BOND
HIGHER EDUCATION
INFORMATION MEMO
APRIL 14, 2023

What Did the Second Circuit Do to the Relationship Between a College or University and its Students in *Rynasko v. New York University*?

In the midst of the COVID-19 pandemic, higher education institutions were faced with myriad challenges - remote instruction, dedensification of campuses, cleaning and sanitizing and COVID testing, to name a few. On top of all of that, hundreds of institutions, including approximately 20 in New York, were swept up in the wave of refund class action lawsuits. In these lawsuits, students argue that they did not receive the "benefit of their bargain" from their college or university when instruction and student services transitioned to remote modalities. They seek refunds of tuition and fees to reimburse them for the perceived loss of their "educational experience."

New York law is unique in its view of the relationship between a higher education institution and its students. Historically, New York courts have held that the relationship is an implied contractual relationship, but that a student seeking to recover for an institution's breach of contract must point to a specific promise in an institution's "circulars, bulletins or catalogs" that was breached.

The United States Court of Appeals for the Second Circuit recently issued a decision reinstating the dismissal of a refund class action against New York University (NYU). In *Rynasko v. New York University*, Case No. 21-1333 (March 23, 2023), in a 2-1 decision, the Second Circuit seemingly expanded the scope of this implied contractual relationship beyond what has been recognized by the New York Court of Appeals and other courts in New York state.

In *Rynasko*, the plaintiff was a parent of a student who brought a putative class action against NYU in the Southern District of New York. The complaint included claims for breach of contract, money had and received, unjust enrichment and conversion, based on the fact that NYU allegedly did not provide the educational services, facilities and opportunities that were promised. NYU moved to dismiss the plaintiff's claims for lack of standing, and also argued against the plaintiff's motion to add a student as a named plaintiff. NYU opposed the motion to amend on the ground that the amendment would be futile because the proposed amended pleading did not identify a specific promise found in NYU's "circulars, bulletins or catalogs," that had been breached. The district court agreed, denying the motion to amend and dismissing the complaint because the parent lacked standing to sue NYU.

On appeal, the Second Circuit agreed that the parent did not have standing to sue because she had not suffered a cognizable injury and because the contract at issue was between NYU and the plaintiff's daughter, i.e., the student.

However, the Second Circuit reversed the lower court's decision to deny the plaintiff's motion to amend to add the student as the plaintiff. The court correctly cited New York law and said: "the relationship between a university and its students is contractual in nature, and that specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract."

Next, however, the majority of the three-judge panel held that materials other than "bulletins, circulars and handbooks" could be considered when determining the scope of the implied contract – something New York courts and district courts applying New York law have consistently refused to do.

The panel framed its role as to "ascertain the intention of the parties *at the time they entered into the contract*." The majority relied upon allegations that NYU had historically offered courses on campus and in-person, had advertised certain courses would be "in person," had described its services and facilities and the benefits of personal contacts between students and faculty members in a manner suggesting they would be on campus and in person, as well as recruiting materials that described the benefits of attending college in New York City.

Considering these allegations from the perspective of whether, before students enrolled in the spring 2020 semester, "the parties mutually intended and implicitly agreed that NYU would provide generally in-person courses, activities, facilities, and services," the majority held that the proposed complaint plausibly alleged "an implied contract between NYU and its students to deliver an in-person student experience."

The Second Circuit also opined that NYU's disclaimer, which reserved the institution's right to alter its course offerings, was "too broad" to excuse NYU's "nonperformance." The Second Circuit's apparent view is that only "true" *force majeure* clauses that specifically excuse nonperformance upon the occurrence of "an event beyond the control of the parties" can protect higher education institutions from liability in breach of contract actions.

Justice Parker dissented from the majority decision. In his dissenting opinion, Justice Parker stated that "longstanding history" of an educational institution is "not an appropriate consideration when analyzing an implied contract between a university and a student." The enforcement of custom or past practice under an implied contract theory contradicts New York's requirement that only specific promises contained in an institution's bulletins or catalogs can form the basis of a breach of contract claim by a student.

NYU has filed a petition seeking *en banc* review of the panel's decision, leaving open the possibility that a majority of the full court may agree with the principles set forth in Justice Parker's dissenting opinion. There are three other appeals of dismissals of refund class actions pending in the Second Circuit, all of which were argued before different three-judge panels. How those panels will decide the remaining appeals in light of *Rynasko* remains to be seen.

In the meantime, the implications of *Rynasko* on contract claims between students and higher education institutions are significant. Colleges and universities in New York are steeped in custom and past practice. To allow such custom and practice to form the basis for a contractual claim between a student and her college or university is unprecedented. Under *Rynasko*, students could theoretically seek to recover under breach of contract anytime a campus that had been featured in a recruiting brochure or website changes in appearance if that change negatively impacts the student's educational experience. In the context of these COVID-19 class actions, *Rynasko* opens the possibility for new lawsuits even in cases that have already seen dismissal of these claims. The statute of limitations on contract claims in New York allows claims to be brought for six years following the alleged breach. We could see a renewed effort by the plaintiff's bar to recover from institutions for COVID-19 related closures.

How *Rynasko* will impact pending or future motions for class certification is an open question. It seems counterintuitive that class certification is appropriate in light of the Second Circuit's statement that the inquiry focuses on the "intention of the parties *at the time they entered into the contract*." The intention of one student likely differs from that of another. The recruiting materials and/or website materials that a student viewed and considered when entering into the contract with an institution likely differ. It would seem that in allowing the plaintiff to proceed with a claim against NYU, the Second Circuit has simultaneously cast doubt on whether the plaintiffs can meet the requirements of a class action under the Federal Rules of Civil Procedure.

The attorneys at Bond are consistently monitoring the developments in these refund class action cases. If you have any questions related to defense of these actions, contact Suzanne Messer or any of the attorneys in Bond's higher education practice.

Bond has prepared this communication to present only general information. This is not intended as legal advice, nor should you consider it as such. You should not act, or decline to act, based upon the contents. While we try to make sure that the information is complete and accurate, laws can change quickly. You should always formally engage a lawyer of your choosing before taking actions which have legal consequences. For information about our firm, practice areas and attorneys, visit our website, www.bsk.com. Attorney Advertising. © 2023 Bond, Schoeneck & King PLLC.

Bond, Schoeneck & King, PLLC BondLawFirm Bond, Schoeneck & King bond_lawfirm