery, Rating Agencies Warn*, THE CHRON. OF HIGHER EDUC. (Dec. 8, 2020), <https://perma.cc/4RVQ-AN4Y> (noting the various ways that IHEs are financially hurting this year); Chris Villani, *Northeastern Must Face COVID-19 Tuition Reimbursement Suit*, LAW 360 (Dec. 14, 2020, 12:18 PM EST), <https://perma.cc/26E3-7EMJ> (“Plaintiffs have a plausible claim for breach of contract with respect to the campus recreation fee.”).

⁹ *Infra* Part I.

¹⁰ *Infra* Part I.

¹¹ *Infra* Part II.

¹² *Infra* Part III.

¹³ *Infra* Part IV.

I. Background

A. *The Open Question of How to Handle Tuition Reimbursement and COVID-19*

Executive orders across the United States mandated limitations on gatherings of more than ten people and required social distancing in accordance with guidance provided by the Centers for Disease Control and Prevention, the World Health Organization, and state level departments of health.¹⁴ The restrictions temporarily shut down businesses and caused more than 4,000 universities and colleges to close their campuses and switch to online learning.¹⁵ As a result, students began bringing class action lawsuits against their institutions seeking refunds for tuition, fees, and room and board expenses.¹⁶ The majority of these lawsuits are based on breach of contract, unjust enrichment, or conversion claims.¹⁷ A few common issues also involve tort claims relating to educational malpractice and negligence.¹⁸ However, the fundamental question the courts are faced with is whether these IHEs fulfilled their basic contracts of providing educational services in exchange for tuition fees.¹⁹ More specifically, questions also include: (1) what the students paid for compared to what they were promised; (2) if their alternative instruction is inferior to what they were promised; and (3) if a class action suit will be able to sufficiently address these questions for all members of the class.²⁰ “[Z]oom university is not worth 50k a year,” a student from New York University wrote on a petition advocating for partial tuition refunds.²¹ Many students are turning to class actions to seek

¹⁴ See, e.g., Order Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, and Prohibiting Gatherings of More Than 10 People, M.A. COVID-19 Order No. 13 (March 15, 2020).

¹⁵ Angelica Cappellino, *More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, EXPERT INST., <https://perma.cc/V3TG-YKFY> (last updated Sept. 9, 2021).

¹⁶ Thomas H. Wintner & Mathilda S. McGee-Tubb, *COVID-19 Tuition and Fees Lawsuits: Defending University Practices and Defeating Class Claims*, MINTZ (Jan. 26, 2020), <https://perma.cc/BG6A-PLRD>.

¹⁷ *Id.*; See also Donald R. Frederico & Melanie A. Conroy, *Navigating the Tuition Refund Class Action*, NAT. L. REV. (May 6, 2020), <https://perma.cc/6253-Z3BH>.

¹⁸ See generally, e.g., *Hassan v. Fordham Univ.*, No. 20-CV-3265, 2021 U.S. Dist. LEXIS 16541, at *27 (S.D.N.Y. Jan. 28, 2021) (holding that the plaintiffs did not establish that Fordham engaged in tortious or fraudulent conduct).

¹⁹ See Cappellino, *supra* note 15.

²⁰ Wintner & McGee-Tubb, *supra* note 16.

²¹ Emma Kerr, *Why Students Are Seeking Refunds During COVID-19*, U.S. NEWS (Apr. 22, 2020), <https://perma.cc/FQ3H-JZFT>.

compensation for the alleged differences in instruction.²²

B. *Structure and Procedure of Class Actions Seeking Tuition Reimbursement*

Before getting to the merits of the lawsuit, students bringing class action claims must first meet the requirements to be certified as a class.²³ The Federal Rules of Civil Procedure outline the requirements in Rule 23: (1) there must be a live claim or controversy in dispute; (2) the class representatives must be members of the proposed class; and (3) the class must be defined by objective criteria.²⁴ Under Rule 23(a), there are four explicit requirements the class must meet which include numerosity, commonality, typicality, and adequacy of class representative and counsel.²⁵ Finally, for plaintiff classes that are seeking damages, as many are in these tuition reimbursement lawsuits, the named plaintiffs must establish predominance and superiority pursuant to the Federal Rules of Civil Procedure 23(b)(3).²⁶ The class certification stage presents problems for plaintiffs who all differ in their major, year in school, type of program they are enrolled in (such as graduate or undergraduate), and amount of tuition paid.²⁷

Class certification creates the first opportunity for IHEs to defend against these lawsuits.²⁸ Legal scholars predict that the typicality and the predominance requirements will be the most challenging requirements for the plaintiffs to meet.²⁹ Other potential defenses include impossibility of performance, a force majeure clause, and a denial of a breach of contract.³⁰ Before defending the lawsuit, the student plaintiffs must establish there was

²² Frederico & Conroy, *supra* note 17 (“It did not take long . . . for lawyers to begin filing class action lawsuits against universities, demanding class-wide awards of prorated tuition refunds.”).

²³ Wintner & McGee-Tubb, *supra* note 16.

²⁴ Adam Polk, *Class Actions 101: How to Obtain (or Defeat) Class Certification*, AM. BAR. ASSOC. (Oct. 22, 2019), <https://perma.cc/EJ4H-3CTD>

²⁵ Fed. R. Civ. P. 23(a).

²⁶ Polk, *supra* note 24.

²⁷ Birnbaum, Weiler & Westbrook, *supra* note 1, at 4; see Villani, *supra* note 8.

²⁸ See Dean Dickie & LaKeisha Marsh, *Higher Education Braces for COVID-19-Related Reimbursements*, JD SUPRA (Apr. 19, 2020), <https://perma.cc/9TDD-XQDB>.

²⁹ Wintner & McGee-Tubb, *supra* note 16 (defining typicality as whether the named plaintiffs’ claims are typical of those of the class and predominance as whether the common issues predominate over individual ones).

³⁰ Cappellino, *supra* note 15 (describing a force majeure provision as listing events that qualify as a force majeure event, some even mentioning epidemics or pandemics).

a contract that existed and that the school was contractually obligated to deliver academic instruction in an on-campus setting.³¹

C. *The Varying Institutional “Contracts”*

A contract is “an agreement between private parties creating mutual obligations enforceable by law.”³² At the most basic level, the contract students are alleging IHEs breached is for the exchange of adequate academic instruction for tuition.³³ Students are finding the contractual agreement in promotional materials, student handbooks, course catalogs, housing agreements, institutional missions, and guidelines from professional associations.³⁴ For example, the plaintiff’s complaint in *Dixon v. University of Miami* cited the University of Miami’s marketing for housing which promised benefits upon enrollment at the university: “Living on campus opens a world of interaction with other students, faculty, and staff members in many social, developmental and academic activities. It’s a special time of learning and maturing; a time to be a member of the University family.”³⁵ In another closely watched case, *Chong v. Northeastern University*, Chong and Gallo, a graduate and undergraduate student respectively, are alleging a contract exists in their Annual Financial Responsibility Agreement.³⁶ The agreement in this case states:

In exchange for the opportunity to enroll at Northeastern, to receive educational services, and for other valuable consideration, I agree to the following terms and conditions: . . . By registering for any class or receiving any service from Northeastern, I accept full responsibility to pay all tuition, fees and other associated costs assessed as a result of my registration and/or receipt of services. I understand and agree that my registration and acceptance of these terms constitute a promissory note agreement.³⁷

³¹ See Birnbaum, Weiler & Westbrook, *supra* note 1, at 5; Cappellino, *supra* note 15.

³² *Contract*, CORNELL L. SCH. <https://perma.cc/MNQ4-29J3> (last visited July 12, 2022).

³³ See generally Frederico & Conroy, *supra* note 17 (explaining that “all assert claims for breach of contract”).

³⁴ Class Action Complaint ¶ 17, *Dixon v. University of Miami*, <https://perma.cc/SSY6-NMY7> (D.S.C. Apr. 8, 2020) (No. 2:20-CV-1348-BHH); Cappellino, *supra* note 15; Wintner & McGee-Tubb, *supra* note 16.

³⁵ Class Action Complaint ¶ 16, *Dixon v. University of Miami*, <https://perma.cc/SSY6-NMY7> (D.S.C. Apr. 8, 2020) (No. 2:20-CV-1348-BHH).

³⁶ *Chong v. Northeastern Univ.*, No. 20-10844-RGS, 2020 D. Mass. LEXIS 233923, at *2–3 (Dec. 14, 2020).

³⁷ *Id.*

The majority of these plaintiffs' arguments assert the existence of a quasi-contract as schools do not typically enter into an express contract with students.³⁸ The elements of a quasi-contract include: "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant had knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it."³⁹ In addition to proving those elements, plaintiffs must be aware of the differing state laws, some of which assume the existence of an implied contract between students and IHEs.⁴⁰ For example, in New York, an implied contract exists when a student pays tuition, whereas in Missouri, there is no statutorily assumed contract between a student and an IHE.⁴¹

On the other side of these "contracts" is a hefty expense for students.⁴² The annual tuition and fees at the IHEs involved in this type of litigation can exceed \$70,000 per year, and only a few schools offered prorated rebates for room and board and froze tuition.⁴³ Georgetown University and Johns Hopkins University offers a 10% discount, while Thomas University in Georgia is offering 30% off tuition.⁴⁴ While some schools are able to cut costs, others are struggling to stay afloat amongst the onslaught of additional expenses for remote learning and repopulating campuses.⁴⁵

II. Importance of Finding a Solution That Fits Students' and Institutions' Needs

A. *Disparity in College Student Experiences During COVID-19 and Online Learning*

The college student experience is made rich by the contributions of students from varying backgrounds, ideologies, and experiences.⁴⁶ Students'

³⁸ See, e.g., *Gociman v. Loyola Univ. of Chi.*, 515 F. Supp. 3d 861, 867–68 (N.D. Ill. 2021) (mem.); *Morales v. N.Y. Univ.*, No. 20. Civ. 4418 (GBD), 2021 U.S. Dist. LEXIS 50333, at *3 (S.D.N.Y. Mar. 17, 2021).

³⁹ *Commerce P'ship 8098 L.P. v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997).

⁴⁰ See *Wintner & McGee-Tubb*, *supra* note 16.

⁴¹ *Wintner & McGee-Tubb*, *supra* note 16.

⁴² See *Belkin*, *supra* note 4.

⁴³ *Belkin*, *supra* note 4.

⁴⁴ Anne Dennon, *The Impact of COVID-19 on College Tuition*, BEST COLL. (Sept. 11, 2020), <https://perma.cc/TK5U-PTWF>.

⁴⁵ See *Whitford, Pandemic's Financial Toll*, *supra* note 2.

⁴⁶ See *Patricia Gurin et al., Diversity and Higher Education: Theory and Impact on Educational*

varying backgrounds occasionally affect their ability to receive the full benefit of the services they are paying for, especially during online instruction.⁴⁷ Student identity has always been a contributing factor in how much time someone is able to spend on their courses.⁴⁸ For example, a student who works to pay for their tuition or contributes to their family's bills has less time to dedicate to academics compared to another student whose parents pay their tuition and give them a weekly allowance.⁴⁹ The disparity between students' learning experiences caused by the COVID-19 pandemic, however, is more extreme than ever before.⁵⁰

Colleges and universities have a tremendous equity problem in access to their education, exacerbated by the variability in living situation as a result of online learning.⁵¹ A *New York Times* story shed light on the realities of the online student experience at a small private liberal arts college in Pennsylvania.⁵² When campus closed down due to the pandemic, one student attended online classes at a family vacation home on the coast of Maine and another student worked hard to keep her mother's Puerto Rican food truck open and stocked.⁵³ One international student could not afford to buy a plane ticket to go home to her family, and another student's father—a private equity executive—relocated his family to another country where infections were lower.⁵⁴ This private liberal arts college had a selling point pre-COVID of being an equalizer among the student body.⁵⁵ The standardization of students' living and learning environments furthers the goal of educational equity and without it, the services students receive are vastly different.⁵⁶

Research shows that online learning disproportionately affects students depending on student identity such as being a caregiver, race, ethnicity,

Outcomes, 72 HARV. EDUC. REV. 330, 330 (2002).

⁴⁷ See Wintner & McGee-Tubb, *supra* note 16 (describing the lawsuits filed as a result of online learning).

⁴⁸ See ADELA SOLIZ & BRIDGET TERRY LONG ET AL., DOES WORKING HELP OR HURT COLLEGE STUDENTS? THE EFFECTS OF FEDERAL WORK-STUDY PARTICIPATION ON STUDENT OUTCOMES: A CAPSEE WORKING PAPER 2 (2016), <https://perma.cc/B7U2-ANBF> (finding that working during college has a negative statistically significant effect on students' first-year GPAs).

⁴⁹ *Id.*

⁵⁰ See Casey, *supra* note 5.

⁵¹ See Casey, *supra* note 5.

⁵² See Casey, *supra* note 5.

⁵³ Casey, *supra* note 5.

⁵⁴ Casey, *supra* note 5.

⁵⁵ Casey, *supra* note 5.

⁵⁶ See Casey, *supra* note 5.

socioeconomic status, and work status.⁵⁷ Socioeconomic status and where students live (urban or rural areas) affect access to high-speed internet and a quiet space to focus, which are essential to the success of online learning, and many students struggle to find both or either.⁵⁸ It is important to note that learning environments are not the only aspect contributing to the disruption in learning.⁵⁹ Students have had to expend more money on additional technology while adjusting to the online learning environment, and mental health concerns are on the rise as well.⁶⁰ In addition to stresses unique to students, many were not immune to the concerns worldwide about contracting the disease themselves or worrying about protecting loved ones from contracting it.⁶¹ While IHEs recognize the struggles students are facing, the pandemic limited their financial ability to compensate students for these losses.⁶²

B. *The Financial Wellness of Colleges and Universities as a Result of COVID-19*

Something must be done to compensate for the inequity in experience in the virtual world, but IHEs are not in a financial position to give out blanket tuition reimbursements.⁶³ The total estimated losses of the higher education industry from the pandemic are \$183 billion.⁶⁴ Included in that figure is \$85 billion in lost revenues, \$24 billion for COVID-related expenses such as personal protective equipment, and an anticipated \$74 billion in future decreases in state funding.⁶⁵ The industry-wide decline in revenue ranges from 5% to 10%.⁶⁶ The largest portion of the losses are from decreases in revenue.⁶⁷ The University of Arizona alone is projected to lose an estimated

⁵⁷ SHAPIRO & SÁNCHEZ, *supra* note 6. See generally GLOBAL STRATEGY GROUP, NEW AMERICA/THIRD WAY HIGHER ED TRACKING SURVEY 1-27 (2020), <https://perma.cc/DFU9-P9TN> [hereinafter HIGHER ED TRACKING SURVEY].

⁵⁸ HIGHER ED TRACKING SURVEY, *supra* note 57, at 2–5.

⁵⁹ See Lilah Burke, *Survey Outlines Student Concerns 10 Months into Pandemic*, INSIDE HIGHER EDUC. (Jan. 22, 2021, 3:00 AM), <https://perma.cc/JWA9-7LRE>.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See* DePietro, *supra* note 7.

⁶³ *See* DePietro, *supra* note 7.

⁶⁴ Paul N. Friga, *How Much Has Covid Cost Colleges? \$183 Billion*, CHRON. HIGHER EDUC. (Feb. 5, 2021), <https://perma.cc/L5G3-AK3C>.

⁶⁵ *Id.*

⁶⁶ Carlson, *supra* note 8.

⁶⁷ *See* Friga, *supra* note 64.

\$250 million.⁶⁸ IHEs rely on tuition and fees, room and board fees, and NCAA athletics.⁶⁹ The loss of revenue is further compounded by additional costs associated with COVID-19.⁷⁰ In order to keep campuses open and functioning despite the pandemic, IHEs had to invest money in face masks, testing, contact tracing, social distancing, and dedicated residential halls for quarantining.⁷¹ State budgets have also been allocating fewer funds over time for state schools because most states are not constitutionally required to fund them.⁷²

Two prevalent credit rating agencies, Moody's Investors Service and Fitch Ratings, both project negative long-term prospects for the higher education industry.⁷³ A more in-depth analysis details the inflexibility of IHE budgets.⁷⁴ For example, salaries of faculty and staff, debt, and lease obligations are all fixed costs that cannot be adjusted despite the lost revenue.⁷⁵ The general economic outlook also has an influence on schools' bottom lines.⁷⁶ Analysts at credit rating companies "expect that it will take until 2022 in the U.S. before economic activity fully returns to pre-virus levels."⁷⁷ The short-term economic effects of COVID-19 on IHEs are bleak, and the long-term effects look no better.⁷⁸ In a perfect world IHEs would offer tuition reimbursement, providing full restitution to the aggrieved students.⁷⁹ However, in this unprecedented time, a more nuanced solution is required to satisfy student needs while at least maintaining or improving the economic forecast for IHEs.⁸⁰

C. *The Federal Government's Bailouts So Far: The CARES Act, the Supplemental Appropriations Act, and the American Rescue Plan Act*

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")

⁶⁸ DePietro, *supra* note 7.

⁶⁹ See DePietro, *supra* note 7; Dill, *supra* note 2; Whitford, *Pandemic's Financial Toll*, *supra* note 2.

⁷⁰ See Whitford, *Pandemic's Financial Toll*, *supra* note 2.

⁷¹ Whitford, *Pandemic's Financial Toll*, *supra* note 2.

⁷² DePietro, *supra* note 7.

⁷³ Carlson, *supra* note 8.

⁷⁴ Carlson, *supra* note 8.

⁷⁵ Carlson, *supra* note 8.

⁷⁶ Carlson, *supra* note 8.

⁷⁷ Carlson, *supra* note 8.

⁷⁸ Carlson, *supra* note 8.

⁷⁹ Carlson, *supra* note 8.

⁸⁰ See generally Jonathan Krasno, *How to Help Higher Ed (and Students) Stay Solvent*, UNIV. BUS. (Apr. 24, 2020), <https://perma.cc/885L-SG6K> (discussing the creation of a government sponsored fund to remedy the effects of COVID-19 on higher education).

was passed on March 27, 2020, with \$14 billion allocated for higher education.⁸¹ In a second round of relief titled Coronavirus Response and Relief Supplemental Appropriations Act, Congress allocated an additional \$21.2 billion for higher education.⁸² The formula for determining payment amounts to IHEs is based on the number of students receiving Pell Grants, or the number of students from a low-socioeconomic status.⁸³ Additionally, IHEs that pay an excise tax on investment income, also called the endowment tax, had their relief payments cut in these two packages.⁸⁴

The third round of relief passed in March 2021 sent \$40 billion in aid to IHEs, which is the largest amount to date.⁸⁵ Like the first two, this appropriation requires colleges and universities to spend at least half of the money on “emergency grants to help students struggling to afford living expenses and the technology for remote classes they need during the pandemic.”⁸⁶ This third relief bill, however, also has some crucial differences.⁸⁷ The third relief bill gives the Department of Education (“DOE”) power to decide whether undocumented and international students will be eligible for relief, while the prior bills excluded this student group.⁸⁸ Another change is that private institutions with large endowments will not have their aid reduced based on their endowment tax.⁸⁹ The federal government stimulus packages have not struck the proper balance between compensating students and assisting IHEs; a more creative approach is necessary to compensate for previous losses, account for future decreases in revenue, and provide students with financial relief.⁹⁰

⁸¹ CARES Act: *Higher Education Emergency Relief Fund*, U.S. DEP’T. OF EDUC., <https://perma.cc/A3H3-E9MK> (last modified Jan. 29, 2021) [hereinafter CARES Act].

⁸² Rick Seltzer, *How Much Will Your College Receive in Coronavirus Stimulus Funding, Part 2?*, INSIDE HIGHER EDUC. (Jan. 18, 2021), <https://perma.cc/WZ5G-7DFD>.

⁸³ *Id.*

⁸⁴ Kerry Murakami, *House Joins Senate in Approving \$40B in Aid for Higher Education*, INSIDE HIGHER EDUC. (Mar. 11, 2021), <https://perma.cc/4QPF-54HS> [hereinafter Murakami, *\$40B in Aid for Higher Education*]; see generally Kerry Murakami, *Continued Confusion over CARES Act Money*, INSIDE HIGHER EDUC. (May 27, 2020), <https://perma.cc/555B-MC5M> [hereinafter Murakami, *Confusion over CARES Act*].

⁸⁵ Murakami, *\$40B in Aid for Higher Education*, *supra* note 84.

⁸⁶ Murakami, *\$40B in Aid for Higher Education*, *supra* note 84.

⁸⁷ Allison Pohle, *What Does the Covid-19 Stimulus Bill Mean for Loan Forgiveness, Financial Aid and College Students?*, WALL ST. J. (Mar. 10, 2021, 4:33 PM ET), <https://perma.cc/U3RG-3VZ3>.

⁸⁸ Murakami, *\$40B in Aid for Higher Education*, *supra* note 84.

⁸⁹ Murakami, *\$40B in Aid for Higher Education*, *supra* note 84.

⁹⁰ See generally Ben Miller, *A Better Formula for Higher Education’s Federal Coronavirus Funding*, CENTER FOR AM. PROGRESS (May 11, 2020, 5:00 AM), <https://perma.cc/PC46-95GE> (arguing that any future stimulus funding for IHEs is more than just about how much money is provided).

ANALYSIS

III. Separation of Powers Leaves Relief to the Legislatures, Not the Judiciary

A. *The Challenges of Class Action Lawsuits for Obtaining Tuition Reimbursements*

Many of these class action lawsuits are being disposed of with a motion to dismiss for failure to state a claim upon which relief can be granted or due to class certification issues.⁹¹ This, in part, is because courts are reluctant to second guess decisions the IHEs make regarding how to handle the pandemic; the courts are typically in a worse position to make well-informed decisions about what is right for each college and university compared to the respective administrations.⁹² In some cases, the schools, faculty, and staff actually expended more time and energy in trying to adjust to the pandemic and to deliver online academic services.⁹³ This is another reason why plaintiffs in these class action lawsuits are having a difficult time succeeding on a breach of contract claim or an unjust enrichment claim.⁹⁴ Members of the academic communities learned new technologies and spent more time than usual trying to provide the academic services promised.⁹⁵ Some schools spent more and rebated various costs, even while they were in a deficit for the year, which does not support the students' theories of unjust enrichment.⁹⁶ Finally, the individualized nature of IHEs and each student's circumstance make it more challenging for the courts to address these lawsuits.⁹⁷ Each student has different injuries due to online learning.⁹⁸ The stakeholders' individualized issues make it even more difficult for the courts to adopt a one-size-fits-all case or opinion in a class action lawsuit that would set the precedent for other IHEs, even if they are located in the same state.⁹⁹

Class action lawsuits are likely not the best way for students to recover

⁹¹ See *Oyoque v. DePaul Univ.*, 520 F. Supp. 3d 1058, 1060–61 (N.D. Ill. 2021); *Hassan v. Fordham Univ.*, No. 20-CV-3265, 2021 U.S. Dist. LEXIS 16541, at *32 (S.D.N.Y. Jan. 28, 2021); *Gociman v. Loyola Univ. of Chi.*, 515 F. Supp. 3d 861, 870 (N.D. Ill. 2021).

⁹² See *Marbury v. Pace Univ. (In re Columbia Tuition Refund Action)*, No. 20-CV-3208, 2021 U.S. Dist. LEXIS 36659, at *2 (S.D.N.Y. Feb. 26, 2021).

⁹³ *Frederico & Conroy*, *supra* note 17.

⁹⁴ See *Frederico & Conroy*, *supra* note 17.

⁹⁵ *Frederico & Conroy*, *supra* note 17.

⁹⁶ See *Frederico & Conroy*, *supra* note 17.

⁹⁷ See *Frederico & Conroy*, *supra* note 17; Elizabeth Pennisi, *During the Pandemic, Students Do Field and Lab Work Without Leaving Home*, SCI. MAG. (July 15, 2020, 2:15 PM EST), <https://perma.cc/L264-D39M>.

damages for diminished educational services.¹⁰⁰ Class action lawsuits often lead to settlements in which class members receive insignificant and unsatisfying damage awards.¹⁰¹ In reality, class actions tend to benefit the class attorney more so than the class members.¹⁰² For students who are seeking even just a partial tuition refund, they could be petitioning the court for thousands of dollars in damages.¹⁰³ Schools would be forced to compensate students with finances that they do not have if students succeed in their class action suits and students would probably receive less reimbursement than they could otherwise.¹⁰⁴ Although there is an argument that class action lawsuits make it possible for many students to recover at least some damages from the limited amount of funds available rather than nothing, students deserve more than pennies on the dollar for their lost experiences.¹⁰⁵ Moreover, class action lawsuits would financially ruin the educational institutions and take years to litigate, further delaying any potential compensation to students.¹⁰⁶

The judiciary and the courts, and especially class actions, are not the appropriate place to set a pandemic relief precedent for students across the board.¹⁰⁷ Even if there is a precedent-setting case about tuition reimbursement at a college or university, the decision would probably not be able to encompass all higher education institutions due to the many differences amongst schools and their respective student bodies.¹⁰⁸

⁹⁸ Frederico & Conroy, *supra* note 17.

⁹⁹ See Frederico & Conroy, *supra* note 17.

¹⁰⁰ See Jacob Shamsian, *A Case Against Southwest Airlines Reveals the Biggest Problem with Consumer Lawsuits in America*, BUS. INSIDER (Aug. 26, 2015), <https://perma.cc/Q4PU-5QZX>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *Chong v. Northeastern Univ.*, No. 20-10844-RGS, 2020 D. Mass. LEXIS 233923, at *5 (Dec. 14, 2020).

¹⁰⁴ See generally *Class Action Lawsuits Seem Good but Have a Lot of Drawbacks That Don't Make Them Very Ideal*, N.C. CONSUMERS COUNCIL, <https://perma.cc/HH4M-J3K6> (last updated Dec. 9, 2021) (citing the pros and cons of class action lawsuits).

¹⁰⁵ See *id.*

¹⁰⁶ See generally Krasno, *supra* note 80 (discussing the financial impact of COVID-19 on colleges and universities and noting that “few have contingency funds to cover that sort of payout”).

¹⁰⁷ See Frederico & Conroy, *supra* note 17.

¹⁰⁸ See, e.g., *Almanac of Higher Education 2017-2018*, 63 CHRON. HIGHER EDUC., Aug. 18, 2017, at 1, 29.

B. *Institutional and Program Differences Make a One-Size-Fits-All Solution Impractical*

There are a plethora of different types of colleges and universities: religiously affiliated, public/private, small/large, urban/rural, research/non-research, residential/non-residential, community colleges, and two-year/four-year.¹⁰⁹ All of these characteristics influence an institution's financial outlook and how much it could refund students.¹¹⁰ These characteristics also affect the needs of the students.¹¹¹ For example, students at a community college that does not offer residential housing will need different reimbursements than students at a four-year private college that offers housing.¹¹² Additionally, a second-year nursing student missing in-person lab courses is different from a first-year student with an undeclared major who is enrolled in general education courses that may have translated better to an online learning environment.¹¹³

A comparison of residential school and community college revenues shows how IHEs are differently situated to refund students.¹¹⁴ Residential schools that are dependent on room and board as a source of revenue are taking a larger financial hit than community colleges that are not.¹¹⁵ Additional fees affected by the pandemic that contribute to residential schools' revenue include, but are not limited to, gym memberships, parking garages, athletic events, research programs, daycares, and various clinics.¹¹⁶ Comparatively, community colleges may rely on gym memberships, but the majority of their revenue comes from state funding and tuition.¹¹⁷ Residential campuses lost more in revenues, comparatively, than non-

¹⁰⁹ *Id.*

¹¹⁰ See Seltzer, *supra* note 82.

¹¹¹ See Seltzer, *supra* note 82.

¹¹² Compare, e.g., *Cost of Attendance*, ROXBURY CMTY. COLL., <https://perma.cc/VTQ4-BWPP> (last visited July 12, 2022) with, e.g., *Room and Board Rates*, BOS. COLL., <https://perma.cc/8TDC-9XVF> (last visited July 12, 2022).

¹¹³ See Georgia Dewart et al., *Nursing Education in a Pandemic: Academic Challenges in Response to COVID-19*, 92 NURSE EDUC. TODAY 1, 1 (2020).

¹¹⁴ Compare BOS. COLL., BOSTON COLLEGE: CONSOLIDATED FINANCIAL STATEMENTS 4 (2020), <https://perma.cc/K4JQ-FYB2> [hereinafter Boston College: Financial Statements], with ROXBURY CMTY. COLL., ROXBURY COMMUNITY COLLEGE: FINANCIAL STATEMENTS AND MANAGEMENT'S DISCUSSION AND ANALYSIS 22 (2019), <https://perma.cc/9GM4-WXSZ> [hereinafter Roxbury Community College: Financial Statements].

¹¹⁵ See generally DePietro, *supra* note 7 ("Institutions are suffering from lost revenue to partial tuition refunds, room and board fees, etc.").

¹¹⁶ Krasno, *supra* note 80; see also BOSTON COLLEGE: FINANCIAL STATEMENTS, *supra* note 114, at 4.

¹¹⁷ ROXBURY COMMUNITY COLLEGE: FINANCIAL STATEMENTS, *supra* note 114, at 10, 12, 22.

residential campuses.¹¹⁸ Residential schools that are realizing larger losses in revenue are in more dire financial situations and have less of an ability to refund students.¹¹⁹ That is not to say that community colleges are also not experiencing losses in revenue, considering a decrease in enrollment.¹²⁰ However, residential campuses provide more services to students regularly, which also is a factor in how much of a refund students are requesting or expecting; the more services they are missing out on, the more they are hoping to be compensated.¹²¹

The disruptions in students' education also vary depending on what program they are enrolled in at their respective IHE.¹²² Field course requirements are essential to students pursuing science majors.¹²³ The shutdown of labs across the country inhibits the learning experience for these future scientists.¹²⁴ Instead of performing dissections in the classroom, professors perform the dissections and set up cameras to stream for students, belaying the argument that this virtual experience is equal to the hands-on experience these students would be getting in person.¹²⁵ Prior to the pandemic, geology-major programs required students to fulfill a capstone field work course to graduate.¹²⁶ These students may have a stronger case for loss of educational services, ultimately deserving greater compensation, than students who are history, English, or math majors, whose programs lack a lab or field work component.¹²⁷ Despite science programs creating innovative solutions to adjust to online learning environments, the lack of lab courses and field work is not what students originally signed up for nor expected.¹²⁸

¹¹⁸ See generally Paul N. Friga, *The Great Recession Was Bad for Higher Education. Coronavirus Could Be Worse*, CHRON. HIGHER EDUC. (sub. req.), Mar. 24, 2020, at 5, <https://perma.cc/ZW7H-X6G3> (citing variances in revenue drops depending on "the type of university, relationship with state legislature, and historical financial models").

¹¹⁹ See *id.* at 4–5.

¹²⁰ Madeline St. Amour, *Community College Enrollment Down Nationally, but Not Everywhere*, INSIDE HIGHER ED (Nov. 19, 2020), <https://perma.cc/X2P8-64X6>.

¹²¹ See Krasno, *supra* note 80.

¹²² See generally Pennisi, *supra* note 97 (discussing the trouble science majors are having completing lab and fieldwork courses).

¹²³ See Pennisi, *supra* note 97.

¹²⁴ See Pennisi, *supra* note 97.

¹²⁵ Pennisi, *supra* note 97.

¹²⁶ Pennisi, *supra* note 97.

¹²⁷ See e.g., Frederico & Conroy, *supra* note 17.

¹²⁸ See Pennisi, *supra* note 97.

IV. The Federal Government Should Establish a Relief Fund Exclusively for Higher Education with a Focus on Student Reimbursement

A. *What the Future Higher Education Bailout Should Do Differently Compared to Past Bailouts*

To balance the needs between students and the college or university while accounting for institutional and program differences, the federal government should provide a specific higher education relief fund aimed at providing individual students with funding regardless of their federal eligibility status and with a focus on public IHEs.¹²⁹ From there, IHEs should be able to distribute the money to students based on individualized needs.¹³⁰

In 2021, the American Council on Education estimated that a total of \$97 billion would be needed to fully meet institutional and student needs.¹³¹ To date, the federal government provided \$76.2 billion in aid for postsecondary education.¹³² The U.S. DOE distributed the funds according to a formula, limiting schools' eligibility based on the size of their endowment and the number of Pell Grant recipients enrolled.¹³³ At the outset of the CARES Act and the second round of funding, the DOE ruled that undocumented college students were not eligible for emergency student grants.¹³⁴ More specifically, the finances would only be available for those who qualify for federal student aid.¹³⁵ The U.S. District Court for the Northern District of California preliminarily enjoined the DOE from enforcing the eligibility requirement.¹³⁶ The third relief bill leaves it up to the DOE to decide whether undocumented and international students will be eligible for relief.¹³⁷

The formula used to allocate funding in any future relief funds needs to be calculated differently.¹³⁸ First, the funding should put an emphasis on

¹²⁹ Krasno, *supra* note 80; Miller, *supra* note 90.

¹³⁰ See generally Krasno, *supra* note 80 (explaining the need for government funding for schools and students during the pandemic).

¹³¹ Kerry Murakami, *Higher Ed Groups Ask for \$97 Billion More in COVID -19 Aid*, INSIDE HIGHER ED (Jan. 26, 2021), <https://perma.cc/3GCT-ZQXN>.

¹³² *Higher Education COVID-19 Relief Funding—Who Got What and What Went Wrong?*, GAO (Aug. 26, 2021), <https://perma.cc/5BWJ-QANY>.

¹³³ *Id.*

¹³⁴ *Oakley v. Devos*, 20-CV-03215-YGR, 2020 WL 3268661, at *13–14 (N.D. Cal. June 17, 2020).

¹³⁵ *Id.*

¹³⁶ *Id.* at *4.

¹³⁷ Murakami, *\$40B in Aid for Higher Education*, *supra* note 84.

¹³⁸ Miller, *supra* note 90.

providing more for public IHEs, including community colleges.¹³⁹ Public institutions are likely to face extreme budget cuts from state legislatures in the face of COVID-19 despite an already existing downward trend of funding over the past few years.¹⁴⁰ Additionally, public institutions and community colleges educate a large share of historically marginalized students compared to their private school counterparts.¹⁴¹ This will address some of the equity concerns that arose among students during the pandemic.¹⁴²

Second, any future COVID relief distributed by the DOE should not base the allocation on Pell eligible students—this leaves undocumented students out of the equation.¹⁴³ Finally, the federal government should base the allocation of funding on the total number of students enrolled, not just the number students enrolled full time.¹⁴⁴ Allocating funding based on the number of students enrolled, regardless of full-time or part-time status, will provide public community colleges with more funding than the prior stimulus bills.¹⁴⁵ In order to provide increased funding to public IHEs and to have a more inclusive formula to base funding allocation on, the federal government should exclude for-profit schools from receiving funds.¹⁴⁶ Once a reimbursement fund is established exclusively for IHEs, schools must then determine how to distribute the funding.¹⁴⁷

¹³⁹ Miller, *supra* note 90; see Hugh T. Ferguson, *CARES Act Review Highlights Lack of Support for Public Colleges*, NAT'L ASS'N OF STUDENT FIN. AID ADMIN. (Sept. 21, 2020), <https://perma.cc/J293-YRHH>.

¹⁴⁰ Miller, *supra* note 90.

¹⁴¹ Miller, *supra* note 90.

¹⁴² See Casey, *supra* note 5; Miller, *supra* note 90.

¹⁴³ HELEN THORPE, JUST LIKE US: THE TRUE STORY OF FOUR MEXICAN GIRLS COMING OF AGE IN AMERICA 27 (2011); FED. STUDENT AID FINANCIAL AID AND UNDOCUMENTED STUDENTS: QUESTIONS AND ANSWERS 1 (2019), <https://perma.cc/9884-576C>.

¹⁴⁴ Miller, *supra* note 90.

¹⁴⁵ Miller, *supra* note 90.

¹⁴⁶ Miller, *supra* note 90.

¹⁴⁷ See generally Ellen M. Burstein & Camille G. Caldera, *Harvard Nets Nearly \$9 Million in Coronavirus Aid from Federal CARES Act*, HARVARD CRIMSON (Apr. 15, 2020), <https://perma.cc/EYY6-YA47> (referencing the various requirements of the distribution of the CARES Act).

V. Proposed Student Compensation Plan Components Each IHE Should Consider Incorporating

A. Refund of Fees Covering In-Person Services Should Be Prioritized

The strongest claims students have for refunds or abatements include room and board fees, gym and recreational fees, computer and library fees, meal plans, study abroad programs, and parking passes.¹⁴⁸ One court, in particular, has declined to dismiss a count of a student's complaint premised on payment of a campus recreation fee.¹⁴⁹ The campus recreation fee involved in *Chong v. Northeastern University* gives students the option to gain admission to home athletic events, use the fitness center, athletic facility, and pool.¹⁵⁰ The judge ruled that this claim for breach of contract was plausible.¹⁵¹ The survival of this breach of contract claim over the campus recreation fee indicates that IHEs should be proactive in refunding this portion of fees that depend on in-person access.¹⁵² In another case, students complained that New York University charged them fees for the purpose of bettering supplemental student programs and offices including the registrar, the health center, counseling services, and the student center.¹⁵³

More research needs to be done about whether or not colleges and universities are offering anything in place of the recreation services.¹⁵⁴ If IHEs charge students a general activity fee, but provide online activities in lieu of in-person activities, the refund of these fees does not need to be prioritized.¹⁵⁵

¹⁴⁸ *Students, Parents: Were You Refunded for Tuition and Other Expenses?*, CLASSACTION.ORG (last visited July 12, 2022), <https://perma.cc/B479-A79N>; see *Chong v. Northeastern Univ.*, No. 20-10844-RGS, 2020 U.S. Dist. LEXIS 233923, at *4 (D. Mass. 2020).

¹⁴⁹ *Chong*, 2020 U.S. Dist. LEXIS at *12.

¹⁵⁰ *Id.* at *9.

¹⁵¹ *Id.* at *11.

¹⁵² See generally Kerr, *supra* note 21 (describing the frustration that students from various colleges feel towards not having access to certain amenities due to COVID-19, leading some students to file lawsuits).

¹⁵³ *Morales v. New York Univ.*, No. 20. Civ. 4418 (GBD), 2021 U.S. Dist. LEXIS 50333, at *4-5 (S.D.N.Y. Mar. 17, 2021).

¹⁵⁴ See Kerr, *supra* note 21.

¹⁵⁵ Cf. *Chong*, 2020 U.S. Dist. LEXIS at *11 (recognizing a plausible claim for breach of contract where a university charges students a campus recreation fee but provides the students with neither in person nor online services in exchange for the payment).

B. *A Focus on Tuition Including Stabilization, Crediting, and Reimbursement*

After the Great Recession, colleges and universities turned towards tuition hikes to make up lost revenue.¹⁵⁶ This indicates that tuition hikes will be a realistic solution for administrations to implement while trying to make up for major revenue losses.¹⁵⁷ Funds received by IHEs from the federal government should first and foremost be used to keep tuition prices the same for the next academic year.¹⁵⁸ This will be an incentive for prospective students to matriculate and for current students to stay.¹⁵⁹

Tuition crediting could be another aspect of the student compensation plans enacted by IHEs.¹⁶⁰ This will keep the money at the college or university, while also allowing students to be somewhat financially compensated for lost time and academic services for the spring 2020 semester.¹⁶¹ Recognizing that this will affect future revenues, tuition credits should be provided on an application basis with preference given to students who can show that their academic experience was adversely affected or that they experienced financial hardship.¹⁶² These applications should be reviewed and considered by task forces at each respective IHE.¹⁶³ It is likely that these task forces already exist for the purposes of distributing the prior federal government funding.¹⁶⁴ However, this task could be daunting; therefore, IHEs should consider creating a new position dedicated solely to reviewing applications for reimbursements, funded by the proposed federal funding.¹⁶⁵

¹⁵⁶ Friga, *supra* note 118.

¹⁵⁷ *See generally id.* (reporting that the primary way higher education made up for lost financial resources from the Great Recession was to increase tuition).

¹⁵⁸ *See* Ferguson, *supra* note 139 (warning that lack of sufficient funding could lead to increased tuition).

¹⁵⁹ *See* DePietro, *supra* note 7.

¹⁶⁰ *See* Nik DeCosta-Klipa, *Northeastern Credits Tuition for 11 Students Dismissed for Breaking COVID-19 Rules*, BOSTON.COM (Sept. 18, 2020), <https://perma.cc/ZW2T-T6HW> (discussing Northeastern University's decision to credit students' spring tuition despite the students' violation of the COVID-19 campus rules).

¹⁶¹ *See id.* (noting that the already paid tuition will be credited towards the students' spring tuition).

¹⁶² *See generally* Casey, *supra* note 5 (providing background information on students experiencing hardship due to COVID-19).

¹⁶³ *See, e.g.,* *COVID-19 Task Force*, SUFFOLK UNIV., <https://perma.cc/6UAAU-CHU9> (last visited July 12, 2022).

¹⁶⁴ *See id.*

¹⁶⁵ *See, e.g.,* *COVID Testing Site Manager for Simmons University*, CHRON. HIGHER EDUC.,

CONCLUSION

The novel COVID-19 virus and the financial ruin it has caused for post-secondary education necessitates an innovative solution that balances equity concerns amongst students without putting the sole financial responsibility on individual IHEs. Remedying the financial impact COVID-19 had on these institutions will be no small undertaking. The federal government needs to provide a relief fund specifically for colleges and universities to supplement their lost revenue and to compensate students accordingly based on the severity of students' financial and academic losses. Preference of this funding should be given to public colleges and universities, as well as community colleges. With this funding, IHEs should prioritize keeping their tuition prices the same. Students should be able to submit applications for consideration of financial compensation. Those applications should be reviewed and decided on by institutional COVID-19 task forces that already exist, or by newly created student support positions funded by the federal government bailouts. Only then will higher education, and students, be one step closer to healing from the COVID-19 pandemic.