THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANDREEA GOCIMAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. LOYOLA UNIVERSITY CHICAGO, Defendant.	)	Case No. 20-cv-03116 Honorable Robert W. Gettleman

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

Defendant Loyola University of Chicago ("Loyola" or the "University"), incorrectly named as Loyola University Chicago, by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1), moves to dismiss Plaintiff's Class Action Complaint with prejudice and submits this Memorandum of Law in support.

PRELIMINARY STATEMENT

In early 2020, the United States encountered its first cases of COVID-19. Quickly infection rates and fatalities began rising. On March 11, 2020, the World Health Organization declared the virus a global pandemic.[1] In Illinois, Governor J.B. Pritzker issued a disaster proclamation followed by a shelter in place order. In the face of this unprecedented public health crisis, every business, organization, and institution was forced to make immediate and unprecedented changes to their daily operations.

Loyola, similarly, had no choice but to quickly adapt for the safety of its students, faculty and staff. On March 12, 2020, consistent with expert recommendations and state and local guidance, Loyola made the necessary decision to suspend in-person classes and transition to online learning for the remainder of the Spring semester. Though the format was different, the academic semester continued. Students attended virtual classes, continued their courses of study, received instruction from their faculty, took exams, completed assignments, received credits, and even graduated. In short, by moving to remote learning, Loyola successfully delivered the education it had promised without jeopardizing the health and safety of its community.

Plaintiff does not dispute the wisdom or the undeniable necessity of Loyola's decision. Nor does she dispute that throughout the Spring semester, her son continued to receive instruction

[1] *See* WHO Director-General's COVID-19 Remarks (March 11, 2020), *available at* https://tinyurl.com/vyvm6ob. Loyola requests that the Court take judicial notice of the timing and impact of the COVID-19 pandemic.

in the courses he selected, from the same renowned faculty, and continued to earn credits towards his degree. Instead, Plaintiff complains that for part of one semester, her son did not have the on-campus experience she had hoped for him. Plaintiff's disappointment is understandable, but not legally cognizable.

The crux of Plaintiff's claim is that Loyola's decision to close campus and move classes online for part of the Spring 2020 semester denied students the in-person experience they were promised and left them with a "dramatically lower quality and less valuable" education. Complaint "Compl." ¶¶ 8, 11. As a result, Plaintiff alleges that she and a putative class are entitled to a refund of a percentage of tuition and a portion of students' mandatory fees for the Spring semester. *Id.* ¶ 56. Plaintiff tries out a few different theories of recovery, alleging breach of contract (Count I), restitution based on quasi-contract (Count II), and conversion (Count III). None have merit.

First, Plaintiff's claims should be dismissed in their entirety because they are, at their core, claims of educational malpractice that require a judicial second-guessing of the University's discretion—something courts have routinely refused to do. Likely knowing as much, Plaintiff attempts to repackage her allegations under various contract and tort theories. The Court should dismiss her claims for what they are—nonjusticiable claims of educational malpractice—and not what they purport to be.

Even taking her claims at face value, Plaintiff fails to state a claim for relief under any theory. Plaintiff's breach of contract claim fails as an initial matter because Plaintiff—who is a student's parent and not a student herself—was not a party to any contract with Loyola and does not have standing to bring a claim. Her claim should be dismissed for that reason alone. Second, Plaintiff cannot identify any specific agreement requiring Loyola to provide exclusively in-person, on-campus instruction. Nor can she point to any document, policy or agreement requiring Loyola

to refund any mandatory fees for unused services during the semester. Indeed, no such documents exist. The law is clear: absent a specific, enforceable promise, a breach of contract claim against a university necessarily fails.

Plaintiff's alternative theories of quasi-contract and conversion fare no better. Plaintiff's quasi-contract claim fails for the simple reason that a contract between the parties regarding Loyola's obligation to its students already exists. Where an agreement already exists, Plaintiff cannot state a claim under a quasi-contract theory. *See Zadrozny v. City Colleges of Chi.*, 220 Ill. App. 3d 290, 295 (1st Dist. 1991). Nor can Plaintiff establish that equity requires restitution as Plaintiff points to no evidence that Loyola benefited from the move to remote learning. Finally, Plaintiff fails to allege the basic elements of a claim for conversion, including that she had an absolute and unconditional right to immediate possession of the prorated tuition and fee payments.

Plaintiff's Complaint evidences a strained attempt to channel her frustrations with the realities of the current pandemic into a claim for damages. Her claims however, are fundamentally without merit and cannot survive a motion to dismiss even if repleaded. As such, Loyola respectfully asks the Court to dismiss the Complaint in its entirety with prejudice.

RELEVANT FACTUAL ALLEGATIONS[2]

Loyola is a private Jesuit, Catholic research university with 11 schools and colleges in the Chicagoland area and nearly 12,000 undergraduates and 5,000 graduate students. Compl. ¶¶ 3-4.

Approximately two months into the Spring 2020 semester, on March 9, 2020, Illinois Governor J.B. Pritzker issued a disaster proclamation in response to the growing number of COVID-19 cases in Illinois.[3] That same day, Loyola advised faculty that courses could begin

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[2] Loyola accepts Plaintiff's allegations as true as it must, for the purposes of this Motion.

[3] Gubernatorial Disaster Proclamation, (March 9, 2020), available at: https://www2.illinois.gov/sites/gov/Documents/CoronavirusDisasterProc-3-12-2020.pdf

moving online. Compl. ¶ 5. Two days later on March 11, the World Health Organization declared COVID-19 a global pandemic.[4]

The following day, Loyola made the decision to suspend all in-person classes and move to an online format. Compl. ¶ 5. In order to further protect the health and safety of its students, faculty, and staff, Loyola encouraged residential students to complete their online coursework from home and on March 19, 2020, officially closed residence halls and campus buildings. *Id.* at ¶¶ 6-7. Loyola offered students a partial refund of their room and board charges and a partial credit of the Student Development Fee but did not offer a refund or credit of tuition or other mandatory fees. *Id.* at ¶¶ 38, 40.

Plaintiff is the parent of a Loyola student who was enrolled during the Spring 2020 semester. Compl. ¶ 15. At Loyola's urging, Plaintiff's son returned home on March 12, 2020 and continued his Spring coursework online. *Id.* at ¶ 35. For the remainder of the semester he did not use any campus facilities, his parking pass, or the CTA pass that was purchased through the school. *Id.* at ¶ 36. Plaintiff paid $22,065 in tuition for the Spring 2020 semester along with a $125 Technology Fee, a $50 Language Lab fee, and a $419 Student Development Fee. *Id.* at ¶ 33. The prior fall, Plaintiff had also purchased a $530 annual parking permit. *Id.*

Plaintiff alleges that Loyola's decision to close campus and move courses online denied its students the "in-person instruction and access to facilities, technology, services, resources, and other benefits for which Plaintiff and Class members contracted when they paid Defendant tuition and mandatory fees for the Spring 2020 semester." Compl. ¶ 8. Plaintiff brings claims on behalf of herself and all persons who (i) paid tuition, mandatory fees, and/or other costs to Loyola "for an in-person class or classes to be conducted during the Spring 2020 semester and/or subsequent

[4] *See* WHO Director-General's COVID-19 Remarks (March 11, 2020), *available at* https://tinyurl.com/vyvm6ob.

terms, and (ii) did not receive the in-person education for which they paid." *Id.* at ¶ 57.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must "contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). A claim should be dismissed where, accepting all well-pleaded factual allegations in the light most favorable to the plaintiff, the complaint nevertheless fails to "plausibly suggest that the plaintiff has a right to relief." *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). While courts must accept the well-pleaded facts in the complaint as true for purposes of a motion to dismiss they "need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Martin v. Direct Wines, Inc.*, 2015 U.S. Dist. LEXIS 89015, at *2 (N.D. Ill. July 9, 2015). Conclusions of fact and law "are … not entitled to the assumption of truth" and may be disregarded. *Iqbal*, 556 U.S. at 679.

A motion to dismiss under Rule 12(b)(1) tests the jurisdictional sufficiency of the complaint, including the plaintiff's standing to bring a claim. In ruling on a motion to dismiss for lack of standing, "the district court must accept as true all material allegations of the complaint and must draw all reasonable inferences therefrom in favor of the plaintiff." *Ret. Chi. Police Ass'n v. City of Chi*, 76 F.3d 856, 862 (7th Cir. 1996) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The plaintiff, however, bears the burden of establishing the required elements of standing. *Id.*

ARGUMENT

I. Plaintiff's Claims Are Non-Justiciable Educational Malpractice Claims and Must Be Dismissed

Plaintiff's claims must be dismissed first and foremost because they amount to allegations of educational malpractice and are not cognizable under Illinois law.

Illinois, like nearly every state, does not recognize the tort of educational malpractice on the grounds that it requires improper judicial interfere in academic affairs and second-guessing the professional judgment of educators and administrators making difficult educational determinations. *Waugh v. Morgan Stanley & Co.*, 2012 IL App (1st) 102653, ¶¶ 42-43, 47; *see Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 602 (7th Cir. 2009) ("the court will not participate in second-guessing the professional judgment of the University faculty on academic matters"). Contract claims that allege a failure to "provide an effective education," invoke the same policy concerns. *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992).

The Seventh Circuit considered the "great weight of authority …bar[ring] any attempt to repackage an educational malpractice claim as a contract claim" in *Ross v. Creighton Univ*., 957 F.2d 410, 416 (7th Cir. 1992). The court noted that while Illinois law recognizes a contractual relationship between a student and an educational institution, not all aspects of that relationship provide a basis for a contract action. *Id.* at 416. To succeed on a breach of contract claim, plaintiff "must do more than simply allege that the education was not good enough." *Id.* The essence of the plaintiff's complaint cannot be "that the institution *failed to perform adequately* a promised educational service, but rather that it failed to perform [the] service *at all*." *Id.* at 417 (emphasis added).

Since *Creighton*, courts in Illinois have held that a claim that raises questions about "the reasonableness of an educator's conduct in providing education services" or that "requires an analysis of the quality of education"—regardless of how it is styled—amounts to a claim of educational malpractice that cannot be sustained. *See, e.g., Waugh v. Morgan Stanley & Co.*, 2012 IL App (1st) 102653, ¶ 33 (affirming dismissal of negligence claims that required an analysis of

"the quality and methods of the education" and thus "clearly fit within the matrix for claims sounding in educational malpractice").

Here, Plaintiff's claims, though purportedly based in contract and tort, are precisely the type of educational malpractice claims that Illinois has refused to recognize. Plaintiff does not allege that Loyola failed to offer students an educational experience *at all*, but rather that the quality of instruction was diminished with the transition to online learning. *See* Compl. ¶ 48 ("Loyola students did not get the same level of academic instruction" during the Spring semester); *Id.* at ¶ 12 ("Plaintiff and Class members paid Defendant for a quality of instruction, which…Defendant did not deliver."). Plaintiff alleges that the online classes were "subpar alternatives," "dramatically lower quality," "watered-down, overpriced substitutes" and "a shadow of the in-person instruction students and/or their families expected to receive." Compl. ¶¶ 9, 11, 42, 45. To evaluate Plaintiff's claims therefore necessarily requires "an analysis of the quality of education" and an evaluation of the "reasonableness of [Loyola's] conduct" that are the hallmarks of an impermissible educational malpractice claim. Though brought under the auspices of contract, Plaintiff's claims require more than an objective assessment of whether Loyola acted in good faith and instead involve a subjective inquiry into the students' academic experiences that is outside the province of the judiciary. Because Plaintiff's claims invoke the same policy concerns that bar a claim for educational malpractice, they cannot proceed under the guise of contract or tort and should be dismissed in their entirety.

II. Plaintiff Fails to State a Claim for Breach of Contract

A. Plaintiff Lacks Standing to Pursue Her Claims

Plaintiff's contract claim fails as a preliminary matter because Plaintiff, as a parent, does not have a contractual relationship with Loyola and thus lacks standing to pursue her claims.

Standing is a jurisdictional question that addresses "whether the litigant is entitled to have the court decide the merits of the dispute or particular issues." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (internal quotations omitted). "There are both constitutional and prudential limitations on the jurisdiction of federal courts." *Jepson v. Bank of N.Y. Mellon (In re Jepson)*, No. 14 C 423, 2014 U.S. Dist. LEXIS 64712, at *12 (N.D. Ill. May 9, 2014). For constitutional standing, the party invoking jurisdiction must establish "a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). "Even if constitutional standing is established, however, there are also prudential limitations to a federal court's exercise of jurisdiction." *Jepsen*, 2014 U.S. Dist. LEXIS 64712, at *11 (citing *FMC Corp. v. Boesky*, 852 F.2d 981, 988 (7th Cir. 1988)). Prudential standing requires a plaintiff to assert his own legal rights and interests, and not the legal rights or interests of third parties. *Id.*

It is well established that an individual who is not a party to a contract and not a third-party beneficiary does not have standing to enforce it. *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (3d Dist. 2009); *Pittsfield Dev., LLC v. Travelers Indem. Co.*, No. 18 C 06576, 2019 U.S. Dist. LEXIS 121394, at *8 (N.D. Ill. July 22, 2019). Under Illinois law, ***students***, not parents, have a contractual relationship with the universities they attend. *DiPerna v. Chi. Sch. of Prof'l Psychology*, No. 14-cv-57, 2015 U.S. Dist. LEXIS 9403, at *6 (N.D. Ill. Jan. 27, 2015). When a student is over the age of majority, parents' "payment of tuition does not create a contractual relationship between parents and a college." *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 761 (E.D. Tenn. 2009) (citations and internal quotations omitted).

A federal court examined this precise issue in *Doe v. Univ. of the South*, 687 F. Supp. 2d 744, 761 (E.D. Tenn. 2009). There, parents of a university student sought to bring contract and

quasi-contract claims against the university on the ground that they entered into an implied contract and were third-party beneficiaries of their son's enrollment agreement because they paid his tuition. *Id.* The court rejected the argument that payment of tuition created a contractual relationship between the parents and the university and found that the parents lacked standing to bring their claims, holding that "when a child reaches the age of majority, 'standing simply transfers from the parent to the child.'" *Id.* (quoting *Loch v. Bd. of Educ.*, No. 3:06–cv–17, 2007 U.S. Dist. LEXIS 67274, at *5–6 (S.D.N.Y. Sept. 17, 2007)).

Other courts have similarly rejected parents' attempts to assert contract claims on behalf of college students. *See, e.g.*, *McCormick v. Dresdale*, No. 09-474 S, 2010 U.S. Dist. LEXIS 41848, at *7 (D.R.I. Apr. 28, 2010) (parents lacked standing to bring a breach of contract claim against a university); *Bakos v. Colo. Seminary*, 2016 Colo. Dist. LEXIS 1786, *11 (finding tuition payment did not create a contractual relationship between the school and the parent and noting that "the Court is unaware of any authority that confers standing to parents to bring a lawsuit against a university merely because they pay tuition and are otherwise actively engaged in their child's education.").

Likewise, Plaintiff here does not have a contractual relationship with Loyola and does not have standing to assert a breach of contract claim. The alleged contract at issue is between Loyola and Plaintiff's adult son. Indeed, Plaintiff admits as much, stating that the contract was formed "when ***students*** bid by formally registering for courses offered by Defendant…and ***Defendant thereafter accepted*** those bids, or registrations, by sending bills for tuition and fees. . . . At this time, written contracts arose." Compl. ¶ 66 (emphasis added). By Plaintiff's own admission, a contract was formed between her son and Loyola prior to any tuition payment.

Plaintiff further acknowledges the obvious fact that it was the *students* who allegedly suffered an injury with the transition to online learning. *See* Compl. ¶¶ 48, 52. Plaintiff's claim that she "suffered damages as a direct and proximate result of Defendant's breach, including being deprived of the education, experience, and services that [she and class members] were promised" is both nonsensical and insufficient. *See* Compl. ¶ 71. As a parent, Plaintiff was never promised any education, experience or services and her disappointment that her son's experience did not match her expectations is not an injury sufficient to establish standing. To establish standing, plaintiff must allege an injury that is both "concrete and particularized." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545 (2016). Plaintiff's disappointment is neither.

Both because she was neither a party to, nor a third-party beneficiary of her son's alleged agreement with Loyola and because she suffered no injury as a result of the alleged breach, Plaintiff does not have standing to assert a breach of contract claim and her claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

B. Plaintiff Cannot Identify a Specific Enforceable Promise

Plaintiff's contract claim should also be dismissed for its failure to identify the breach of a specific enforceable promise. It is well established that an implied contract may exist between a student and a university and that the "catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant may become a part of the contract." *Bissessur v. Ind. Univ. Bd. of Trs.*, 581 F.3d 599, 601-02 (7th Cir. 2009). To state a breach of contract claim in an educational setting however, the plaintiff "must point to an *identifiable contractual promise* that the defendant failed to honor." *Fleming v. Chi. Sch. of Prof'l Psychology*, 2019 U.S. Dist. LEXIS 8081, at *10 (N.D. Ill. Jan. 16, 2019) (emphasis added). It is insufficient "for a student to merely state that . . . an implied contract existed." *Bissessur*, 581 F.3d at 603. "Instead, the student's

complaint must be specific about the source of this implied contract, the exact promises the university made to the student, and the promises the student made in return." *Charleston v. Bd. of Trs. of the Univ. of Ill.*, 741 F.3d 769, 773 (7th Cir. 2013); *see also Marmarchi v. Bd. of Trs. of the Univ. of Ill.*, 715 F. App'x 529, 533 (7th Cir. 2017) (affirming dismissal where plaintiff had "not alleged any contract terms that the University violated, thus dooming this claim").

Absent evidence of a specific promise, the court will not sustain a claim for breach of contract. *See, e.g.*, *DiPerna*, 2014 U.S. Dist. LEXIS 116844, at *7-8 (dismissing breach of contract claim where plaintiff failed to allege with specificity which contractual provision had been breached.); *Miller v. MacMurray Coll.*, 2011 IL App (4th) 100988-U, ¶ 49 (affirming dismissal where plaintiff failed to cite any documentation to substantiate her claim that the college contractually agreed to schedule its classes in the manner she alleged).

The essence of Plaintiff's contract claim is that Loyola breached a promise to provide "on-campus educational services." Compl. ¶ 68. Plaintiff fails to identify however, a single contract, handbook, policy or document in which Loyola agreed to provide exclusively in-person, on-campus education. While in-person instruction may have been the norm in ordinary times, nowhere was it guaranteed, least of all in the midst of a global health crisis.

Plaintiff's claim appears to be based on her subjective expectations for her son, rather than a specific and enforceable promise by the University. Plaintiff alleges for instance, that the fees and tuition she paid were "predicated on students' ability to: have constant, face-to-face interaction with and feedback from peers, mentors, professors and guest lecturers; use technology, libraries, laboratories and studios; conduct research; complete real-world clinics and internships; develop independence; build a professional network; explore the 'expanded campus' [sic] the city of Chicago; and make friends, among other things." Compl. ¶ 54. Nowhere does Loyola promise

this litany of experiences. Indeed, this long list of supposed predicates for Plaintiff's payment is further evidence of a claim driven by general disappointment at experiences that could have been, rather than by a specific promise that the University failed to honor.

Plaintiff attempts to distract from this clear deficiency in her pleading by pointing to promotional materials from Loyola's website describing the general benefits of campus life and the resources of the Chicagoland area. *See, e.g.*, Compl. ¶¶ 26, 29, 30, 31. As an initial matter, these generalized statements—admittedly designed for marketing purposes (*see* Compl. ¶ 30)—are distinguishable from the "catalogues, bulletins, circulars, and regulations of the institution made *available to the matriculant*" that form the basis of a contract between a student and university. *See DiPerna*, 2014 U.S. Dist. LEXIS 116844, at *7 (emphasis added).

However, even these statements do not include a promise to provide exclusively in-person classes. The website's description of downtown Chicago as an "unparalleled setting" for "internship, network and career opportunities" and an experience that "will shape you for the rest of your life" is simply not a contractual promise to provide that experience, let alone a promise to provide exclusively face-to-face instruction. *See Abrams v. Ill. Coll. of Podiatric Med.*, 77 Ill. App. 3d 471, 477 (1st Dist. 1979) (rejecting plaintiff's breach of contract claim based on a provision in the student handbook that "was more in the nature of an unenforceable expression of intention, hope or desire").

Fleming v. Chi. Sch. of Prof'l Psychology is instructive. No. 15 C 9036, 2017 U.S. Dist. LEXIS 159669 (N.D. Ill. Sep. 28, 2017). In that case, a forensic psychology student alleged that the Chicago School of Professional Psychology breached a contract to provide an adequate education. *Id.* at *8. Among other things, the plaintiff argued that the school was liable under a breach of contract theory for failing to allow her to complete her practicum, which was a

requirement of graduation. *Id.* at *12. The court found that even though plaintiff was required to complete a practicum, plaintiff failed to identify any promise that she could complete her practicum *no matter the circumstances*. *Id.* (emphasis added). In that case, even a graduation requirement was not explicitly promised in all circumstances. Likewise, Plaintiff here cannot identify a promise to provide on-campus instruction, let alone a promise to do so *no matter the circumstances*. While face-to-face instruction may well have been Plaintiff's expectation, it has never been explicitly promised, particularly where doing so could jeopardize student safety.

Plaintiff attempts to overcome the absence of a specific enforceable promise by arguing that in-person instruction was impliedly promised because the tuition and fees charged were "higher than those for online courses." Compl. ¶ 53. This tuition differential, she claims, entitled her son to a "wholistic, on-campus experience" complete with research opportunities, internships, exploration of the city and time with friends. *Id.* Loyola is not aware of any precedent allowing courts to infer a promise to provide a particular type of educational experience and a breach thereof simply from the amount of tuition or fees paid. Indeed, Plaintiff's theory is directly contrary to the clear requirement that a breach of contract claim against a university requires an *identifiable contractual promise*.

Plaintiff also fails to plead a contractual promise that would entitle her to a prorated refund of mandatory fees. Plaintiff alleges generally that she paid a technology fee, language lab fee and student development fee for the Spring semester and an annual parking fee, but does not allege any contract, policy or other promise by the University with respect to those fees and the services provided—least of all a promise to issue a refund for unused services. In fact, the fees at issue are structured as flat fees and are incurred whether or not students used certain services.[5] Because

[5] *See* https://www.luc.edu/bursar/tuitionfees/2019-2020/undergraduate/#Mandatory%20Fees

students paid these mandatory fees regardless of use, Plaintiff cannot plausibly allege that she is entitled to a prorated refund for unused benefits during the latter half of the Spring semester.

C. Any Requirement to Provide In-Person Education is Excused

Finally, assuming *arguendo*, that Plaintiff was able to effectively allege an enforceable promise to provide on-campus instruction, Loyola's inability to fulfill that obligation was excused by the significant public health risks posed by the pandemic.

The doctrine of impossibility excuses performance where an unanticipated circumstance renders performance "vitally different" from what the parties reasonably contemplated. *Ill.-Am. Water Co. v. City of Peoria*, 332 Ill. App. 3d 1098, 1106 (3d Dist. 2002) (citing *Fisher v. U.S. Fid. & Guaranty Co.*, 313 Ill. App. 66, 73 (1st Dist. 1942)). The doctrine requires that the "circumstances creating the impossibility were not and could not have been anticipated by the parties, that the party asserting the doctrine did not contribute to the circumstances, and that the party invoking the doctrine demonstrate that it has tried all practical alternatives available to permit performance." *Ill.-Am. Water Co.*, 332 Ill. App. 3d at 1106.

To say that the circumstances in March 2020 were "vitally different" from what the parties reasonably expected at the start of the semester is a gross understatement. COVID-19 suddenly and fundamentally altered normal life in a way nobody could have predicted. In-person instruction and on-campus socialization, which had been the norm for most college students, suddenly posed a serious and unavoidable threat to the health and safety of students. Like every other school, Loyola sought a solution that would allow it to fulfill its obligations to students while keeping them safe. Remote learning was the only practical approach. Indeed, nearly every university and college in Illinois and across the country reached the same conclusion, as did the Federal Office of Postsecondary Education at the U.S. Department of Education which provided "broad approval

to institutions to use distance learning modalities" as an emergency measure to accommodate students during the COVID-19 crisis.[6,7] To the extent Plaintiff plausibly alleges Loyola's response to the pandemic constituted a breach of promise (which she does not and cannot), it was the only workable solution to an unprecedented crisis. Because in-person instruction was practically impossible, the decision not to offer it was excusable.

Ultimately, Loyola fulfilled its primary obligations to its students. Though the experience was necessarily different, students continued to receive instruction in the courses they had selected from the same professors, continued to receive academic credit towards their degrees, and remained part of the Loyola community and virtually connected to their peers and faculty. In Illinois, courts consider whether a breach is material by asking whether a provision is the "*sine qua non* of the contract's fulfillment." *See Arrow Master v. Unique Forming Ltd.*, 12 F.3d 709, 715 (7th Cir. 1993). Here, the *sine qua non* of Loyola's students' contracts with the University was the academic instruction that they received. If exclusively on-campus classes were ever a part of Loyola's promise to its students, an alternative method of instruction for a portion of a semester under extenuating circumstances is not a material breach and Loyola's fulfillment of its central promise to its students bars Plaintiff's claim.

III. Plaintiff Fails to State a Claim for Restitution Based on Quasi-Contract

A. An Enforceable Agreement Bars Plaintiff's Quasi-Contract Claim

A quasi-contract or contract implied in law "is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice." *Hayes Mechanical, Inc. v. First*

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[6] *See* Memorandum from the Office of Postsecondary Educ., U.S. Dep't Educ. (Apr. 3, 2020), https://ifap.ed.gov/electronic-announcements/040320UPDATEDGuidanceInterruptStudyRelCOVID19

[7] Illinois Colleges Suspend In-Person Classes Due to COVID-19 (Mar. 11, 2020) available at: https://www.usnews.com/news/best-states/illinois/articles/2020-03-11/illinois-colleges-suspend-in-person-classes-due-to-covid-19

Indust., L.P., 351 Ill. App. 3d 1, 8 (1st Dist. 2004). If a contract exists between the parties and concerns the same subject matter, a quasi-contract claim necessarily fails. *Zadrozny* , 220 Ill. App. 3d at 295 (affirming dismissal of a quasi-contract claim where specific rules regulated the subject of the dispute); *see also Cromeens, Holloman, Siber, Inc. v. AB Volvo*, 349 F.3d 376, 397 (7th Cir. 2003) (finding a plaintiff may not pursue a quasi-contractual claim where there is an enforceable contract between the parties).

The rationale for barring a quasi-contract claim where an agreement already exists "is not difficult to discern." *Indus. Lift Truck Serv. Corp. v. Mitsubishi Int'l Corp.*, 104 Ill. App. 3d 357, 361 (1st Dist. 1982). "When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated. As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery." *Id.* This is precisely what Plaintiff has attempted here.

The law is unequivocal that a contractual relationship exists between students and the university they attend. *See Raethz v. Aurora Univ.*, 346 Ill. App. 3d 728, 732 (2d Dist. 2004). Indeed, Plaintiff alleges as much. *See* Compl. ¶¶ 65-66 ("Plaintiff and the other members of the class entered into binding contract with [Loyola]," "these contracts were formed by multiple documents," "written contracts arose"). The fact of the contract is not in dispute. Recognizing that Loyola's agreement with its students does not specifically promise the in-person education Plaintiff expected (*see supra* II.B.), Plaintiff alleges a quasi-contract in an attempt to impose new obligations based on promises that were never made, which "the law will not allow." *Indus. Lift Truck Serv. Corp.*, 104 Ill. App. 3d at 361. Where, as here, an agreement between the parties

already exists, Plaintiff's quasi-contract claim on the same subject is improper and must be dismissed.

B. Plaintiff Cannot Establish That Equity Requires Repayment

Plaintiff's quasi-contract claim further fails because she cannot establish that it would be unjust for Loyola to retain the payments it received for the Spring 2020 semester.

The essence of a cause of action based upon quasi-contract is the defendant's failure to make equitable payment for a benefit that it voluntarily accepted from the plaintiff. *Cannella v. Village of Bridgeview*, 284 Ill. App. 3d 1065, 1074 (1st Dist.1996). To state a claim, a plaintiff "must allege specific facts in support of the conclusion that [she] conferred a benefit upon the defendant which the defendant has unjustly retained in violation of fundamental principles of equity and good conscience." *Marque Medicos Farnsworth, LLC v. Liberty Mut. Ins. Co.*, 2018 IL App (1st) 163351, ¶ 17 (internal citations and quotations omitted). Even where a defendant receives a benefit, it is liable for payment "only if the circumstances . . . are such that . . . it is unjust for him to retain it." *Hayes Mech.*, 351 Ill. App. 3d at 9.

Here, Plaintiff does not and cannot allege that by paying tuition and fees for the Spring 2020 semester she conferred an unjust benefit on Loyola. Plaintiff's claim that she and the class "conferred a benefit of enrichment" that Loyola "unjustifiably kept" is entirely unsupported. *See* Compl. ¶¶ 75, 78. Plaintiff alleges no facts to suggest that Loyola was enriched by Plaintiff's standard tuition and fee payments or enjoyed any undeserved benefit as a result of its transition to remote learning.[8] Indeed, throughout the Spring semester Loyola continued to incur the significant costs of operating a university in addition to the added technology and infrastructure costs that

[8] Plaintiff's apparent insinuation that Loyola received some financial benefit by receiving Coronavirus Aid, Relief and Economic Security ("CARES") Act funding while still refusing to refund Spring tuition and most of the mandatory fees lacks any factual basis and should be disregarded. *See Iqbal*, 556 U.S. at 679.

come with rapidly transitioning to a novel model of online instruction. Plaintiff's bare assertion that Loyola was unjustly financially enriched by the move to online learning has no factual basis and is not plausibly plead.

Nor has Plaintiff alleged that equity and good conscience require repayment. Loyola, like everyone in the Spring of 2020, adapted out of necessity and Plaintiff does not claim that Loyola acted in bad faith or plausibly allege that it benefitted from the changes it was forced to make. Contrary to Plaintiff's assertion, "good conscience" requires acknowledgment of Loyola's Herculean effort to rapidly transition approximately 17,000 students to remote learning and honor its obligation to its students under extraordinary circumstances.

IV. Plaintiff Fails to State a Claim for Conversion

Having failed to state a claim for relief based on contract or quasi-contract, Plaintiff makes a final attempt to shoehorn her educational malpractice claim into a claim for conversion. Here again, Plaintiff cannot state a plausible claim.

To succeed on a claim for conversion under Illinois law, a plaintiff must allege that (1) defendant wrongfully assumed control, dominion or ownership over the plaintiff's property, (2) plaintiff had a right in the property, (3) plaintiff had an absolute and unconditional right to immediate possession of the property, and (4) plaintiff made a demand of the property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998). The essence of the claim is the "wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held." *Horbach v. Kaczmarek*, 288 F.3d 969, 978 (7th Cir. 2002).

In a claim for the conversion of money, a plaintiff's right to the money must be absolute. *Horbach*, 288 F.3d at 978. It must be shown that the money "*at all times* belonged to the plaintiff and that the defendant converted it to his own use." *In re Thebus*, 108 Ill. 2d 255, 261 (1985). As

such, "Courts have consistently held that there is no conversion where one has *voluntarily* transferred money to another." *Nelson v. Levy Home Entm't, LLC*, No. 10 C 3954, 2012 U.S. Dist. LEXIS 15320, at *37 (N.D. Ill. Feb. 8, 2012) (collecting cases); *see also Horbach*, 288 F.3d at 978 (affirming dismissal of conversion claim where plaintiff paid defendant consistent with the parties' agreement and as a result, could not "show that the money at all times belonged unconditionally to him" or that "defendant's receipt of that money [was] unauthorized or wrongful in the sense that a claim for conversion requires.")

Here, Plaintiff voluntarily and intentionally made payments to Loyola for the Spring 2020 semester for services that Loyola provided. The funds at issue therefore did not belong to Plaintiff at all times and Plaintiff did not have an absolute and unconditional right to immediate possession. Plaintiff's claim for conversion clearly fails as a result.

In addition, Plaintiff fails to allege that she made a demand for possession. Perhaps anticipating this flaw in her claim, Plaintiff states, without any factual support, that "*class members* demanded the return of prorated unused tuition and fee payments." Demands by the putative class however, will not allow Plaintiff to state a claim. Her claim for conversion should be dismissed on this basis as well. *See Am. Inter-Fidelity Corp. v. M.L. Sullivan Ins. Agency, Inc.*, No. 15 C 4545, 2016 U.S. Dist. LEXIS 95300, at *22-23 (N.D. Ill. July 21, 2016) (finding plaintiff's "failure to allege that it made a demand . . . require[d] dismissal of its conversion claim").

CONCLUSION

For the reasons discussed above, Plaintiff cannot state a claim upon which relief can be granted. Because no amendment or additional facts can salvage Plaintiff's claims, the Court should dismiss the Complaint with prejudice.

Dated: August 14, 2020

Respectfully submitted,

LOYOLA UNIVERSITY OF CHICAGO

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CERTIFICATE OF SERVICE

I, Monica H. Khetarpal, an attorney, certify that on August 14, 2020, I caused a true and correct copy of the attached *Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Class Action Complaint* to be filed with the Clerk of the Court using the Electronic Filing System, which will send notification of such filing to all counsel of record.

/s/ Monica H. Khetarpal