

# Tuition Refund Requests Due to Distance Learning

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SCHOOLS IN NEW ENGLAND

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# Today's Agenda

1. COVID-19 school closures, move to remote learning and resulting parent demands for tuition refunds
2. Enrollment contract clauses – force majeure and remote learning
3. College and university level class action lawsuits
4. Results of tuition refund court cases
5. Lessons learned from the court cases
6. Tuition refund insurance considerations
7. Q&A

# Tuition Refund Legal Considerations

Linda Johnson, Director, Litigation Department and Co-Chair  
of Education Law Group

Susan Schorr, Of Counsel, Litigation Department and Vice  
Chair, Education Law Practice Group

The logo for McClane Middleton is displayed within a white rectangular box. The word "MCLANE" is written in a large, blue, serif font. A thin blue horizontal line separates "MCLANE" from the word "MIDDLETON", which is written in a smaller, grey, serif font below the line.

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# The 2020 Spring Switch

From on-campus, in person learning and living  
to  
remote/distance learning and living

# K-12 Parent Reaction

Many schools received requests and demands from families for a refund of tuition, and room and board fees

Some schools already had force majeure clauses

Few, if any, had remote learning provisions

Fewer still mentioned the word “pandemic”

# Schools and *Force Majeure*

Why did some schools already have *force majeure* clauses even before the COVID-19 pandemic?

# 2006 St. Paul's School Flood



## Deluge Threatens New England Boarding School

May 18, 2006 · 10:00 AM ET



The school's flooded power plant on Monday morning.

*Kathy Baer*



The Hargate Building, where officials feared the school's art collection might be lost. A brick path and road washed away, leaving water pouring into the front entrance.

*Kathy Baer*

# Flooding closing St. Paul's School; students flying home

By David Tirrell-Wysocki, Associated Press Writer | May 15, 2006

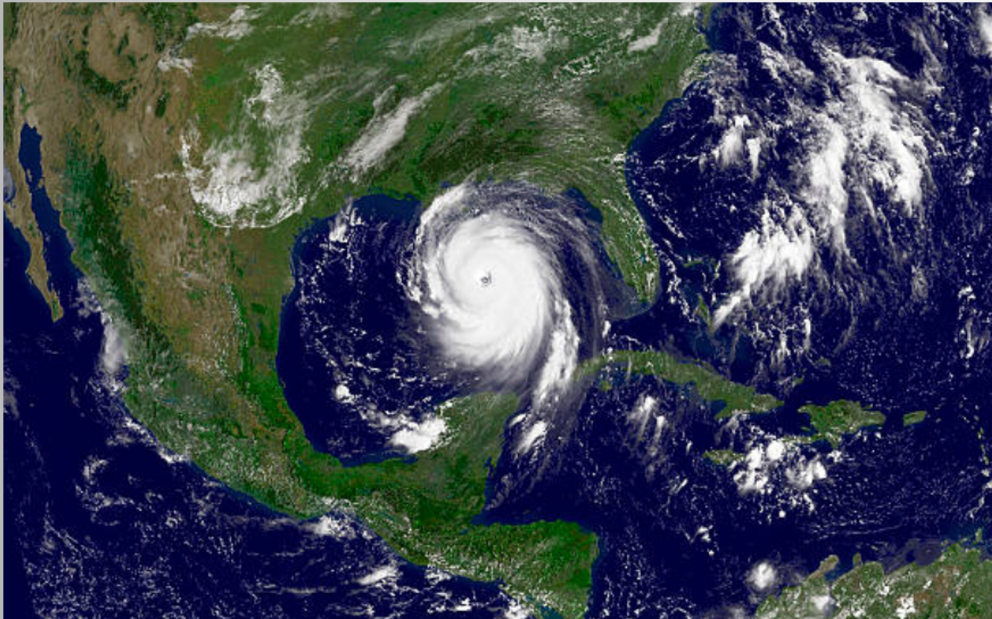
CONCORD, N.H. “Flooding has closed St. Paul's School and the school is working to get students back to their homes around the world on short notice.

"It is a challenge, particularly when have 90-plus international students in a school of 530," said Rector Bill Matthews.

Flooding from Big Turkey Pond and the Turkey River knocked out the prep school's heating plant and sewage pumping station and hit some dorms, the library, the health center, post office and performing arts center. In addition, the normally calm river is rushing through the sprawling, scenic campus, posing a safety concern....”

[http://archive.boston.com/news/education/higher/articles/2006/05/15/flooding\\_closing\\_st\\_pauls\\_school\\_students\\_flying\\_home/](http://archive.boston.com/news/education/higher/articles/2006/05/15/flooding_closing_st_pauls_school_students_flying_home/)

# Hurricane Katrina pummeled the Gulf Coast on August 29, 2005



[https://www.gettyimages.com/photos/hurricane-katrina?phrase=hurricane%20katrina&sort=most popular](https://www.gettyimages.com/photos/hurricane-katrina?phrase=hurricane%20katrina&sort=most%20popular)

# How the K-12 Schools Responded

1. Some, without force majeure clauses, offered a refund
2. Some, even with force majeure clauses, offered a refund
3. Some offered no refund
4. Guidance about what to do was mixed
5. Most intent to “do the right thing” and maintain good ongoing relations with families

## Other K-12 School Responses to Tuition Refund Requests

1. Asked parents to donate all or a portion of their refund to the school's Annual Fund or to the school's capital campaign
2. Asked parents to consider applying the refund as a credit toward the next year's tuition
3. SAIS (Serving and Accrediting Independent Schools) posted sample letters online about communicating about refunds for tuitions

# A Closer Look at *Force Majeure*

Following the COVID-19 school closures and resulting parental demands for refunds, schools without force majeure clauses adopted them and schools that already had them enhanced them.

Let's take a look:

# *Force Majeure*

- Translated from the French, it means “superior force”
  - Event beyond your control
- Gives the school the ability to modify or suspend educational its contractual obligations immediately and without notice due to a force majeure event
- Be sure to explicitly reference “pandemic” and “government action,” which would include mandatory business closures due to government orders
- Reference the school’s discretion to convert to remote learning or extend the academic year should it be necessary to do so in order to satisfy legal requirements to provide the necessary hours of instruction
- Indicate no tuition refunds are due

# Remote Learning

- Explicitly state that the school may convert to online learning whether to comply with government action or for reasons the school determines to be safest for the community.
- If the school intends to record online sessions and state law requires two-party consent for video and audio recordings, such a provision should act as both notice and consent for the school to record students and reproduce their coursework.
- Indicate that students and parents are not permitted to make their own recordings.
- Reinforce that no tuition refunds will be issued under these circumstances (or refer back to the “Unconditional Obligation to Pay” provision of the contract or addendum.

# Recent Example

Elon University Disclosure Statement Regarding COVID-Related Circumstances includes the following:

- “....Tuition and fees for the 2020-2021 academic year have been set and will not be changed if adjustments are made to campus operations. Tuition and fees are paid by students in exchange for learning, academic credit, and certain non-academic services that will be provided whether in person, in a hybrid environment, or entirely remotely.”
- This tuition policy statement lead to Elon students filing a petition for the tuition policy to be amended because the “Elon experience” was missing with online classes.
- See ENN “No tuition refund if classes go remote raises concerns for students,” by Isabella Seman, 7/21/20

# Class Actions on the College and University Level

By May of 2020, tuition refund class actions abounded across the country.

The media began to report staggering figures, for example, collectively \$670 million that local New England colleges would need to refund in unused student room and board.\*

- Harvard stands to lose \$99 million from room and board refunds
- Boston University could lose about \$68.4 million
- Stonehill College could refund \$8.4 million
- Merrimack College could refund

\* See [www.bizjournals.com/boston/news/2020/03/19/local-colleges-to-refund-up-700m-in-unused-student.html](http://www.bizjournals.com/boston/news/2020/03/19/local-colleges-to-refund-up-700m-in-unused-student.html)

# Court Results Have Been Mixed

**Brown University decision** – March 4, 2021 – A federal court **dismissed** a series of claims from students who filed a lawsuit alleging breach of contract and tort claims that they were entitled to a tuition refund. Choi et al. v. Brown, C.A. No. 20-191-JJM-LDA.

- The judge noted that there was no plausible reading of Brown's course catalog, student handbook, policies, marketing and other **materials** that made a contractual promise for in-person learning.
- The University also **explicitly reserved the right** to alter the administration of its academic offerings.
- Brown argued that despite the pandemic, it continued to provide a world class education and students continued to learn remotely.

# Santa Clara

## Santa Clara Lawsuit, March 31, 2021

- A California federal judge **dismissed** a putative class action brought by students demanding to be reimbursed for tuition and fees
- The court held that the school's statements do not impose contractual obligations, implied or express, and that the terms and conditions stated that the university would not issue tuition refunds as a result of **“curtailed services resulting from strikes, acts of God, civil insurrection, riots or threats thereof, or other causes beyond the control of the university.”**

# George Washington University

George Washington University, March 24, 2021 decision.

- A D.C. federal judge **dismissed** a consolidated proposed class action demanding tuition refunds for transitioning to online learning during the pandemic
- Court held that the school's statements of general descriptions do not create enforceable obligations
- Also that the school's policy reserves the right to make changes to its programs, fees and academic calendar when deemed necessary and the school "reserves the right to make changes in programs without notice whenever circumstances warrant such changes."
- Court also dismissed claims of unjust enrichment and conversion

# Not Fully Dismissed

**Pace and Columbia University**, March 1, 2021

- A New York federal judge dismissed some but not all of a pair of proposed class actions demanding tuition and fee reimbursements
- References to the school's on-campus experience in marketing materials was not enough but promise that on-campus courses would be "taught with only traditional in-person, on-campus class meetings" could be subject to challenge
- Students were provided a refund but alleged that it wasn't enough and the students pointed to the school's \$182 million endowment and federal government coronavirus aid.

# The Boston Angle

- **Boston University**, January 7, 2021 decision – motion to dismiss granted in part and denied in part – students stated a claim for breach of contract for failure to provide in-person instruction and failure to provide access to on-campus facilities and resources – failed to state a claim for failure to provide room and board for one week and failed to state a claim for unjust enrichment
- **Northeastern University**, October 1, 2020 and December 14, 2020 decision – motion to dismiss granted in part and denied in part – students stated a plausible breach of contract claim on failure to refund recreation fee

# Lessons Learned From the College and University Court Cases

1. Explicit and clear language that no refund will be provided is key and will be upheld
2. Be careful about the wording of your marketing, course and other materials and publications such as how you refer to on-campus experiences and promises
3. Be reasonable – if school charges a fee, like a recreation fee, and there is no recreation, consider a refund
4. Consider how you set out or itemize tuition and other fees
5. Adopt force majeure and remote learning provisions that remove all doubt about what rights the school reserves to change the learning environment with no tuition or fee refunds

# The Trickle Down Effect

Trends on the college and university level often wind their way down to the K-12 level.

Example: antitrust concerns

# Tuition Refund Insurance Considerations

**Jack Strain, Executive Vice President, A.W.G.  
Dewar**



THE TUITION REFUND PLAN

**Providing Tuition Security Since 1930**

- What coverage is there under tuition refund insurance (if any)?
- How does tuition refund insurance work?

# Q&A and Discussion



The information in these slides is **NOT legal advice**. For specific situations or advice about the application of these guidelines, laws or rules to your business or industry, you should seek specific legal advice.

# About McLane Middleton's Education Law Group

- McLane Middleton's Education Law Group attorneys serve as outside legal counsel to numerous K-12 independent schools in New England, and provide consultation and training services to schools and school associations throughout the country and internationally.
- The group has extensive experience in understanding the unique nature of the governance of educational institutions as well as in handling difficult issues that may arise such as relating to crisis response, contracts, policies and handbooks, employee performance, tax exempt status, restrictions on endowment, privacy and data security, health care, immigration, litigation, faculty compensation and tenure issues, and student discipline, to name a few.
- Our focus and dedication to the needs of this industry is unparalleled.

▪ [www.mclane.com](http://www.mclane.com)

# About Dewar's Tuition Refund Plan

- The Tuition Refund Plan is a unique form of insurance originated by Dewar to provide families the opportunity to protect their tuition investment in independent schools and colleges.
- The program refunds a portion of the unused annual tuition and insured fees when students are withdrawn or dismissed for covered reasons.
- The Plan's benefit extends to the school by helping to insure receipt of its budgeted tuition income.
- The Tuition Refund Plan has a proven track record of providing tuition security to schools and families since its inception in 1930. Currently more than 1,200 schools and colleges rely on its protection.
- [www.tuitionrefundplan.com](http://www.tuitionrefundplan.com)

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