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CASE NUMBER: 2020-CV-000290

Court: Shawnee County District Court

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Case Title: Ariel Clingan obo herself and others similarly situated vs. Kansas Board of Regents, et al.

Type: MEMORANDUM DECISION AND ORDER REGARDING DEFENDANT WICHITA STATE UNIVERSITY'S MOTION TO DISMISS THE FIRST AMENDED PETITION

SO ORDERED.

/s/ Honorable Mary E Christopher, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION EIGHT

ARIEL CLINGAN, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	2020-CV-290
WICHITA STATE UNIVERSITY,	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER
REGARDING DEFENDANT WICHITA STATE UNIVERSITY'S
MOTION TO DISMISS THE FIRST AMENDED PETITION

This matter comes before the Court upon defendant Wichita State University's *Motion to Dismiss the First Amended Petition*, filed on September 24, 2020. Plaintiff Ariel Clingan appears through W. Greg Wright, Rex A. Sharp, Larkin E. Walsh, and Charles T. Schimmel. Defendant Wichita State University (WSU) appears through Anthony F. Rupp, Daniel Buller, Nathaniel W. Mannebach, Holly A. Dyer, and Stacia Boden.

NATURE OF THE CASE

Wichita State University is a public university located in Wichita, Kansas, with a total enrollment of over 16,000 students. WSU offers over 60 degrees encompassing more than 200 areas of study. WSU also operates an online program called WSU Online which offers both undergraduate and graduate-level degrees.[1] Plaintiff filed suit alleging contract and tort claims against Wichita State University. Plaintiff seeks recovery of the cost difference between

[1] This paragraph mirrors the allegations in plaintiff's First Amended Petition, ¶2.

expected on-campus education and the online schooling she received during the last half of the Spring 2020 semester due to the COVID-19 pandemic.

On March 11, 2020, the World Health Organization declared the novel coronavirus SARS-CoV-2 (COVID-19) a pandemic. On March 12, 2020, Governor Kelly issued a State of Disaster Emergency Proclamation for the State of Kansas. Thereafter, the legislature extended the State of Disaster Emergency Proclamation by House Concurrent Resolution. See e.g., HCR 5025. On March 13, 2020, President Donald Trump declared a national emergency in response to the COVID-19 pandemic, pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. § 1601, *et seq*. and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 5121-5207 (the "Stafford Act"). Many branches of government took action in an effort to deescalate the multifaceted threat posed by the pandemic. The Chief Justice of the Kansas Supreme Court noted:

> "Due to the outbreak of COVID-19, an emergency exists that poses a threat of imminent and potentially lethal harm to vulnerable individuals who may come in contact with a carrier of COVID-19. To date, to the extent possible … Kansas courts and judicial offices have remained operational … [but] rapid escalation of the emergency requires more comprehensive measures to protect the health and safety of Kansans …."

Kansas Supreme Court Administrative Order 2020-PR-16, March 18, 2020.

WSU's Spring 2020 semester commenced on or about January 21, 2020, and was scheduled to conclude on or about May 14, 2020. On March 16, 2020, as a result of the Covid-19 pandemic, WSU moved all in-person classes online for the remainder of the spring 2020 semester. (Am. Pet. ¶ 32.) WSU announced "students would receive prorated refunds for housing, dining and parking, but not tuition and fees, by at least April 1, 2020" as a result of WSU's pandemic response of moving classes online. (WSU *Memorandum,* p. 4; Am. Pet. ¶ 14.)

Like other universities across Kansas, the suspension of in-person classes continued for the duration of the 2020 spring semester. Plaintiff Ariel Clingan filed this lawsuit against defendants WSU and the Kansas Board of Regents, requesting certification of her lawsuit as a class action. Defendant Kansas Board of Regents was dismissed previously.

The Court has reviewed defendant WSU's motion to dismiss, the response, supporting briefs, and the court file. After careful consideration, and being well advised in the premises, the Court is ready to rule.

ANALYSIS

A. Standard of Review

This matter is before the Court on motion to dismiss. The standard of review for a motion to dismiss is well known. When considering a motion to dismiss pursuant to K.S.A. 60-212(b)(6), a court "must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition." *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576, 790 (2019). A court resolves every factual dispute in the plaintiff's favor in determining whether the petition states a valid claim for relief. Dismissal is appropriate only when the plaintiff's allegations clearly demonstrate they do not have a valid claim. *Kudlacik*, 309 Kan. at 790. Courts consider the well-pled facts of the petition when considering a motion to dismiss pursuant to K.S.A. 60-212(b). See *Sperry v. McKune,* 305 Kan. 469, 480-81, 384 P.3d 1003 (2016). Thus, in analyzing WSU's motion, the analysis begins with plaintiff's First Amended Petition.

Plaintiff Ariel Clingan was a student at WSU during the spring 2020 semester. She enrolled in in-person classes at WSU for the spring 2020 semester. (1st Am. Pet. ¶ 17.) She paid

approximately $1,300 in out-of-state tuition and fees for the spring 2020 semester's classes. (1st Am. Pet. ¶ 16.) On March 16, 2020, as a result of the Covid-19 pandemic, WSU moved all in-person classes to online for the remainder of the spring 2020 semester. (1st Am. Pet. ¶ 32.) WSU issued a notice on its website indicating tuition and fees would not be refunded for the spring 2020 semester. (1st Am. Pet. ¶ 14.)

In the First Amended Petition, Ms. Clingan alleges causes of action for (1) breach of contract; (2) unjust enrichment; (3) conversion; and (4) money had and received. Plaintiff seeks a refund for herself and putative class members, and defendant WSU's disgorgement of pro-rated portion of tuition and fees, proportionate to the amount of time that remained in the Spring Semester 2020 when classes moved online and the opportunity to use campus services became restricted. (1st Am. Pet. ¶39.) The damages she describes include monetary damages to reimburse her for funds she spent on what she believed would be in-person classes and on-site services. In addition, Ms. Clingan requests prejudgment and post-judgment interest; an order of restitution; equitable relief; injunctive relief; and an award of reasonable attorney fees, expenses and costs.

A motion to dismiss must be converted to a motion for summary judgment under K.S.A. 60-256 if "matters outside the pleadings are presented to and not excluded by the court [and] all parties are given reasonable opportunity to present all material" relevant to such a motion. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384–85 (10th Cir. 1997); see also *Prager v. State, Dep't of Revenue*, 271 Kan. 1, 5, 20 P.3d 39, 44 (2001) (referencing the holding in *GFF Corp.).* If the plaintiff refers to a document in their pleading and the contents are "central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp.,* 130 F.3d at 1385.

In this matter, Clingan makes references to WSU's "Refund policy," which was allegedly previously available on WSU's website. Clingan also refers to WSU's "Course Schedule Search" and "course-specific syllabi," although she only provides a non-specific screenshot of the former. WSU submitted eight exhibits that it argues the Court can consider without triggering the rule that the Defendants' motions be converted to motions for summary judgment. Two pertinent exhibits include Exhibit 3, "Spring 2020 Refund Guidance" and Exhibit 5 "Refund Policy." The Court finds Exhibit 3 is specifically addressed in Clingan's Amended Petition (¶ 14.) However, the "Refund Policy," as it is termed by WSU, is not referenced in Clingan's First Amended Petition despite Clingan using this term. Ms. Clingan uses "Refund Policy" to refer to a web announcement referencing the spring 2020 semester specifically, which is found in WSU's Exhibit 3. None of the other exhibits are specifically referenced by Clingan's pleadings and they will not be considered by the Court. As a result, the Court's analysis continues under the standard of review for a motion to dismiss.

B. Defendant WSU's Motion to Dismiss

Defendant WSU maintains all of the claims in plaintiff's First Amended Petition must be dismissed either under K.S.A. 60-212(b)(1) for lack of subject-matter jurisdiction, or under 60-212(b)(6) for failure to state valid claims that may be redressed by the Court. WSU presents the following arguments in support of dismissal:

1. Kansas courts refuse to second-guess the value of an education, so the Court may not consider Plaintiff's contract, implied contract, and tort claims.

2. The Court lacks jurisdiction to hear Plaintiff's breach of contract claim because she failed to exhaust her administrative remedies.

3. The Court lacks jurisdiction to hear Plaintiff's implied contract claims because she did not submit them to the joint committee on claims against the State.

4. Plaintiff fails to plead a specific, enforceable promise or a breach of such promise.

5. There is no allegation that WSU exercised a right of ownership over goods or chattels belonging to another, so the conversion claim fails.

The Court will address the issues raised by defendant's motion to dismiss as necessary.

C. Educational Malpractice Doctrine

According to defendant, Ms. Clingan's claims are quintessential examples of impermissible "educational malpractice" claims. Defendant WSU argues plaintiff should not be permitted to repackage educational malpractice claims under other legal theories, and that plaintiff's claims must be dismissed in their entirety. In a recent opinion, *Minjarez-Almeida v. Kansas Board of Regents, et al.*, Shawnee Co. Dist. Ct. Case No. 2020-CV-000378, (Aug. 2, 2021), the Hon. Teresa Watson, summarized the treatment of educational malpractice claims under Kansas law:

> "While often proposed as a remedy for those who think themselves wronged by educators, educational malpractice has been repeatedly rejected by the American courts." (Internal quotations and citations omitted.) *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 474, 845 P.2d 685 (1993).
>
> There are "strong public policy reasons" for our courts' refusal to recognize claims for educational malpractice: "(1) a lack of a measurable standard of care; (2) inherent uncertainties as to the cause and nature of damages; (3) the potential for a flood of litigation; and (4) the courts' overseeing the day-to-day operation of the schools." *Id*. at 477. Indeed,
>
> > "To entertain a cause of action for educational malpractice would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies." (Internal quotations and citations omitted.) *Id*. at 475.

Finstad decided only that Kansas courts would not recognize a claim for educational malpractice. It did not define the precise parameters of such a claim or identify its elements. The Kansas Court of Appeals later took a step in that direction in *Florez v. Ginsberg*, 57 Kan.App.2d 207, 449 P.3d 770 (2019). There, *Florez* sued the University of Kansas and others based on a false representation on the university's website that coursework in the School of Education fulfilled state requirements for an initial teaching license. His claims were pled as negligence and violations of the Kansas Consumer Protection Act ("KCPA"). The district court dismissed the negligence claim on the basis that it was an educational malpractice claim prohibited under Kansas law. Id. at 208.

The Kansas Court of Appeals reversed, reasoning that "we must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice. Instead, the specific facts of each case must be considered in light of the relevant policy concerns that drive the rejection of educational malpractice actions." *Id*. at 214. Further:

> "Unlike an educational malpractice claim, Florez' negligence claim is not a challenge to classroom methodology, theories of education, or the quality of the education he received. His claim is unrelated to academic performance or the lack of expected skills. His claim does not bring into question internal operations, curriculum or academic decisions of an educational institution, or any assigned function of a school under state law. Finally, his claim does not interfere with the legislative standards and policies of competency. In sum, we find the district court erred in construing Florez' claim as one for educational malpractice." *Id.* at 212-13.

Neither *Finstad* nor *Florez* dealt specifically with a breach of contract claim or any of the other claims raised by Plaintiffs here. But it is not the claim's label that matters – it is the substance of the complaint articulated. "Where the essence of the complaint is that the school failed to provide an effective education, it is irrelevant whether the claim is labeled as a tort action or breach of contract, since in either situation the court would be forced to enter into an inappropriate review of educational policy and procedures." *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1159, 1160 (D.Kan. 2007). Indeed, "the policy concerns that preclude a cause of action for educational malpractice apply with equal force to bar a breach of contract claim attacking the general quality of an education." *Id*.

Plaintiffs in *Jamieson* sued a private technical school for breach of contract, fraud, and violations of the KCPA. Defendants moved to dismiss the breach of contract claim on the basis that it amounted to an educational malpractice claim not actionable under Kansas law. The Jamieson court made clear when a breach of contract claim in the educational context would be recognized:

> "There are, however, at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services. The first would be exemplified by a showing that the educational program failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field. The second would arise if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program. *Gupta v. New Britain General Hosp*., 239 Conn. 574, 592–593, 687 A.2d 111 (1996); see *Ross*, 957 F.2d at 416 (To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor)." (Internal quotations omitted.) *Id*. at 1159-60.

The court in *Jamieson* denied the defendants' motion to dismiss the breach of contract claim as it related to provisions in the enrollment agreement promising a specific number of hours per week of instruction. *Id*. at 1160. The court granted defendants' motion to dismiss the breach of contract claim as it related to provisions in the enrollment agreement that were not "detailed or specific." *Id*. "Instead of promising a specific quality of computers and instructors, or cost-free training, Vatterott promised to provide the 'instructors, equipment, laboratories, classrooms and other facilities necessary for teaching' at a rate consistent with its tuition. Consequently, Plaintiffs' allegations based on this general contract language are more analogous to claims attacking the overall reasonableness of an institution's decisions in providing educational services." *Id*. The court said: "Without specific and detailed contractual promises, Plaintiffs' allegations implicate *Finstad*'s concern of having courts oversee the general operations of educational institutions. See *Alsides*, 592 N.W.2d at 473 (breach of contract claims against educational institutions may not be brought if the promises to be enforced are general and would require an inquiry into the nuances of educational processes and theories). Indeed, an inquiry into these allegations would require the trier of fact to weigh the qualifications of the instructors and the methods by which they taught; to review of the number and types of classes in the courses of study; to determine what is and is not material in a course of study; to determine the type of equipment, laboratories, classrooms and other facilities necessary to teach students given Vatterott's tuition rate. This is the type of comprehensive review courts have sought to avoid, as it replaces the judgment of educators for those of judges and juries. See *Paladino*, 89 A.D.2d at 90, 454 N.Y.S.2d 868 ('The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods.')." *Id*. at 1160-61."

Minjarez-Almeida v. Kansas Board of Regents, et al., Shawnee Co. Dist. Ct. Case No. 2020-CV-000378, Slip Op. 5-8 (Aug. 2, 2021).

With this background as to educational malpractice law in Kansas, the Court now turns to the analysis of plaintiff's claims.

1. Allegations in the First Amended Petition

In this case, plaintiff's First Amended Petition states:

> "36. The online learning options being offered to WSU students are subpar in practically every aspect, from the lack of facilities, materials, and access to faculty. Students have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique. Moreover, office hours for professors are essentially non-existent ….
>
> 37. The remote learning options are in no way the equivalent of the in-person education putative class members contracted and paid for. The online education being provided is not even remotely worth the amount charged class members for Spring Semester 2020 tuition. In-person instruction at WSU encompasses an entirely different experience which includes but is not limited to:
> • Face to face interaction with professors, mentors, and peers;
> • Access to facilities such as libraries, laboratories, computer labs, and study room;
> • Student governance and student unions;
> • Extra-curricular activities, groups, intramural sports, etc.;
> • Student art, cultures, and other activities;
> • Social development and independence;
> • Hands on learning and experimentation;
> • Networking and mentorship opportunities."

(See 1st Am. Pet. ¶¶36, 37.)

These allegations, without more, reflect claims related to the effectiveness of an education, in essence exclusively framing an educational malpractice claim. *Florez,* 57 Kan. App. 2d at 212. Ms. Clingan claims the parties' contractual agreement, assuming one exists, was breached when classes moved online because the "Course Schedule Search and course-specific syllabi indicated that in-person classes would be administered in an in-person, on-campus setting." (Am. Pet. ¶ 57.) She further contends the defendant failed to provide contracted for services and otherwise did not perform under the contract, although she does not specify any

other reason to support this claim except that classes were moved online. Ms. Clingan argues she has "suffered damages as a direct and proximate result of [WSU's] breach, including but not limited to being deprived of the education, experience, and services to which they were promised and for which they have already paid." (Am. Pet. ¶ 59.) However, nowhere in the amended petition does Ms. Clingan claim that her classes ceased or that she did not receive credit for her coursework. She makes no claim that her professors stopped communicating or otherwise did not offer office hours through a format like Zoom or Google Meet.

Lawsuits similar in posture to Clingan's have erupted across the nation. See Robert E. Boone III, Jonathan Potts, & Michael R. Cannon, *What Does College Tuition Pay For? Pandemic-related College Refund Class Actions May Provide Answers*, May 5, 2020 ("Now that the dust has begun to settle, students have responded by filing a flurry of putative class action lawsuits, contending that they no longer receive the benefit of their bargain through remote learning."[2]). These claims are essentially grounded in the same argument made by Clingan: when classes moved online after the pandemic began, students did not receive the same mode of instruction they expected as part of their learning experience.

Here, plaintiff alleges the decision to convert to online classes deprived her of in-person instruction, as well as the opportunity for face-to-face interaction, access to facilities, activities, social development, networking and mentorship. The plaintiff claims online instruction is "in no way the equivalent of in-person education." Ms. Clingan alleges entitlement to a refund because the online learning options "are subpar in practically every aspect," and that students were deprived of opportunities including collaborative learning, dialogue, feedback, critique and in-

[2] Available at: https://www.lexology.com/library/detail.aspx?g=1e232446-c34b-4c38-bd74-2263238750a8.

person assistance. (1st Am. Pet. ¶36.) Plaintiff's allegations emphasize "[t]he remote learning options are in no way the equivalent of the in-person education … [and the] online education being provided is not even remotely worth the amount charged …." (1st Am. Pet. ¶37.)

Plaintiff's claims do appear to challenge the adequacy or quality of the modality of instruction through online communication. Ms. Clingan's claim of entitlement to a refund for the value of in-person education also seem to invite the Court or jurors to question academic decisions, delve into educational policy and determine the quality and value of differing modalities of education.

2. Post-Pandemic University Cases and Educational Malpractice Doctrine

The parties have cited numerous cases as supplemental case authority in this matter. Several states, such as New York, Florida, Vermont, and Indiana, legally recognize or imply a contractual relationship between a student and a university. To a large extent, this distinction made a significant difference in the treatment of claims. Many of the cases cited by Clingan originate from states that have previously found the student-university relationship is inherently grounded in contract law.

That is not the case in Kansas, however. To allege a breach of contract by an educational institution in Kansas, a plaintiff "must point to an identifiable contractual promise that the defendant failed to honor." *Jamieson*, 473 F.Supp.2d at 1160. This Court identifies the following cases as persuasive:

In *Gociman v. Loyola Univ. of Chicago*, No. 20 C 3116, 2021 WL 243573, at *3 (N.D. Ill Jan. 25, 2021), the allegations in plaintiffs' complaint were similar to those asserted by Ms. Clingan. In that case, after Illinois Governor J.B. Pritzker issued a disaster proclamation in

response to the growing number of COVID-19 cases in Illinois, defendant Loyola University suspended all in person classes and moved to an online format. *Id.* Plaintiffs' first amended complaint asserted claims of breach of contract and unjust enrichment, requesting damages because the remote instruction in response to the COVID-19 pandemic was "worth significantly less than the value of live classes." *Id*. Similar to this case, plaintiffs in *Gociman* alleged "defendant's website, brochures, course catalogues, and online registration portal establish a contractual promise to provide an in-person instruction and access to facilities and resources." *Id*.

Defendant Loyola University filed a motion to dismiss, arguing plaintiffs' breach of contract claims amount to allegations of educational malpractice. *Gociman*, 2021 WL 243573, at *5. The United States District Court for the Northern District of Illinois looked closely at the nature of plaintiffs' breach of contract claims, and concluded plaintiffs' claims must be dismissed because they amounted to allegations of educational malpractice not cognizable under Illinois law. *Id.* at *6.

The *Gociman* Court observed: "[C]ourts have concluded that 'the adequacy of teachers and teaching methods are matters entrusted to educators and institutions that regulate them, not to judges and juries.'" *Linder*, 2020 WL 7350212, at *7 (citing *Jamieson v. Vatterott Educ. Ctr., Inc.*, 259 F.R.D. 520, 540 (D. Kan. 2009)). The Court examined the allegations and agreed the quality of online education was challenged by plaintiffs:

> Plaintiffs [argue] … they are not challenging the quality of their education, but rather alleging that defendant failed to perform the educational service "at all." Plaintiffs' argument is contradicted by the text of the [complaint], which states that plaintiffs received online instruction and course credits, and repeatedly claims that the online instruction was "worth less" than the traditional in-person instruction.

Gociman, 2021 WL 243573, at *3.

> The Court determined the complaint "clearly challenges the quality of the online instruction, not whether defendant provided education 'at all.' Consequently, … plaintiffs' claims are the type of educational malpractice claims that Illinois courts, and courts throughout the country, have rejected. *Gociman*, 2021 WL 243573, at *3 (granting motion to dismiss breach of contract and unjust enrichment claims).

In *Lindner v. Occidental Coll.,* No. CV 20-8481-JFW (RAOX), 2020 WL 7350212 (C.D. Cal., Dec. 11, 2020), the Court considered similar allegations of sub-par education due to the change of modality from in-person to online classes during the pandemic and determined they represented prohibited educational malpractice claims. In *Lindner,* plaintiff alleged the education she received was not "worth the amount charged" or "in [any] way the equivalent of [an] in-person education," that the programs were "sub-par," and that online classes lacked "collaborative learning and...dialogue, feedback, and critique." *Lindner,* 2020 WL 7350212, at *7. The *Lindner* Court dismissed the case based upon the educational malpractice doctrine because "resolution of Plaintiffs' claims would require the Court to make judgments about the quality and value of the education that Occidental College provided in the Spring 2020 semester." *Id*.

In *Crawford v. Presidents & Directors of Georgetown Coll.*, No. 20-CV-1141 (CRC), 2021 WL 1840410, at *1 (D.D.C. May 7, 2021), the United States District Court for the District of Columbia considered a motion to dismiss in a case where students also asserted similar allegations of receiving sub-par online classes the last half of the spring 2020 semester. The students asserted claims for breach of contract, unjust enrichment, money had and received, conversion, and other claims based on failure to provide in-person classes. As in this case, the

American University plaintiffs alleged that American's course catalog and syllabi identify on-campus locations for courses; that various marketing materials emphasized the benefits of its on-campus experience; and that its website specifically distinguished between campus-based, degree-granting programs and online, non-degree programs. 2021 WL 1840410, at *5.

The *Crawford* Court decided the students' allegations did not support a plausible inference that the universities "promised away their discretion to make reasonable modifications in response to radically changed circumstances … to keep students and faculty safe … [during] a once-in-a-century pandemic." It explained:

> After careful consideration, the Court concludes that the Georgetown and American students have failed to state valid claims. The Court has no trouble accepting that the students expected a campus-based semester. Under normal conditions, the universities might be obligated to fulfill that expectation. Yet, the students' allegations do not support a plausible inference that the universities promised away their discretion to make reasonable modifications in response to radically changed circumstances, such as moving classes online to keep students and faculty safe during the deadly and uncertain early months of a once-in-a-century pandemic.

Crawford, 2021 WL 1840410, at *1.

The Court concluded: "On the facts presented here … it appears that the parties bargained for a presumption of in-person education **but preserved the universities' right to suspend campus-based instruction if they had a good-faith reason to do so.** *Crawford*, 2021 WL 1840410, at *8 (emphasis added).

In *Buschauer v. Columbia College Chicago*, No. 20 C 3394, 2021 WL 1293829 (N.D. Ill. Apr. 6, 2021), the United States District Court for the Northern District of Illinois noted that to avoid the bar on educational malpractice claims, "the essence of the plaintiffs' complaint must be 'not that the institution failed to perform adequately a promised educational service, but rather

that it failed to perform that service at all.'" *Id.* at *4, citing *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992).

The *Buschauer* Court stated, "despite Buschauer's framing, the first amended complaint includes allegations that one could read to claim that the online instruction Buschauer received '*was not good enough*,' *Ross*, 957 F2d at 417, thus requiring an inquiry into the quality of the education he received for the spring 2020 semester." *Id*. at *4. The *Buschauer* Court decided it did not need to determine if the educational malpractice doctrine barred plaintiffs' claims, however, at the dismissal stage of proceedings. *See id*. at *4. It warned, "To the extent that it becomes clear at a later stage that Buschauer's claims or damages request would require an evaluation of the comparative value of the remote and in-person instruction he received, the Court may reassess its conclusion." *Id.* at *4.

Other jurisdictions have decided class action lawsuits against universities do not implicate the educational malpractice doctrine, but have granted dismissal for failure to state valid claims.[3] In *Michel v. Yale University*, 2021 WL 2827358 (U.S.Dist.Ct., D. Conn. Jul. 7, 2021), the Court granted defendant Yale University's F.R.C.P. 12(b)(6) motion to dismiss the claims in plaintiff's putative class action lawsuit. *Id.* at *1. However, the *Michel* court found the educational malpractice doctrine inapplicable to COVID-19 tuition reimbursement claims. *Id.* at *5. The *Michel* court reasoned the educational malpractice doctrine was not implicated because plaintiff had not challenged the adequacy of the online instruction he received, only its relative adequacy. *Id*. Thus, the Court did not believe it would not be asked to define what constitutes a

[3] See e.g., Hassan v. Fordham University, Case No. 20-CV-265, 2021 WL 2932255 (S.D.N.Y. Jan. 28, 2021) (granting motion to dismiss as to breach of contract, unjust enrichment, conversion and money had and received, but allowing to amend); see also *Rhodes v Embry-Riddle Aeronautical Univ., Inc.*, No. 620-CV-927-ORL-40EJK, 2021 WL 140708 (M.D. Fla. Jan. 14, 2021).

reasonable educational program. *Id.* at *5. However, the *Michel* Court ultimately granted dismissal of the breach of contract, unjust enrichment, and Connecticut Unfair Trade Practices Act claims. As to the breach of contract claims, the Court found no plausible allegation that Yale breached any agreement to provide in-person education. *Id*.

The recent opinion of the Hon. Teresa Watson in *Plank, et al., v. Kansas Board of Regents, et al.*, Shawnee Co. Dist. Ct. Case No. 2020-CV-000432, (Aug. 2, 2021) (consol. 2020-CV-378), also provides guidance. In *Plank,* the first amended petition contained allegations that the "online learning options being offered to [KSU's] students are sub-par in practically every aspect as compared to what the educational experience afforded Plaintiffs and the members of the Class once was. During the online only portion of the Spring and Summer 2020 semesters, [KSU] principally used programs by which previously recorded lectures were posted online to view … or by virtual Zoom meetings." *Id.*, slip op. at *24. Judge Watson concluded the plaintiffs' allegations were "the embodiment of an educational malpractice claim," as they "challenge[d] classroom methodology, internal operations, curriculum, academic decisions of an educational institution, and the resultant quality of the education provided." *Id*. citing *Florez,* 57 Kan. App. 2d at 212-13. Further, "they implicate the policy concerns described in *Finstad,* and they lack an anchor to a specific contractual promise as required in *Jamieson*." The *Plank* allegations are very similar to the allegations in Ms. Clingan's First Amended Petition.

Here, Ms. Clingan does not allege she was unable to complete her enrolled courses for the spring 2020 semester, or that she didn't earn the same course credits she would have earned attending classes in-person. Plaintiff alleges she and other students similarly situated are entitled

to a refund because WSU converted to an online class format in response to state and local COVID-19 shut-down orders.

Under Kansas law: "Where the essence of the complaint is that the school failed to provide an effective education, it is irrelevant whether the claim is labeled as a tort action or breach of contract, since in either situation the court would be forced to enter into an inappropriate review of educational policy and procedures." *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1159, 1160 (D. Kan. 2007). Indeed, "the policy concerns that preclude a cause of action for educational malpractice apply with equal force to bar a breach of contract claim attacking the general quality of an education." *Id*. The *Jamieson* Court made clear when a breach of contract claim in the educational context would be recognized:

> "There are, however, at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services. The first would be exemplified by a showing that the educational program failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field. The second would arise if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program. *Gupta v. New Britain General Hosp*., 239 Conn. 574, 592–593, 687 A.2d 111 (1996); see *Ross*, 957 F.2d at 416 (To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor)." (Internal quotations omitted.) *Id*. at 1159-60.

Notably, plaintiff does not allege she was unable to complete her enrolled courses for the spring 2020 semester, or that she didn't earn the same course credits she would have earned attending classes in-person. It appears that, even though WSU arranged for her to complete her courses without on campus exposure to contagion and although she was able to earn the same course credits after the outbreak of a pandemic, plaintiff believes she is entitled to a refund simply because state and local COVID-19 shut-down orders made it necessary for schools to

change to online classes only. The theory underlying plaintiff's allegations is that the online education she received the last half of the 2020 Spring Semester was worth significantly less than the value of in-person classes. Plaintiff's allegations of sub-par education as the result of the pandemic and WSU's conversion to online classes is based on the premise that online learning is objectively worth less than what Clingan paid for in-person classes.

The essence of plaintiff's claimed injury is that the school's conversion of in-person courses to online courses during a pandemic constitutes a failure to provide her with an "effective education." This Court finds the allegations in the Amended Petition require implicit recognition that, because of the alleged cost difference, online education is less effective than in-person education. The Court is unaware of any measurable means of weighing the effectiveness of online education versus in-person education.

Plaintiff's premise would call for a comparison and evaluation by the factfinder of the modalities of in-person versus online education, and an assignment of value to differing methods of instruction to determine whether the university provided substantially similar services. The allegations would bring squarely into question the internal operations, curriculum and academic decisions of an educational institution. Just as in the *Plank* case, Ms. Clingan's lawsuit represents the "embodiment of an educational malpractice claim," as it "challenge[s] classroom methodology, internal operations, curriculum, academic decisions of an educational institution, and the resultant quality of the education provided." *Id*. citing *Florez*, 57 Kan. App. 2d at 212-13.

This Court finds it clear that, based on plaintiff's allegations in the First Amended Petition, plaintiff's claims represent prohibited educational malpractice claims. They call on the

factfinder to perform an inappropriate review of educational policy and to evaluate whether WSU failed to provide an effective education. The resolution of such issues is not the province of courts and juries. That fact cannot be ignored by this Court. Having determined the plaintiff's breach of contract claims violate the educational malpractice doctrine, this Court grants WSU's motion to dismiss.

D. Breach of Contract Claims

Even if the educational malpractice doctrine is not sufficient reason to grant dismissal, defendant WSU argues plaintiff fails to state a valid claim of breach of contract. Defendant points to the absence of any allegations identifying an express contract between the parties. In addition, WSU argues Ms. Clingan fails to allege a specific, enforceable promise or a breach of such promise by WSU.

"The essential elements of a claim of breach of contract are:

- The existence of a contract between the parties;
- Sufficient consideration to support the contract;
- The plaintiff's performance or willingness to perform in compliance with the contract;
- The defendant's breach of the contract; and
- Damages to plaintiff caused by the breach."

PIK Civ. 4th 121.02, Breach of Contract.

Plaintiff's First Amended Petition alleges Ms. Clingan and WSU entered into a contractual agreement where plaintiff would provide payment in the form of tuition and fees and defendant, in exchange, would provide in-person educational services, experiences,

opportunities, and other related services. Plaintiff alleges the terms of the contractual agreement were set forth in "publications from WSU, including WSU's Course Schedule Search." (See 1st Am. Pet. ¶2.) Plaintiff does not reference any specific contractual provision in the First Amended Petition.

Ms. Clingan refers to WSU's "Course Schedule Search," with only a reprint of a non-specific screenshot. Plaintiff also identifies WSU's "course-specific syllabi. Plaintiff references unspecified course schedule information available through a link to a WSU search website, which in turn contain links to other sites which may or may not have changed since Spring 2020. (See 1st Am. Pet. ¶2, n. 2.) The internet links in plaintiff's First Amended Petition do not identify specific documents, date(s) of availability, or limit references solely to the initial link, and the initial links lead in turn to more links. The "specific contractual promise" must be "distinct from any overall obligation to offer a reasonable program" or the "reasonableness of an institution's decisions in providing educational services." *Jamieson*, 473 F.Supp.2d at 1160.

This Court does not accept Plaintiffs' invitation to consider unspecified information available through undated links within the WSU search website as set forth in the First Amended Petition, or other unspecified information on the WSU website such as: WSU's Student Responsibility statement; unidentified "course-specific syllabi"; the Spring Semester 2020 calendar; a refund policy that is no longer posted on the WSU website; and unidentified marketing materials.[4] (See 1st Am. Pet.)

[4] As noted by Hon. Teresa Watson:

"There is no particular document referenced or incorporated by reference. Plaintiffs do not direct the Court's attention to any specific piece of information. Rather, these links are simply gateways to a rabbit hole of information that the

"A contract is an agreement between two or more persons consisting of a set of promises that are legally enforceable." PIK Civ. 4th 121.01, Definition of Contract. The WSU Course Schedule Search appears to be a search engine that allows interested parties to search for available classes; however, the Course Schedule Search link indicates it does not serve as registration for the class. The Court notes that Ms. Clingan does not identify a financial services agreement, official course registration, or similar document in her amended petition. The Course Schedule Search appears to append course descriptors indicating if the class is in-person, online, remote, etc. But these descriptors are hardly sufficient to form a binding contract.

While this Court views the well-pleaded facts in a light most favorable to the plaintiffs and assumes as true those facts and any inferences reasonably drawn from them, *Endres v. Young*, 55 Kan. App. 2d 497, 499, 419 P.3d 40, *rev. denied* 308 Kan. 1593 (2018), the Court need not accept conclusory allegations on the legal effects of events. *Grindsted Products, Inc. v. Kansas Corporation Comm'n*, 262 Kan. 294, 303, 937 P.2d 1 (1997); *Citimortgage, Inc. v. Jacobs*, No. 120,331, 2019 WL 7207549, at *4 (Kan. App., unpub., Dec. 27, 2019).

As another means of claiming contract formation between the parties, plaintiff's amended petition identifies the WSU Spring Semester 2020 calendar. (See 1st Am. Pet. ¶10.) Plaintiff's amended petition claims WSU's extension of spring break by an extra week deprived students of a full week of instruction WSU had agreed to provide *as specified on the Spring Semester 2020 calendar*. (See 1st Am. Pet. ¶10.) Due to the extension of spring break which was not shown on the 2020 calendar, plaintiff claims entitlement to a refund of tuition and fees from WSU. There

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Court declines to consider on a motion to dismiss." *Minjarez-Almeida,* Shawnee Co. Case No. 2020-CV-000378, Slip. Op. 11 (Aug. 2, 2021).

are no allegations establishing a meeting of the minds, or an exchange of promises between the parties. This Court concludes the calendar does not represent a contractual agreement or a set of mutual promises between the parties. Plaintiff cannot state a cognizable claim for breach of contract based on the WSU Spring Semester 2020 calendar.

Plaintiff merely alleges that, as a result of the closure of WSU's facilities, it did not deliver the educational services, facilities, access and/or opportunities contracted and paid for by Ms. Clingan and the putative class. Again, however, plaintiff does not plead any specific contractual promises by the parties, and do not reference any specific contractual provision in the first amended petition. The most pointed reference is the entire course catalog as a whole. Without reference to any specific contractual promise sufficient to state Plaintiffs' claim for breach of contract, it must be dismissed. See *Jamieson*, 473 F.Supp.2d at 1160; and *Coffman*, 2018 WL 3093506. See also *Buschauer*, 2021 WL 1293829, *6.

Finally, adopting the reasoning of the Court in *Crawford v. Presidents & Directors of Georgetown Coll.*, No. 20-CV-1141 (CRC), 2021 WL 1840410 (D.D.C. May 7, 2021), this Court finds plaintiff's allegations do not support a plausible inference that WSU promised away its discretion to make reasonable modifications, in good faith, in response to radically changed circumstances in order to keep students and faculty safe in response to a once-in-a-century pandemic.

E. Submission of Implied Contract Claims to Joint Committee on Claims Against State

WSU contends plaintiff cannot establish proper subject matter jurisdiction for her implied contract claims because she failed to submit them to the Joint Committee on Claims Against the

State, a pre-condition required by statute. Therefore, WSU argues plaintiff's implied contract claims (Ct. II unjust enrichment, Ct. IV money had and received) must be dismissed.

The statutes mentioned by defendant on the Joint Committee on Claims against the State are K.S.A. 46-903 and 46-907. Those statutes provide:

> **46-903. Payment of claims based upon implied contracts, when.** No money or funds shall be disbursed from the state treasury or any special fund of the state of Kansas in part or full satisfaction or payment of any claim or judgment based in whole or in part on an implied contract, unless the payment of such claim or judgment has been specifically authorized by act of the legislature.

K.S.A. 46-903.

> **46-907. Submission of certain claims to joint committee on special claims against the state.** All claims proposed to be paid from the state treasury or any special fund of the state of Kansas, which cannot be lawfully paid by the state or any agency thereof except by an appropriation of the legislature shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature.

K.S.A. 46-907.

The definition of a state agency includes: "any state office or officer, department, board, commission, institution, bureau or any agency, division or unit within any office, department, board, commission or other state authority or any person requesting a state appropriation." K.S.A. 75-3701(3). See also K.S.A. 76-712 ("the state educational institutions are separate state agencies"). WSU meets this definition of a state agency.

Unjust enrichment and money had and received are claims based on the existence of an implied contract. *Sharp v. State*, 245 Kan. 749, 754, 783 P.2d 343 (1989) (unjust enrichment); *Missimore v. Hauser*, 130 Kan. 20, 285 P. 558 (1930) (money had and received). Implied contract claims are subject to K.S.A. 46-903 and K.S.A. 46-907.

In *Wheat v. Finney*, 230 Kan. 217 (1981), the Kansas Supreme Court concluded K.S.A. 46-903 and K.S.A. 46-907 contained a "statutory requirement that claims based on implied contracts be filed with a special claims committee." *Id*. at 221. The Court also held filing the claim with the special claims committee was a condition precedent to maintenance of an implied contract action against the state. The Supreme Court stated:

> "K.S.A. 46-903 and 46-907 provide a statutory requirement that claims based on implied contracts be filed with a special claims committee; such filing and processing are held to be conditions precedent to the maintenance of an action. An action may not be maintained against the State without first filing a claim on which payment is denied. See 81A C.J.S., States §310 for a discussion of conditions precedent to actions against the State."

Wheat v. Finney, 230 Kan. 217, 221–22, 630 P.2d 1160, 1163–64 (1981).

Because no attempt was made to comply with the requirements of K.S.A. 46-903 and 46-907, the *Wheat* Court concluded plaintiff was precluded from maintaining an action based on implied contract.

Later, in *Sharp v. State*, 245 Kan. 749, 754 (1989), the Kansas Supreme Court once again held implied contract claims against the state must first be submitted to the joint committee on special claims under K.S.A. 46-903 and 46-907.

Here, plaintiff has not presented her implied contract claims to the joint committee on special claims against the state. Defendant contends this requires dismissal of her implied contract claims. On the other hand, plaintiffs assert that neither K.S.A. 46-903 nor K.S.A. 46-907 specifically requires that an implied contract claim be presented to or rejected by the joint committee prior to filing suit, only that prior to payment of a claim or judgment from the state treasury, the matter "shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature."

Wheat and *Sharp* are stare decisis authority which this Court is bound to follow. The doctrine of stare decisis recognizes that "'once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised.'" *McCullough v. Wilson*, 308 Kan. 1025, 1032, 426 P.3d 494, 498 (2018).

For the reasons stated, this Court finds defendants motion to dismiss plaintiff's implied contract claims (unjust enrichment, and money had and received) should be granted.

F. Additional Issues Raised

Defendant asserts additional arguments in favor of its motion to dismiss including: (1) the petition must be dismissed for lack of subject matter jurisdiction and failure to state a claim under the KJRA, and, (2) the express implied contract claims cannot co-exist with the express contract claim. Given the Court's dismissal of all of plaintiffs' claims against defendant for the reasons set forth above, there is no need to address WSU's additional issues.

G. Does Plaintiff's First Amended Petition State a Valid Claim for Conversion?

WSU argues the Court must dismiss plaintiff's conversion claim because Kansas law does not support a conversion claim for money owed. In response, Ms. Clingan argues her conversion claim rests on the argument that she has an ownership right to in-person educational services that the defendant(s) were supposed to provide. (Am Pet. ¶ 72.) Ms. Clingan cites to *Rezac Livestock Comm'n Co., Inc. v Pinnacle Bank* to support the validity of her conversion claim. 255 F. Sup. 3d 1150, 1170 (D. Kan. 2017).

In *Rezac*, the plaintiff sought the return of his cattle (tangible personal property) or the value of his converted cattle. Here, plaintiff claims conversion of an intangible right to method of

presentation. Ms. Clingan indicates "in-person educational services" constitute the property WSU converted.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." *Carmichael v. Halstead Nursing Ctr., Ltd.,* 237 Kan. 495, 500, 701 P.2d 934 (1985). The type of property at issue here, in-person learning as opposed to online learning, is not a tangible good or personal chattel and is not the proper subject of a conversion claim for the reasons stated in the defendant's motion.

Moreover, the Kansas Supreme Court has specifically held that money withheld or owed cannot be the basis for a conversion claim. See *Temmen v. Kent-Brown Chevrolet Co.,* 227 Kan. 45, 50, 605 P.2d 95 (1980) ("An action will not lie for conversion of a mere debt or chose in action. Hence, where there is no obligation to return identical money, but only a relationship of debtor and creditor, an action for conversion of the funds representing the indebtedness will not lie against the debtor."); see also *Ford v. Rensselaer Polytechnic Inst.,* No. 1:20-CV-470, 2020 WL 7389155 (N.D.N.Y. 2020) (dismissing conversion claim based on facts very similar to this case, finding "conversion cannot enforce a simple obligation to pay money . . . unless the money is in the form of a 'specific, identifiable fund' subject to 'an obligation to return or otherwise treat in a particular manner.'"). Thus, an obligation to pay money, including a claim for tuition reimbursement, is insufficiently tangible to qualify as "property" for purposes of a conversion claim.

Ms. Clingan fails to explain how in-person educational services qualify as goods or personal chattels. No case law authority is cited in support by plaintiff. In addition, this Court observes that the First Amended Petition does not allege that defendant exercised dominion and

control over actual physical items or chattels belonging to plaintiff. Ms. Clingan does not allege any obligation exists to return identical money, and the Kansas Supreme Court has specifically held that money withheld or owed cannot be the basis for a conversion claim. See *Temmen,* 227 Kan. at 50.

The Court agrees plaintiff's conversion claim must be dismissed. For all the reasons stated herein, the Court grants WSU's motion to dismiss.

ORDERS

The Court GRANTS defendant Wichita State University's *Motion to Dismiss First Amended Petition*, filed on September 24, 2020.

The entirety of this case is dismissed and terminated in favor of defendants.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

_____
Hon. Mary E. Christopher
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

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