



Fla. College's Immunity Weighed In COVID Fees Refund Suit

*By Nathan Hale
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Law360, Miami (November 10, 2021, 7:25 PM EST) -- Miami Dade College urged a state appellate panel Wednesday to find that a lower court erred in advancing a proposed class action seeking prorated refunds for student fees after 2020 campus closures prompted by the COVID-19 pandemic, arguing that the pleadings do not satisfy requirements to overcome the school's sovereign immunity.

The trial court in Miami had dismissed nursing student Fernando Verdini's unjust enrichment claim, but denied the public school's motion to dismiss his breach of contract claim, finding that invoices he attached to his complaint satisfied the requirement for an express written contract to trigger an exception to sovereign immunity.

But on Wednesday, it appeared Verdini faced a greater challenge in convincing the state's Third District Court of Appeal to keep his case alive, a suit that attorneys said could affect a class of 92,000 students. The three-judge panel repeatedly questioned whether the invoices and a financial obligation agreement amount to a written contract, as well as Verdini's assertions that he should be allowed to advance the case and take discovery to see if the college has additional contractual documents in its possession.

Arguing for MDC, Dwayne A. Robinson of Kozyak Tropin & Throckmorton LLP, asserted that Verdini has failed to meet his burden and failed to pursue available avenues for seeking any additional documents, such as a public records request.

"There is no escape hatch that allows a plaintiff to leap over sovereign immunity [and] file a lawsuit without the contract that is the basis for his or her claim," he told the court. "Any waiver of sovereign immunity must be clear and unequivocal. That's the law. They're not allowed to jump over that safety hatch and say, 'Oh, we don't have the contract. The dog ate my homework. Let me come and bring the sovereign into court.' They're not allowed to do that."

Robinson noted that his firm has litigated with and against Verdini's counsel from The Moskowitz Firm, which was founded by former Kozyak Tropin partner Adam Moskowitz.

"The fact they've chosen to come to court without doing their homework does not excuse what is the law in the state," he said.

Attorney Adam A. Schwartzbaum, who presented Verdini's arguments, offered somewhat conflicting answers when pushed by the court about whether the existing pleadings are sufficient or if his side believes MDC actually has an express written contract document in its possession.

Schwartzbaum said he believes there are likely further invoices and documents that elaborate on the listed fees, and he noted that in a similar case the firm brought in state court on behalf of a student against the University of South Florida, discovery did turn up additional registration papers despite the school's denial there were any. He said the court in that case asked the legal team to attach the registration to an amended complaint.

"This is a motion to dismiss. Let us move forward. Let us take discovery on this issue and let's get a complete record," Schwartzbaum argued.

But Schwartzbaum also said that over the past year, trial courts "in every corner of this state" have made findings under similar circumstances that students in these types of cases have sufficiently alleged the existence of express written contracts.

And when pressed if he believed the case was sufficient to survive a motion to dismiss as currently pled, he said yes.

"We believe that the docs we have attached to the complaint are sufficient to show an agreement between the parties in writing because they list the types of fees by name, and then they say how much was charged," he said. "There's an offer, acceptance and consideration."

Judge Monica Gordo pointed out the federal Middle District of Florida's dismissal of the case *Lafleur v. University of South Florida* on sovereign immunity grounds, but Schwartzbaum argued that case was distinguishable because it sought refunds of tuition payments, not just service fees.

MDC attorney Robinson rebutted that assertion, telling the court the *Lafleur* ruling had broader reach into refunds for promises for "experiences, opportunities and related services."

Robinson also argued that several other rulings around the state that have allowed students' cases to get past sovereign immunity at the motion to dismiss stage have ignored the Third District's 2019 decision in *City of Miami Firefighters' & Police Officers' Ret. Tr. & Plan v. Castro*, in which the court held that an express written contract can waive sovereign immunity only if it "impose[s] the express duty that the plaintiff alleged was breached."

He contended that the invoices and financial obligation agreement do not specify any duty to provide on-campus services.

After Schwartzbaum cited fees for lab work that was meant to take place on campus and was supposed to be an important part of Verdini's coursework but got canceled when concerns about COVID-19 shuttered the campus, the judges pressed him on whether he had included lab fees in the complaint. Schwartzbaum pointed to a reference to "among others" and a statement that the "total amount of fees will be proven at trial."

Judge Kevin Emas mouthed the word "Wow."

"Why wouldn't you include lab fees, because it seems to me it is the brightest example that you could show of a necessarily on-campus, in-person activity?" Judge Emas then said.

After some back and forth about fees for various types of possible services and whether the services could have been satisfied through remote learning or other means, Schwartzbaum told the court: "The facts that we're arguing about 'how much' and 'what just' based on the language of these invoices and this agreement — where they said they can come take us into collections and go after us if we don't pay these fees — shows that there is clearly enough in writing here for all of us to understand what the agreement was."

Judges Kevin Emas, Norma S. Lindsey and Monica Gordo sat for the Third District panel.

Miami Dade College is represented by general counsel Javier A. Ley-Soto and by Javier A. Lopez, Dwayne A. Robinson, Michael R. Lorigas and Eric S. Kay of Kozyak Tropin & Throckmorton LLP.

Verdini is represented by Adam Moskowitz, Howard M. Bushman and Adam A. Schwartzbaum of The Moskowitz Law Firm PLLC.

The case is District Board of Trustees of Miami Dade College v. Verdini, case number 3D21-470, in the Third District Court of Appeal.

--Editing by Jill Coffey.