UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ABRAHAM BARKHORDAR, SARAH ZELASKY, and ELLA WECHSLER-MATTHAEI, individually and on behalf of all others similarly situated, Plaintiffs, v. PRESIDENT AND FELLOWS OF HARVARD UNIVERSITY, Defendant.	No. 1:20-cv-10968-IT Hon. Indira Talwani

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I. INTRODUCTION

Many parents save throughout their children's lives to send them off to college. Higher education is often one of the biggest investments that a family makes. But despite the existence of less-expensive online programs, many students and their families continue to pay more for an in-person education. The reason: it is on campus where students receive an immersive educational experience involving in-person instruction, enriched through interaction with faculty and students and facilitated by access to campus resources.

As a result, Plaintiffs applied for and accepted offers of enrollment for an in-person education at Harvard University. Though other colleges (and Harvard itself) offer less expensive online classes or programs, Plaintiffs paid more for an in-person education on Harvard's campus, including in its lecture halls, laboratories, libraries, student centers, dorms, and dining halls. In response to COVID-19, however, Harvard switched to online learning mid-way through the Spring semester. While this was an understandable response to the pandemic, Harvard's failure to reimburse students for the tuition differential between in-person and online learning was not. And it amounts to breach of contract, unjust enrichment, and conversion.

Harvard argues that courts in Massachusetts may not review the quality of education provided at an academic institution. But breach of contract claims will lie where, as here, a university fails to provide a specifically promised service because the relevant inquiry is whether the service was provided at all, not whether it was adequate or appropriate. Moreover, Plaintiffs sufficiently allege Harvard's unjust enrichment based on its inequitable retention of money paid for in-person education. And a conversion claim exists based on Harvard's retention of money paid for in-person education without applying it to that purpose.

Numerous courts analyzing similar claims against educational institutions for failure to provide live, in-person instruction and access to campus facilities in the wake of COVID-19 have

denied motions to dismiss claims for breach of contract and unjust enrichment. *See Salerno v. Florida Southern College,* 2020 WL 5583522 (M.D. Fla. Sept. 16, 2020); *Smith v. Ohio State Univ.*, 2020 WL 5694224 (Ohio Ct. Cl. Sept. 9, 2020); *Milanov v. Univ. of Michigan*, 2020 Mich. Ct. Cl. LEXIS 1 (Mich. Ct. Cl. Jul. 27, 2020); *Cross v. Univ. of Toledo*, 2020 WL 4726814 (Ohio Ct. Cl. Jul. 8, 2020); *Garland v. Western Michigan Univ.*, 2020 Mich. Ct. Cl. LEXIS 7 (Mich. Ct. Cl. Sept. 15, 2020); *Waitt v. Kent State Univ.*, 2020 WL 5894543 (Ohio Ct. Cl. Sept. 28, 2020); *Zahn v. Ohio Univ.*, 2020 Ohio Misc. LEXIS 230 (Ohio Ct. Cl. Oct. 19, 2020); *Mellowitz v. Ball State Univ.*, 2020 WL 5524659 (Ind. Super. Ct. Aug. 14, 2020); *McDermott v. Ohio State Univ.*, 2020 WL 5239892 (Ohio Ct. Cl. Aug. 24, 2020). This Court should do the same.

II. ARGUMENT

A. Plaintiffs are not asking the Court to review the quality of education at Harvard but its failure to deliver on its specific promise to provide an in-person education.

Harvard erroneously recasts Plaintiffs' claims as claims for educational malpractice. To be sure, "most [] jurisdictions that have considered the issue" have found that "educational malpractice claims are not cognizable because there is no duty."[1] But "courts have recognized claims by students for breach of contract, fraud, or other intentional wrongdoing that allege a private or public educational institution has failed to provide *specifically promised educational services.*"[2] Indeed the lead case that Harvard cites—*Doe v. Town of Framingham*[3]—relied on

[1] *Blake v. Career Educ. Corp.*, No. 4:08-CV-00821-ERW, 2009 WL 2567011, at *2 (E.D. Mo. Aug. 18, 2009). Internal citations and quotations omitted and emphasis added throughout unless otherwise indicated.

[2] *Id.* (emphasis in original).

[3] 965 F. Supp. 226, 229-30 (D. Mass. 1997) (rejecting the plaintiff's self-described claim for "educational malpractice"); *see also McLaughlin v. City of Lowell*, No. CIV.A. 94-5069, 1998 WL 224929, at *15 (Mass. Super. Apr. 3, 1998) (denying summary judgment because the city "may be found negligent for the defendants' alleged failure to notify the [parents] of the decision not to initiate a [special needs] evaluation" of their daughter but

the Seventh Circuit's decision in *Ross v Creighton Univ.*, which held that a student may bring a contract claim for breach of a "specific contractual promise" to provide educational services.[4]

Ross explained that to "state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough."[5] Instead, "he must point to an identifiable contractual promise that the defendant failed to honor."[6] For example, if a university "promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available."[7] The court explained that in such a case "the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service," as to which the university would be entitled to deference, "but rather that it failed to perform that service at all."[8] So adjudication "would not require an inquiry into the nuances of educational processes and theories," but instead "an objective assessment" of whether the university performed on its promise.[9] Likewise, while the First Circuit stated in *Havlik v. Johnson & Wales Univ.* that "courts must accord a school some measure of deference," it held that if a university makes a promise, that promise "must be carried out in line with the student's reasonable expectations."[10] So too here.

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recognizing that claim for "negligence in the evaluation, placement, or delivery of educational services" would not be permitted). *See* Def.'s Mem. Supp. Mot. Dismiss First Am. Consolidated Compl. ("Mot.") at 8-9 (ECF No. 34).

[4] 957 F.2d 410, 413 (7th Cir. 1992).

[5] *Id.* at 416-17.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id.* (breach of contract claim cognizable where complaint alleged that "the University breached its promise by reneging on its commitment to provide [tutoring] services"). *Cf. Gillis v. Principia Corp.*, 832 F.3d 865, 873 (8th Cir. 2016) ("Matthew Code and the scriptural passages embodied therein do not amount to specific, discrete promises" but instead an "intent to maintain an ethical environment"). *See* Mot. at 8 n.9.

[10] 509 F.3d 25, 35 (1st Cir. 2007).

Plaintiffs' claims address whether Harvard delivered on its promised in-person education.[11] Nine cases analyzing similar COVID-19 claims have held that claims for unjust enrichment and breach of contract to provide in-person instruction and access to campus facilities did *not* constitute claims for educational malpractice.[12] And this can be valued based on the tuition differential between in-person and online college programs.[13] Attempting to reframe the case, Harvard insists that Plaintiffs' claims are "challenging the adequacy" of their education.[14] But however one might describe Zoom classes—HLS Dean Manning for his part acknowledges that "an online learning experience may not be optimal"—this is an effect of Harvard's failure to provide its promised in-person education.[15] As the court stated in *Smith*, the "mere mention" that "online learning is substandard" does not change the "essence of plaintiff's breach of contract claim [] that she contracted for in-person classes and received online classes instead."[16] Thus, the Court should decline Harvard's invitation to restate Plaintiffs' claims.[17]

[11] ¶¶ 17-21, 39-48. All ¶ __ references are to the First Am. Consolidated Class Action Compl. (ECF No. 26).

[12] *See* Introduction (collecting cases). *See also Alsides v. Brown Inst. Ltd.*, 592 N.W.2d 468, 474 n.3 (Minn. Ct. App. 1999) (permitting student's contract claim where educational institution allegedly failed to perform on specific promises, including the provision of hands-on training); *Ryan v. Univ. of N.C. Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998) (contract claim based on "failure to provide a one month rotation in gynecology" as promised "would not involve an inquiry into the nuances of educational processes and theories").

[13] ¶ 72.

[14] Mot. at 2.

[15] ¶ 60.

[16] 2020 WL 5694224, at *2 (rejecting the argument that the claims amounted to "educational malpractice," because a "court's role generally does not include recasting a party's pleading").

[17] In Harvard's cases the plaintiffs' claims were expressly about educational quality. *See Adams v. Antonelli Coll.*, 304 F. Supp. 3d 656, 665 (S.D. Ohio 2018) (granting summary judgment where the plaintiff "confirmed in her deposition that the breach of contract alleged in her Complaint arises from her allegation that [the college] did not provide the quality of education represented"); *Barneby v. New England Sch. of Montessori, LLC*, 2016 WL 3768928, at *3 (Conn. Super. Ct. June 9, 2016) (granting motion to strike allegation that a preschool failed to provide "quality educational opportunities" because that amounted to a claim for educational malpractice, but allowing "leave to plead over" that they were "only contesting the defendant's failure to provide the afternoon daycare services required under the contract"). *See* Mot. at 8 n.9.

Harvard's cases differ as they arise in the context of student performance or conduct.[18] *See Sullivan v. Bos. Architectural Ctr., Inc.*, 786 N.E.2d 419, 422 (Mass. App. Ct. 2003) (affirming dismissal of contract claim brought by student placed on academic probation for failure to complete course work where plaintiff did not follow procedures for obtaining credit and instead attempted to resolve her incomplete "on her own terms"); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 376 (Mass. 2000) (affirming dismissal of contract claims brought by student suspended for engaging in "unwanted sexual activity," but employing "reasonable expectations" test to review each contract claim). In fact, though courts "are chary about interfering with academic and disciplinary decisions" made by institutions, it remains true that "the reasonable expectation standard insures that students receive the benefit of the contractual promises made to them by private colleges and universities."[19] As this Court put it in *Doe v. Harvard Univ.*, "universities have flexibility to adopt diverse approaches to student discipline matters . . . but still must meet the expectations that arise out of the terms of the contract."[20]

Harvard's other cases are also inapposite because they involve claims not actually at issue in this case.[21] *See Bauza v. Morales Carrion*, 578 F.2d 447 (1st Cir. 1978) (holding that admissions decisions for kindergarten class did not violate the equal protection or due process clause); *Ambrose v. New England Ass'n of Sch. & Colleges, Inc.*, 252 F.3d 488, 499 (1st Cir.

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[18] *See* Mot. at 9.

[19] *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 215-16, 218 (D. Mass. 2017) (denying motion for judgment where plaintiff asserted that "a student reading the *Policy and Procedures* would expect the College to conduct its investigation and fact-finding process" in a different manner).

[20] No. 1:18-CV-12150-IT, 2020 WL 2769945, at *10 (D. Mass. May 28, 2020) (denying motion to dismiss contract claims because student provided "sufficient allegation that Harvard failed to meet Plaintiff's standard of reasonable expectations" where policy allowed but university denied "opportunity to meaningfully respond to information obtained during the disciplinary investigation process"); *see also DMP v. Fay Sch. ex rel. Bd. of Trustees*, 933 F. Supp. 2d 214, 222 (D. Mass. 2013) ("*Absent a contractual commitment to the contrary*, schools have wide discretion in school discipline matters. . . . to prevail, [the student] must either establish that [the school] breached a contractual right, or clearly abused its discretion in enforcing its policies and regulations.").

[21] Mot. at 9-10.

2001) (refusing to hold an accreditor liable to a consumer of the accredited service under a negligent accreditation theory). Lastly, Harvard cites language from *Cuesnongle I* that the First Circuit itself described as dicta in a subsequent decision that Harvard fails to cite.[22] And in that later decision, the First Circuit rejected the university's argument that the Department of Consumer Affairs did "not have power, authority or jurisdiction to review *any* matter concerning private Academia" as "completely unsupported by law."[23] Instead, it held in *Cuesnongle II* that the department did *not* violate the university's first amendment rights by ordering it to reimburse a registration fee for classes canceled at the outset of the term.[24] In any event, the change in the date of classes, which *Cuesnongle I* addressed in dicta, was to put them off for a week,[25] and the court acknowledged that the "opinion should not be read to imply that students could never obtain repayment of improperly obtained fees."[26] Here, Harvard's cancellation of in-person classes was a complete upheaval for students mid-way through their semester.[27]

B. Plaintiffs allege breach of a specific promise for in-person education.

A claim for breach of contract requires allegations "that there was a valid contract, that the defendant breached its duties under the contractual agreement, and that the breach caused the plaintiff damage.[28] "Massachusetts law has long recognized that in the context of private

[22] *Cuesnongle v. Ramos*, 835 F.2d 1486, 1489 (1st Cir. 1987) (*Cuesnongle II*) ("In dictum, this court expressed skepticism that DACO had properly interpreted the University Catalogue. *Id.* at 885-86."). *See* Mot. at 9 (citing *Cuesnongle v. Ramos*, 713 F.2d 881, 885-86 (1st Cir. 1983) (*Cuesnongle I*)).

[23] *Cuesnongle II*, 835 F.2d at 1501.

[24] *Id.* at 1502.

[25] *Cuesnongle I*, 713 F.2d at 882 ("Although classes were to have commenced on August 16, they did not begin until August 25").

[26] *Id.* at 884 n.1.

[27] ¶ 57.

[28] *Guckenberger v. Bos. Univ.,* 957 F. Supp. 306, 316-17 (D. Mass. 1997) (*Guckenberger I*) (allegations that "the promotional materials created a contract between the students with learning disabilities and the university, and that the university breached this agreement," was sufficient to support breach of contract claim); *see also*

education, there is a contractual relationship between the school and student."[29] And "the promise, offer, or commitment that forms the basis of a valid contract can be derived from statements in handbooks, policy manuals, brochures, catalogs, advertisements, and other promotional materials."[30] Moreover, "in the absence of an express agreement, a contract implied in fact may be found to exist from the conduct and relations of the parties."[31] Ultimately, the standard for interpreting a student-university contract is that of "reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the student to give it."[32] "A breach of contract is established if the facts show that the college has failed to meet the student's reasonable expectations."[33] In general, "any uncertainty in the meaning of the document's terms is to be construed against the drafter."[34] And "the court must accept as true the factual allegations" made and "must make any reasonable inferences favorable to his position both with respect to determining what a student may have reasonably expected terms . . . to mean and whether the College failed to meet those expectations."[35]

1. The complaint alleges that Harvard promised students an in-person and on-campus education.

Plaintiffs enrolled at Harvard for an in-person education "to obtain the full experience of live, in-person courses and direct interactions with instructors and students."[36] Plaintiffs allege

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Guckenberger v. Bos. Univ., 974 F. Supp. 106, 152 (D. Mass. 1997) (*Guckenberger II*) (holding "there was an enforceable contractual agreement").

[29] *Fay Sch.*, 933 F. Supp. 2d at 223.

[30] *Guckenberger II*, 974 F. Supp. at 150.

[31] *Squeri v. Mount Ida Coll.*, 954 F.3d 56, 71 (1st Cir. 2020).

[32] *Doe v. W. New England Univ.*, 228 F. Supp. 3d 154, 170, 175 (D. Mass. 2016).

[33] *Amherst Coll.*, 238 F. Supp. 3d at 215.

[34] *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 593-94 (D. Mass. 2016).

[35] *Amherst Coll.*, 238 F. Supp. 3d at 215.

[36] ¶ 17.

that Harvard promised them an in-person educational experience. For example, Harvard states that its "campus creates a stunning backdrop for all that happens within the University," claiming to offer "unparalleled resources to the University community, including libraries, laboratories, museums, and research centers to support scholarly work in nearly any field or discipline."[37] And Harvard states that "[o]pportunities abound inside the classroom and out, with over 8,000 courses from over 100 departments and countless research programs" with "access to almost every extracurricular program imaginable."[38] These statements created the reasonable expectation Harvard would provide an in-person education.

Plaintiffs also allege that Harvard's "usual and customary practice when students register for on-campus courses and pay tuition for such courses is to provide on-campus instruction," so students' "reasonable expectation when registering for classes for the Spring 2020 semester was that those classes would be provided on-campus."[39] In addition, the complaint alleges that tuition and fees for online courses are lower than those for in-person courses, because they are "entirely different learning and living experiences."[40] Again, students paying over $23,000 per term had a reasonable expectation that they would receive an in-person education.

2. Harvard breached its promise to provide an in-person education and caused damages to Plaintiffs when it closed campus and moved classes online.

In response to the pandemic, Harvard moved its instruction online half-way through the semester.[41] While this shift was understandable, Plaintiffs paid more than they contracted for, *i.e.*, for the in-person college experience, during the part of the semester that Harvard provided

[37] ¶ 34.

[38] *Id.*

[39] ¶ 40.

[40] ¶ 72.

[41] ¶¶ 48, 55.

them with only online instruction.[42] This states a claim for breach of contract.[43] Harvard and the students had an enforceable contract whereby the students would pay for, and Harvard would provide, in-person instruction and services.[44] The students paid for the on-campus experience for Spring 2020, but Harvard did not provide it for the duration of the semester.[45] And Plaintiffs have been damaged by having to pay for educational services they did not receive.[46]

This Court and others enforce contract law when a school makes a specific promise it fails to keep. In *Brandeis Univ.*, for example, a student subject to a disciplinary proceeding alleged that "by refusing to give him a copy" of a special examiner report, the university breached a provision in its handbook stating that students had a right to access their "educational records."[47] The court found that a student reading the provision "could reasonably expect" that the report "was part of his 'educational record.'"[48] So the court found it "at least plausible that the failure of Brandeis to provide [the student] access" was "a material breach of contract."[49] Here, it is likewise plausible that a claim that "opportunities abound inside the classroom and out" would create a reasonable expectation of an in-person education.[50]

Similarly, in *Shulse v. W. New England Univ.*, the court found that a disabled student had stated a breach of contract this his university "failed to provide reasonable and necessary health services," where the student handbook stated that it would provide comprehensive health care.[51]

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[42] ¶¶ 58, 63.

[43] *Guckenberger I*, 957 F. Supp. at 316-17.

[44] *Id.* (contract); ¶¶ 88-91, 100-104.

[45] *Guckenberger I*, 957 F. Supp. at 317 (breach); ¶¶ 93, 105.

[46] *Guckenberger I*, 957 F. Supp. at 317 (damages); ¶¶ 95, 106.

[47] 177 F. Supp. 3d at 582, 598.

[48] *Id.* at 599.

[49] *Id.* (denying motion to dismiss on this ground).

[50] ¶ 60.

[51] No. 3:19-CV-30146-KAR, 2020 WL 4474274, at *9-10 (D. Mass. Aug. 4, 2020).

And the court also found that the university "breached its contractual obligation to provide [the disabled student] with an academic environment free from discrimination," including reasonable accommodations. The court found that in both instances the plaintiff had a "reasonable expectation" of receiving services promised by the university.[52] Here too, Plaintiffs reasonably expected receiving the in-person education that Harvard promised them.

Courts have allowed contract claims to proceed on virtually identical facts. In *Salerno*, the "crux of the College's motion"—as here—was that the complaint did "not identify a specific contractual provision that establishes that the College had an obligation to provide in-person educational services for the entire Spring 2020 semester."[53] The court disagreed. Because Florida law recognizes that "the college/student contract is typically implied in the college's publications," this is "not a typical contract situation where there is an express document with delineated terms that a plaintiff can reference."[54] The college's "publications clearly implied that courses would be conducted in-person" and its "materials also touted its many resources and facilities—all of which were located on the campus thereby implying in-person participation."[55] So the court held that these created a sufficiently specific contractual provision to provide in-person educational services.[56]

Moreover, in *Smith*, the court found that a student stated a breach of contract claim on allegations that "when she paid tuition to defendant a contract was created and that by holding classes virtually and not refunding a portion of the previously paid tuition and fees, defendant

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[52] *Id.*; *see also Arriaga v. Members of Bd. of Regents*, 825 F. Supp. 1, 6 (D. Mass. 1992) (denying dismissal of impairment of contract claim where complaint alleged "the plaintiffs had contracts generating legitimate expectations that their tuition would not be raised retroactively").

[53] *Salerno*, 2020 WL 5583522, at *5.

[54] *Id.*

[55] *Id.*

[56] *Id.*

breached such contract."[57] And seven other cases besides *Salerno* and *Smith* have allowed breach of contract claims to proceed. *See* Introduction (collecting cases).[58]

3. Harvard's arguments to the contrary lack merit.

First, Harvard feigns ignorance that students reasonably expected in-person education.[59] But the handbooks Harvard submitted specifically support that very expectation. For example:

- Although both check-in and course registration are done online, students are expected to be ***present in the Cambridge area*** to be officially registered for the semester. Exhibit 1, ECF No. 35-1 (Ex. 1), at 13.

- ***When new students arrive on campus***, they must bring government-issued identification to facilitate photo and identity validation before they can receive their Harvard ID cards. Exhibit 2, ECF No. 35-2 (Ex. 2), at 26.

- During incoming student check-in, students are issued an official Harvard University Identification Card (ID) ***for gaining access to Harvard University libraries, classroom buildings, and services*** throughout the Harvard community. Ex. 2 at 26, *see also* Exhibit 3, ECF No. 35-3 (Ex. 3), at 114.

- The School encourages students to receive any required immunizations ***before they arrive at Harvard*** . . . . If students are unable to obtain these prior to their arrival on campus, they may arrange to get immunizations at various locations in the area, including HUHS. Ex. 2 at 55, *see also* Ex. 3 at 125.

- Students generally seek ***work-study positions after arriving on campus***. Ex. 1 at 43.

- The Office of Work and Family . . . coordinates ***childcare on campus***. Ex. 1 at 87.

- HGSE is committed to being a ***bike friendly campus***. Ex. 1 at 91, *see also* Ex. 2 at 49.

[57] 2020 WL 5694224, at *2.

[58] *See also Alsides*, 592 N.W.2d at 474 n.3; *Ryan*, 494 S.E.2d at 791; *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399-400 (Colo. 1994) (permitting contract action where the students paid for educational services, including modern equipment and computer training, that school allegedly failed to provide); *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 10-11 (1972) (plaintiff "did not receive all that she bargained for" where there was "a contract obligating defendant USC to give the course Sociology 200 consisting of a given number of lectures and a final examination in consideration of the tuition and fees for the course paid by plaintiff" but the "stated number of lectures and the normal type of final examination were not given").

[59] Mot. at 11-12.

- HUCEP teams who are trained and supervised by the HUPD provide ***walking escorts*** to students, faculty and staff ***seven nights a week during the academic year and cover the Yard, River, and Quad areas***. Ex. 1 at 89, Ex. 3 at 128.

- The ***Evening Shuttle Van Service*** is designed to provide transportation ***throughout the Cambridge and Allston campuses*** . . . . Ex. 1 at 89, Ex. 3 at 128.

- The ***taxi escort service*** is available to School students on a first come, first serve basis. The hours of operation are 9:00 p.m. to 3:00 a.m. seven days a week. . . . The taxi service is free ***within a one mile radius of the campus.*** Ex. 2 at 56.

- The Doctor of Education Leadership (Ed.L.D.) is a three year, full-time, practice-based program, including two years of ***on-campus coursework*** and a third-year residency with one of the program's partner organizations. Ex. 1 at 9.

- [Masters of Public Health] students are ***limited to*** a maximum of 3.75 online credits in any term and a maximum of ***10 online credits overall*** out of the required 65 credits for the MPH degree. Ex. 2 at 32.

These representations, along with those discussed in section II(A), exemplify language that "formed an express or implied contract" to provide students with an on-campus education.[60]

Nevertheless, Harvard cites the outlier *Chong,* a dismissal *without* prejudice.[61] But the *Chong* plaintiffs did not plead that the course descriptions they relied on "comprised part of the parties' contract."[62] Here, Plaintiffs allege that Harvard's handbooks and its website promotional materials form part of the parties' contractual understanding.[63] So Plaintiffs are not "silent regarding the source of the contractual obligation."[64] Moreover, Harvard's cites for the proposition that its promises are too "vague and imprecise" are inapposite. *See Shin v. Mass. Inst. of Tech*., 2005 WL 1869101, at *7 (Mass. Super. June 27, 2005) ("generalized representations to

[60] *Squeri*, 954 F.3d at 71-72; *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir. 2007) (pleader must "explain what obligations were imposed on each of the parties by the alleged contract"). Mot. at 11.

[61] Mot. at 11 (citing *Chong v. Northeastern Univ.*, No. 20-10844-RGS, 2020 WL 5847626, at *3 (D. Mass. Oct. 1, 2020)).

[62] *Chong,* 2020 WL 5847626, at *3.

[63] ¶ 41. The website allegations are not limited to the undergraduate experience except for the one cherry-picked sentence Harvard references. *See* Mot. at 12.

[64] Mot. at 12.

treat students with 'fairness and beneficence' in [] promotional materials were too vague and indefinite to form an enforceable contract"); *Higgins v. Town of Concord*, 246 F. Supp. 3d 502, 518 (D. Mass. 2017) (allegation of breach of implied contract when the defendants forced the plaintiff "to resign without providing her a hearing" was "without more" insufficient to provide "meaningful guidance to the defendants," but permitting leave to amend). Plaintiffs point to language specifically describing the experience that Harvard promised students.[65]

Second, citing no authority, Harvard contends that disclaimers in two of its three handbooks preclude the formation of an express contract.[66] But courts have held that although a defendant "attempts to frame its written disclaimers as a categorical bastion against the formation of any contractual understanding," communications by a defendant can be "rationally at odds" with its written disclaimers and so have "the potential to create contractual obligations."[67] Indeed, a "disclaimer is not automatically effective and must be read in the context of the totality of the circumstances, including the parties' norms, conduct and expectations."[68] Here, the norm has long been an on-campus education, Plaintiffs did not expect that core contractual promise was subject to change.[69]

Harvard then argues that students cannot reasonably expect it to provide any promised on-campus services during a pandemic and that its norm and "customary practice" of providing an on-campus education should not apply during "extraordinary circumstances."[70] But that

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[65] ¶ 34, Exs. 1-3.

[66] Mot. at 13-14 (citing Exs. 1 & 2).

[67] *Rothberg v. Xerox Corp.*, 2013 WL 12084543, at *4 (D.D.C. Jan. 4, 2013).

[68] *Id. See also Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998) (holding that because "the graduate school catalog is not a wholly integrated contract but instead is only one part of a more complex contractual relationship between the student and the college," under certain circumstances "the university could obligate itself through the actions and oral statements of its officials, despite the language of the caveat provision").

[69] Plaintiffs discussed in section I, above, that *Cuesnongle* provides inapposite dicta. *See* Mot. at 14 & n.11.

[70] Mot. at 14, 16.

misses the point. Harvard's promised—and usual and customary practice of providing—an on-campus education is what students reasonably expected when they paid over $23,000 for the semester.[71] Absent COVID-19, Harvard could not have just moved all classes online. That would have been a clear breach, and it remains a breach despite COVID-19. So Harvard must compensate students who paid in full for tuition, room and board, and other services, without receiving their end of the bargain. *Cf. Milanov*, 2020 Mich. Ct. Cl. LEXIS 1, at *21 ("even when performance has become impossible, a party who was deprived of the promised performance is entitled to a refund of consideration for services not rendered due to impossibility").[72] Moreover, the norm of on-campus education does not contradict the terms of the contract as Harvard incorrectly contends,[73] but instead reinforces the many specific representations of an in-person and on-campus education found in the handbooks.

Harvard also argues that Plaintiffs are not entitled to any return of tuition under its refund policies.[74] But these policies apply to students who have withdrawn or gone on leave.[75] So students who have *not* decided to withdraw or go on leave would not reasonably expect the withdrawal and refund schedule to apply to them. Instead, contract law supplies the remedy for Harvard's breach of its promise to provide an on-campus education. Indeed, Harvard suggests

[71] ¶¶ 43-44, 47.

[72] *See also* RESTATEMENT (SECOND) OF CONTRACTS § 377 (1981) ("A party whose duty of performance . . . is discharged as a result of impracticability of performance . . . is entitled to restitution for any benefit that he has conferred on the other party by way of part performance."); *id.* cmt. a ("Furthermore, in cases of impracticability . . . the other party . . . is also entitled to restitution."); *id*. cmt. b ("after the occurrence of a disrupting event that was ordinarily unforeseeable when the contract was made . . . . restitution is all that is required"); Victor P. Goldberg, *After Frustration: Three Cheers for Chandler v. Webster*, 68 Wash. & Lee L. Rev. 1133, 1161 (2011) ("[T]he majority position is that restitution should be made for work performed and money paid before the intervening event.").

[73] Mot. at 16 (citing *Dickerson v. MassMutual Life Ins. Co.*, 111 N.E. 3d 1113 (Mass. App. Ct. 2018)).

[74] Mot. at 15.

[75] Ex. 1 at 19 (partial refund for withdrawal by March 24); Ex. 2 at 24 (partial refund for withdrawal by March 30); Ex. 3 at 91 (partial refund for withdrawal by March 31).

but cannot seriously expect that—*due to its breach*—students should have withdrawn and forfeited their credits for the semester in order to receive a *partial* refund.

Lastly, Harvard insinuates that a contract cannot be implied in the academic setting.[76] But the First Circuit stated earlier this year in *Squeri* that "in the absence of an express agreement, a contract implied in fact may be found to exist from the conduct and relations of the parties."[77] So too here. And Harvard acknowledges that courts need not defer to academic decision-making when there is a "violation of a reasonable expectation created by the contract."[78] Moreover, *Rodriguez* differs because the plaintiff alleged that the terms of the contract were the "regular MBTA published schedules."[79] But the plaintiff did "not allege that the MBTA intended or agreed to be bound by the regular schedule."[80] Here, Plaintiffs allege that the parties mutually agreed to be bound both by Harvard's express representations of an on-campus education and its usual and customary practice of providing one.[81] And *Paynter v. New York Univ.* differs "because classes were suspended on May 7, 1970," and the court regarded the late-in-term suspension of classes to be a "minor" and "insubstantial change" in the schedule of classes.[82] Harvard's cancelation of in-person classes, conversely, was a mid-semester upheaval.

C. Plaintiffs adequately allege Harvard's unjust enrichment based on its inequitable retention of money Plaintiffs paid for in-person education.

To plead a claim for unjust enrichment, a plaintiff must allege three elements "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the

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[76] Mot. at 15-16.

[77] 954 F.3d at 71.

[78] Mot. at 15 (citing *Berkowitz v. President & Fellows of Harvard Coll.*, 789 N.E.2d 575, 581 (Mass. App. Ct. 2003)). *See also* section I, above.

[79] *Rodriguez v. Mass. Bay Transp. Auth.*, 80 N.E.3d 365, 368-69 (Mass. App. Ct. 2017).

[80] *Id.*

[81] *E.g.*, ¶ 102.

[82] 319 N.Y.S.2d 893, 893, 894 (N.Y. App. Term 1971).

defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under the circumstances would be inequitable without payment for its value."[83] Here, Plaintiffs have conferred a benefit (paid tuition) in exchange for a promise (an in-person education) but Harvard has knowingly retained the benefit without following through on its promise.[84]

Harvard argues that Plaintiffs cannot maintain an unjust enrichment claim because a contract governs the relationship.[85] While it is true that an unjust enrichment claim is not permitted where a court has "found as a matter of law that a contract existed between the parties covering the issue asserted by the plaintiff,"[86] courts permit both claims to proceed when the existence of the contract "is best decided after discovery, based on a fully developed record."[87] Indeed, it "would be inequitable to foreclose Plaintiff from pursuing a quasi-contract recovery at this stage when the trier of fact could ultimately determine that the parties did not have a meeting of the minds or otherwise did not reach an enforceable agreement."[88]

For example, in *McDermott*, the court found that the parties disagreed "as to the existence of one or more of the alleged contracts" where the defendant university disputed the existence of an implied contract requiring it to provide an in-person clinical program to its dental students.[89] So the court permitted the unjust enrichment claim to proceed.[90] Likewise, Harvard may argue

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[83] *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 57 (1st Cir. 2009).

[84] ¶¶ 111-114.

[85] Mot. at 17 (citing *Metro. Life Ins. Co. v. Cotter*, 984 N.E. 835, 848-49 (Mass. 2013)).

[86] *SAR Grp. Ltd. v. E.A. Dion, Inc.*, 947 N.E.2d 1154, at *6 (Mass. App. Ct. 2011). *See also SiOnyx, LLC v. Hamamatsu Photonics K.K.*, 332 F. Supp. 3d 446, 474 (D. Mass. 2018) ("Here, there is no dispute that Harvard's contract with SiOnyx is valid and enforceable."). Mot. at 17.

[87] *Garcia v. Right at Home, Inc.*, 2016 WL 3144372, at *6 (Mass. Super. Jan. 19, 2016). *See also Tomasella v. Nestle USA, Inc.*, 962 F.3d 60, 84 (1st Cir. 2020) (unjust enrichment may be pled alternatively where "ambiguity in [a] contract casts doubt on whether a breach of contract claim was indeed available as a legal remedy for the plaintiff"). *See also* ¶ 110.

[88] *Love & War LLC v. Wild Bunch A.G.*, 2020 WL 3213831, at *9 (C.D. Cal. Mar. 19, 2020).

[89] 2020 WL 5239892, at *3.

[90] *Id*.

that a contract is unenforceable under common law avoidance doctrines. As discussed above, in the cases of impossibility, impracticability, and frustration of purpose, *both* parties are excused from performance and the law seeks to restore both parties to their pre-contract position. So where Plaintiffs have already performed (by pre-paying tuition and fees), equitable restitution must accomplish this result.[91] The contract may also be illusory and unenforceable if Harvard can choose to disregard such a core obligation like the provision of in-person education.[92]

Harvard also argues that its retention of full tuition and fees was not unjust, because it contravened no agreement.[93] But Harvard knowingly retained a benefit without following through on its promise of an on-campus education.[94] While the switch to distance learning was understandable, Harvard's failure to refund the difference in tuition for in-person and online education was not. While universities have access to additional resources, such as insurance, fundraising, and endowments,[95] parents often save throughout their offspring's entire childhood for them to have the opportunity *to go off to college*. Watching lectures on Zoom from a childhood bedroom—while Harvard retains the full benefit of tuition for a promised in-person education it did not provide—is not a fair exchange for the sacrifice so many families make. Thus, courts have permitted unjust enrichment claims to proceed on virtually identical facts.[96]

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[91] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 cmt. c (2011) ("Restitution claims of great practical significance arise in a contractual context . . . when a valuable performance has been rendered under a contract that is . . . subject to avoidance . . . .").

[92] *See Jackson v. Action for Bos. Cmty. Dev., Inc.*, 525 N.E.2d 411, 415 (Mass. 1988) (finding no implied contract where "the defendant retained the right to modify unilaterally the personnel manual's terms" and this "tends to show that any 'offer' made by the defendant in distributing the manual was illusory"). *See also* ¶ 110. Plaintiffs discussed in section I, above, that *Cuesnongle* provides inapposite dicta. *See* Mot. at 18 n.12. And *Chong* involved a Financial Responsibility Agreement not at issue here. 2020 WL 5847626, at *1, 4. *See* Mot. at 17-18.

[93] Mot. at 18.

[94] ¶ 114.

[95] ¶ 28 ("At nearly $40 billion, the Harvard endowment is larger than half of the world's countries' GDPs.").

[96] *See* Introduction (collecting cases).

D. Plaintiffs allege conversion based on Harvard's retention of money paid for in-person education and its deprivation of students' right to that education.

"[C]onversion may be established by a showing that one person exercised dominion over the personal property of another, without right, and thereby deprived the rightful owner of its use and enjoyment."[97] "Money may be the subject of conversion," and there "is no requirement that the property be held in trust or in escrow."[98] Instead, conversion occurs when one "uses money entrusted to him by another person for his own purposes or benefit and in a way that he knows the 'entruster' did not intend or authorize."[99] Here, Plaintiffs entrusted specific sums to Harvard to pay for in-person instruction.[100] Yet Harvard retains that money without applying it to the expected purpose of in-person educational services.[101] This states a conversion claim.

Harvard also deprived Plaintiffs of their right to the in-person education they purchased. As stated by the First Circuit, "[w]hether or not Massachusetts limits conversion claims to tangible property is debatable."[102] And courts "have held that intangible property that is in some way merged with or inhered in a physical object," such as a document, can be the subject of a

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[97] *In re Hilson*, 863 N.E.2d 483, 491 (Mass. 2007); *see also BRT Mgmt. LLC v. Malden Storage, LLC*, No. CV 17-10005-FDS, 2019 WL 4007914, at *12 (D. Mass. Aug. 23, 2019).

[98] *Hilson*, 863 N.E.2d at 491; *see also Rac Associates v. R.E. Moulton, Inc.*, No. 09-820-A, 2011 WL 3533221, *1 (Mass. Super. Feb. 01, 2011) (conversion lies where the property is an identifiable "sum of money" that "the defendant has wrongfully expropriated after having been entrusted with the property by, or on behalf of, the plaintiff"); *see also id.* (recognizing that "requirement that a plaintiff must show an immediate right to possession of the subject property in order to succeed on a claim for conversion seems to have been relaxed in recent years, at least in cases where the property consists of money").

[99] *U.S. v. Tkhilaishvili*, 926 F.3d 1, 19 (1st Cir. 2019).

[100] ¶ 47. *See also Devaney Contracting Corp. v. Devaney*, 939 N.E.2d 135, at *1 (Mass. App. Ct. 2010) (conversion "lies where defendant's possession is not wrongful at inception but demand and refusal to return property puts him in position of wrongdoer"). *See* Mot. at 19.

[101] ¶¶ 48, 121.

[102] *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 499 (1st Cir. 2009); *Sentient Jet, LLC v. Apollo Jets, LLC*, No. 13-CV-10081, 2014 WL 1004112, at *11 (D. Mass. Mar. 17, 2014) (same). *Musket Research Assocs., Inc. v. Ovion, Inc.*, No. 05-CV-10416-MEL, 2006 WL 8458276, at *6 (D. Mass. May 15, 2006) predates *In re TJX*. *See* Mot. at 19.

conversion claim.[103] Here, matriculation documents identify Plaintiffs as students who paid for the intangible right to an in-person experience. Specifically, Plaintiffs paid for the right to access the University's campus and facilities, including its lecture halls, laboratories, and libraries, and to receive an in-person education.[104] But, in response to the pandemic, Harvard denied access to campus and deprived Plaintiffs of their in-person education by asking students "not to return to campus after Spring Recess and to meet academic requirements remotely until further notice."[105] This also states a claim for conversion under Massachusetts law.

Harvard argues that Plaintiffs seek only damages from a breach of contract.[106] But the case it relies on is inapposite, because the plaintiff had paid no money to the defendant at all—much less for a certain purpose. *See Rac*, 2011 WL 3533221 (dismissing conversion claim for "failure to pay sums due on a contract for services"). Harvard also argues that the economic loss rule precludes recovery here for a tort "like conversion" premised on breach of contract.[107] But "conduct amounting to a breach of contract becomes tortious [] when it also violates an independent duty arising from principles of tort law."[108] So the economic loss rule does not bar a conversion claim, because a defendant has "an independent duty not to misappropriate" property that "existed outside the contract."[109] Harvard also argues that a conversion claim cannot seek the value of money, as opposed to the return of funds. But Plaintiffs seek refunds.[110] And,

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[103] *Sentient Jet*, 2014 WL 1004112, at *11.

[104] ¶ 47.

[105] ¶ 55; *see also* ¶¶ 118-119.

[106] Mot. at 17.

[107] Mot. at 17. Harvard relies on *Strategic Energy, LLC v. W. Mass. Elec. Co.*, 529 F. Supp. 2d 226, 236 (D. Mass. 2008), which does not address conversion, and *Rac*, 2011 WL 3533221, which does not address the economic loss rule. Mot. at 17.

[108] *Wynne Systems, Inc. v. Mobile Storage Grp., Inc.*, 2010 WL 11595726, at *7 (C.D. Cal. May 5, 2010).

[109] *Id.*

[110] Mot. at 19; ¶ 121.

again, Harvard's cases are inapposite as the plaintiffs did not seek return of monies paid, as here. *See Wollaston Indus., LLC v. Ciccone*, No. 19-10678-PBS, 2019 WL 6841987, at *3 (D. Mass. Dec. 16, 2019) (subcontractor sought payment for services performed for general contractor); *Weiler v. PortfolioScope, Inc.*, 12 N.E. 354, 365-66 (Mass. 2014) (plaintiff had contractual right to amount equaling 5% of net proceeds of fund).

E. Plaintiff Barkhordar adequately alleges his refund request for Fall 2020.

Harvard argues that Plaintiff cannot seek a refund for Fall 2020 because Harvard essentially notified students that it intends for its breach of contract to continue.[111] But whether Harvard's promises to provide an on-campus education extend for the duration of the period for which students were offered enrollment—and whether students have an obligation to mitigate damages by taking a leave of absence—are questions of students' reasonable expectations for the trier of fact. And *Squeri* is inapposite, because the plaintiffs did "not allege the terms of any contract," unlike here.[112] In short, Harvard's motion should be denied.

III. CONCLUSION

Plaintiffs respectfully request that the Court deny Harvard's motion to dismiss; if the motion is granted in any part, however, Plaintiffs request leave to amend. *See Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 20 (1st Cir. 2004) ("leave to amend shall be freely given when justice so requires").

[111] Mot. at 19-20.

[112] 954 F.3d at 71 ("The plaintiffs' contract pleadings were that they 'applied for admission to Mount Ida,' they were each accepted, and that 'a contract was formed.'").

Dated: October 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel J. Kurowski, hereby certify that on October 21, 2020 the foregoing document filed through the Court's CM/ECF system will be sent electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

/s/ Daniel J. Kurowski
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