UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALLISON KING, on behalf of herself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	**C.A. NO. 6:20-CV-00504-ADA-JCM**
	§	
BAYLOR UNIVERSITY,	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ALAN D ALBRIGHT, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

Before the Court is Defendant's Motion to Dismiss ("Def.'s Mot. to Dismiss", ECF No. 31) and the attendant Response ("Pl.'s Resp.", ECF No. 34), Reply ("Def.'s Reply", ECF No. 37), and Sur-Reply in Opposition thereto ("Pl.'s Sur-Reply", ECF No. 39). For the reasons explained below, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss be **GRANTED** and that Plaintiff's First Amended Complaint ("Pl.'s Am. Compl.", ECF No. 28) be **DISMISSED WITH PREJUDICE** for failure to state a claim.

Also before the Court is Planitiff's Motion for Appointment of Interim Class Counsel ("Pl.'s Mot. for Appt. of Interim Class Council", ECF No. 27). Because the Court recommends dismissal on the merits, the undersigned also **RECOMMENDS** that Plaintiff's Motion for Appointment of Interim Class Counsel be **DENIED**.

I. BACKGROUND

The essential facts of this case are familiar to students and parents in nearly every school district at every level in the United States. Plaintiff Allison King ("King") was enrolled as an undergraduate student at Defendant Baylor University ("Baylor") during the Spring semester of 2020. Pl.'s Am. Compl. at 2. In mid-March, following an extended spring-break, King reconvened with her collegiate classmates for the continuation of the Spring semester, not on the Waco campus, but on her web camera. *Id*.

King brought this action, alleging that Baylor breached its contract with her, or was alternatively unjustly enriched, when it transitioned to exclusively online, remote instruction without issuing refunds for tuition, meal plans, and various student fees. *Id.* at 3. In mid-March, Baylor determined the best response to the COVID-19 pandemic was to "encourage students to stay home and to enable them to do so by using a distance-learning model to finish out the semester's course work." Def.'s Mot. to Dismiss at 10. Baylor did not refund any of King's tuition, student fees, or the remaining value of her unused meal plan. Pl.'s Am. Compl. at 2.

As to the remaining value of her unused meal plan, Baylor issued a prorated credit for the balance of "unused meal plans and dining dollars". *Id.* at 3. King alleges that she did not receive the benefit of her bargain but instead received an inferior product for the second half of the Spring 2020 semester. Pl.'s Am. Compl. at 1. In response to King's Complaint, Baylor filed its Motion to Dismiss.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 12(b)(6)

Upon a motion to dismiss for failure to state a claim, a court may dismiss an action that fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule

12(b)(6) motion to dismiss for failure to state a claim, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the non-movant. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

To survive a motion to dismiss, a non-movant must plead enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The court determines whether the plaintiff has stated both a legally cognizable and plausible claim; the court should not evaluate the plaintiff's likelihood of success. *Lone Star Fund V. (U.S.), LP v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). Based upon the assumption that all the allegations in the complaint are true, the factual allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. A court, however, need not blindly accept each and every allegation of fact; properly pleaded allegations of fact amount to more than just conclusory allegations or legal conclusions masquerading as factual conclusions. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002); *see Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

When the non-movant pleads factual content that allows the court to reasonably infer that the movant is liable for the alleged misconduct, then the claim is plausible on its face. *Iqbal*, 556 at 678. The plausibility standard, unlike the "probability requirement," requires more than a sheer possibility that a defendant acted unlawfully. *Id.* The pleading standard under Rule 8(a)(2) does not require detailed factual allegations but demands greater specificity than an unadorned, "the-defendant-unlawfully-harmed-me accusation." Fed. R. Civ. P. 8(a)(2); *Iqbal*, 556 U.S. at 678. A pleading offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. Additionally, a complaint does not meet the standard if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

Evaluating the plausibility of a claim is a context specific process that requires a court to draw on its experience and common sense. *Iqbal*, 556 U.S. at 679.

III. DISCUSSION

As noted, King alleges that Baylor is liable for breach of contract or, alternatively, unjust enrichment. *See generally* Pl.'s Am. Compl. For the sake of clarity, King's breach of contract claim is worth briefly untangling. King's theory is premised on the breach of an implied contract. *See* Pl.'s Resp. at 11. Thus, in the event that an express contract exists that governs the entirety of the relationship between King and Baylor, King's claim fails. Baylor argues that such a contract exists: the Financial Responsibility Agreement ("FRA"). *See* Def.'s Mot. to Dismiss at 12–13.

Naturally, King disputes that the FRA is controlling and, in fact, argues the FRA is "not a contract." *See* Pl.'s Resp. at 11. Baylor alternatively argues that King's claims sound in "educational malpractice." Def.'s Mot. to Dismiss at 5. Baylor further alleges that, despite the lack of controlling Texas or Fifth Circuit precedent, educational malpractice claims are not cognizable under Texas law. *See id.* King counters that her claims do not sound in educational malpractice and are simply claims for breach of contract and unjust enrichment, as described in her Amended Complaint. *See* Pl.'s Resp. at 4.

The Court, however, determines that it need not wade into the murky waters of assessing whether King's claims sound in educational malpractice and, in turn, if Texas law would likely forbid claims of this nature. Instead, the Court determines that, even taking King at her word that her claim is for breach of contract (and, alternatively, unjust enrichment), King fails to adequately state a claim. The Court, thus, begins its analysis by focusing on the breach of contract claim. The Court then briefly explains why its disposition of this issue renders King's unjust enrichment claim

appropriate for dismissal as well.[1] Next, the Court briefly acknowledges the parties' educational malpractice argument. Finally, the Court recommends the denial of King's Motion to Appoint Interim class counsel based on its recommendation on the merits.

I. King fails to satisfy the essential elements for a breach of contract claim.

The parties dispute whether the FRA constitutes a valid, enforceable contract, and in turn, whether Baylor breached that contract when Baylor transitioned to exclusively online instruction in response to the COVID-19 pandemic. *See* Pl.'s Am. Compl. at 2; Def.'s Mot. to Dismiss at 12. Under Texas law, breach of contract requires pleading and proof that (1) a valid contract exists; (2) the plaintiff performed, or tendered performance as contractually required; (3) defendant breached the contract by failing to perform or tender performance as contractually required; and (4) the plaintiff sustained damages due to the breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019). The parties disagree as to elements (1), (3), and (4). With respect to element (2), the parties both acknowledge that King paid tuition for the Spring 2020 semester. *See* Pl.'s Am. Compl. at 4; Def.'s Mot. to Dismiss at 3.

According to King, the FRA "is not a contract at all." Pl.'s Resp. at 11. She claims that Baylor breached an implied promise to "provide an in-person, on-campus education," and that the online alternative was an "inferior or somewhat inferior" product. *Id.* at 1–2. She seeks a refund for the value difference between what she expected to receive—and was allegedly promised—and what she actually received. *Id.* at 4. According to Baylor, the FRA "is a valid express contract" that does not obligate Baylor to provide "in person" instruction, supply a particular level of "on-

[1] The Court also notes that it recently recommended that, under the *Erie* framework, unjust enrichment is not an independent cause of action. *See Denicus v. Bosacker*, 6:19-cv-00655, ECF No. 40 at 14-16. This recommendation has not yet been adopted by the District Court.

campus" services, or offer a particular type of refund if services are modified. Def.'s Mot. to Dismiss at 2.

Because the Court determines today that the FRA is a valid contract which does not obligate Baylor to provide in-person, on-campus instruction, King has failed to establish a breach of contract claim. Accordingly, this court **RECCOMENDS** King's breach of contract claim be **DISMISSED** for the foregoing reasons.

A. The FRA contains all of the material or essential terms required to constitute a valid, enforceable contract.

King objects to the validity and enforceability of the FRA on the ground that it "contains no material terms at all." Pl.'s Resp. at 12. To succeed on her breach of contract claim, King must show that the FRA fails to address or incorporate at least one essential or material term and, therefore, the Court should examine King's claim from the perspective of the alleged implied contract. However, because the FRA incorporates the services to be rendered, the duration of such services, and the price, King's argument is without merit.

First, to be enforceable under Texas law, a contract "must address all of its essential and material terms with a reasonable degree of certainty and definiteness." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (1955)). While it is difficult to say exactly what particularity of the terms is essential to meet the requirement of "reasonable degree of certainty," a contract must at least be sufficient to demonstrate that both parties actually intended to be contractually bound, allow a court to determine their obligations, and accordingly prescribe an appropriate remedy if they are breached. *Id.* (quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000) and Restatement (Second) of Contracts § 33(2) (1981)).

Texas decides what terms are material and essential on a case-by-case basis according to what the parties would "reasonably regard as vitally important ingredients of their bargain." *Fischer*, 479 S.W.3d at 237; *see also Port Freeport v. RLB Contracting Inc.*, 369 S.W.3d 581, 590 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). In Texas, the essential terms "generally include time of performance, the price to be paid and the service to be rendered." *Coe v. Chesapeake Exploration, L.L.C.*, 695 F.3d 311, 321 (5th Cir. 2012). Whether all essential and material terms have been included is a question of law. *Lambert St. Packaging, Ltd. v. Sprout Foods, Inc.*, SA-09-CA-823-FB, 2011 WL 13324395 at *10 (W.D. Tex. Mar. 28, 2011) (quoting *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 74 (Tex. App.—Houston [14th Dist.] 2010, pet. filed); *see also E.P. Towne Ctr. Partners v. Chopsticks, Inc.*, 242 S.W.3d 117, 122; *Crisp Analytical Lab, L.L.C. v. Jakalam Props., Ltd.*, 422 S.W.3d 85, 89–90 (Tex. App.—Dallas 2014, pet. denied); *Nickerson v. E.I.L. Instr., Inc.*, 874 S.W.2d 936, 939 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Second, Texas has long recognized the contract doctrine of incorporation by reference. *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968) ("It is uniformly held that an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged."). In Texas, "a contract may incorporate an unsigned document by reference 'provided the document signed by the defendant plainly refers to another writing.'" *Sierra Frac Sand, L.L.C. v. CDE Glob. Ltd.*, 960 F.3d 200, 203 (5th Cir. 2020). In other words, when a contract term expressly references another document's contents, that term is not rendered invalid "merely because it exists in a document incorporated by reference." *In re D. Wilson Cons. Co.*, 196 S.W.3d 774, 781 (Tex. 2006). Relying on this doctrine, "[i]nnumerable contracts are consummated every day in Texas that incorporate other documents by reference." *Id.*

King contends that the FRA does not address the three terms that are generally considered essential in Texas: "what (if any) services Baylor will provide," "the duration of such services," and "the price that will be paid." Pl.'s Resp. at 12. The FRA, however, incorporates each of these three terms by reference.

The FRA expressly incorporates "three sources" for calculating King's "tuition, fees, and other associated costs assessed as a result of [her] registration" and her payment schedule. Def.'s Mot. to Dismiss, Ex. 2 at 2. Those sources are (1) pertinent email correspondences from Baylor to King, (2) the invoices, statements, and schedules in King's My Account tab of Baylor's E-Bill System, and (3) Baylor's online published payment schedule. *Id.* The language of the FRA effectively incorporates these other sources by reference such that they are considered part of the contract. *See, e.g.*, *Sierra Frac Sand*, 960 F.3d at 203–04 (5th Cir. 2020); *In re bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007).

The Court may read the FRA and "three sources" as "part of a single, unified instrument." *Rieder v. Woods*, 603 S.W.3d 86, 89 (Tex. 2020). Baylor agreed that it would provide the "educational services" for which King registered (the services). Def.'s Mot. to Dismiss Ex. 2 at 2. King registered for the "educational services" through Baylor's exclusive registration portal, where she selected the spring 2020 term (the duration). Def.'s Mot. to Dismiss, Ex. 1 at 3–4. The total assessed cost was reported in King's "My Account of Baylor's . . . E-Bill System" (the price). Def.'s Mot. to Dismiss, Ex. 2 at 2. Thus, because the FRA incorporates all of the essential and material terms of King's registration for Spring 2020 academic classes, her characterization of the FRA as "not a contract" is incorrect.

B. The FRA contains a merger clause that extinguishes any implied contracts separate from the FRA, including any promise of in-person instruction.

The FRA contains a merger clause, a "contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understanding and oral agreements relating to the subject matter of the contract." *Rieder v. Woods*, 603 S.W.3d 86, 96 (Tex. 2020) (quoting *Integration (Merger) Clause*, Black's Law Dictionary (11th ed. 2019)). King and Baylor's inclusion of a merger clause in the FRA "binds them to that agreement and makes that agreement's terms the final, binding, and superseding obligations each has agreed to undertake" with respect to the Spring 2020 semester. *See id.* at 97. Accordingly, the FRA extinguishes any implied promise or contract and constitutes the entirety of the parties' agreement.

Texas courts are not prone to declare implied contracts. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 747 (Tex. 2003) (noting that Texas courts "must be quite cautious" when they look beyond the written agreement). Generally, Texas "looks only to the written agreement" and "cannot make contracts for parties." *Id.* Nor can Texas courts imply a duty or obligation without "satisfactory basis in the express contracts which make it necessary." *Id.* at 747–48. Any implied covenant must only find its basis in the "terms as actually expressed in the written instrument itself." *Id.* at 748. Therefore, "a covenant will not be implied simply to make a contract fair, wise, or just." *Id.*

A clear merger clause precludes any prior implied contract from being enforceable as a matter of law because the clause presumes that all prior negotiations and agreements have been merged into the contract, and it will be enforced as written and cannot be added to, varied, or contradicted by parol evidence. *See People's Cap. & Leasing Corp. v. McClung*, 4:18-CV-00877, 2020 WL 4464503, *5 (E.D. Tex. Aug. 4, 2020); *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co., Inc.*, 234 S.W.3d 711, 719 (Tex. App.—Eastland 2007, pet. denied).

There are exceptions to this prohibition on parol evidence, but King does not appear to directly argue any of these exceptions. *See ISG State Operations*, 234 S.W.3d at 719 n.11 (Tex. App.—Eastland 2007, pet. denied)("Extrinsic evidence is admissible to show (1) the execution of a written agreement was procured by fraud, (2) an agreement was to become effective only upon certain contingencies, or (3) the parties' true intentions if the writing is ambiguous.). King does argue that the FRA is "ambiguous." Pl.'s Resp. at 13. This argument, however, rests on the premise that the FRA operates without the previously discussed incorporation of the "three sources" that define the essential terms of the contract. *See id.* The Court has rejected this ambiguity argument. *See* Section I(A), *supra*.

The FRA's merger clause unambiguously indicates that the agreement is fully integrated. The merger clause appears at the very end of the FRA and reads: "This Agreement supersedes all prior understandings, representations, negotiations, and correspondence between the student and Baylor, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance." Defs.'s Mot. to Dismiss Ex. 2 at 4.

The merger clause expressly contemplates that any number of Jumanjian[2] phenomena may require Baylor to alter its anticipated methods in order to continue providing "educational services," and so Baylor will not be bound by alleged extra-contractual promises. In fact, Baylor is no stranger to catastrophic exegencies. In 2006, then Baylor freshman and temporary residence hall refugee Sherrie King commented on her displacement after her dorm flooded: "I am kind of irritated. I pay $30,000 a year to stay in a room. You would think they would have the plumbing under control." Laura Klingsporn, *Memorial Evacuated After Flood*, The Baylor Lariat, Nov. 7,

[2] Johnston, J. (1995). Jumanji. TriStar Pictures.

2006, at 4. On May 11, 1953 the deadliest tornado in Texas history, a massive F5, tore across Waco requiring Baylor to cancel classes. Randy Fiedler, *Baylor Faculty, Alums Recall 'Deadliest Tornado in Texas History'*, Baylor University Media and Public Relations (May 8, 2003), https://www.baylor.edu/mediacommunications/news.php?action=story&story=5144.

Poignantly, in October 1918, the City of Waco ordered the closing of all "schools, picture shows, theaters, and other places for public gatherings on account of the epidemic of Spanish influenza." Matthew Mershon, *Texas Spanish Influenza Reaction Similar to COVID-19 Reponse 100 Years Later*, Spectrum News 1 (Apr. 21, 2020, 3:54 PM), https://spectrumlocalnews.com/tx/san-antonio/news/2020/04/20/how-texas-dealt-with-spanish-influenza-similar-to-covid-19-response-100-years-later. In the wake of each of these unforeseen events, now including COVID-19, Baylor's campus, its classrooms, and its residence halls certainly looked different than anyone expected.

This merger clause is clear and unambiguous and, absent language regarding the mode of instruction in the express terms of the instrument, King's objection to remote instruction merely reflects a preference that does not give rise to a claim. Because the FRA is not ambiguous, the Court should not disregard the clear merger clause and add an implied promise for in-person, on-campus instruction. Upon consideration of the entire record in this case, and for good cause shown, the undersigned **RECOMMENDS** that Plaintiff's breach of contract claim be **DISMISSED WITH PREJUDICE** for failure to state a claim.

II. King's unjust enrichment claim should be dismissed.

The Court recently determined that, under Texas law, unjust enrichment is not an independent cause of action. *See Denicus v. Bosacker*, 6:19-cv-00655, ECF No. 40 at 14-16. The Court also explained, however, that a party may pursue unjust enrichment as theory of liability

under other equitable causes of action, such as quantum meruit. *Id.* at 16 n.2. This determination alone is likely sufficient to recommend dismissal of King's alternative claim.

Even assuming, arguendo, that King had instead framed her claim as a quantum meruit claim, the Court's disposition of the breach of contract issue renders any such claim dismissable.[3] "Quantum meruit is an equitable remedy that is 'based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.'" *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 732 (Tex. 2018). The doctrine prevents a party from being "unjustly enriched" by "retain[ing] the benefits of the . . . performance without paying anything in return. *Id.* (quoting *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988)). Generally, a party cannot recover under this theory when there is a valid contract covering the services or materials furnished. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 737 (Tex. 2018).

As addressed above, the FRA is a valid contract that covers the educational services rendered. *See* Section I(A), *supra*. Therefore, the undersigned **RECOMMENDS** that King's alternative claim for unjust enrichment claim be **DISMISSED WITH PREJUDICE** for failure to state a claim.

III. Texas law is silent as to educational malpractice.

The parties lengthily briefed whether King's claim sounds in educational malpractice and presented a multitude of cases from other jurisdictions where similarly situated students' claims survived or suffered dismissal on the basis of the doctrine that forbids such claims.[4] For instance, both parties direct the Court's attention to *Paladino v. Adelphi University*, a New York state-court

[3] Thus, although the *Denicus* Report and Recommendation came after King's Amended Complaint and the District Court has yet to adopt the *Denicus* R&R, the Court should not grant a Motion for Leave to Amend King's Amended Complaint on this ground. *See Stripling v. Jordan Prod. Co.*, LLC, 234 F.3d 863, 872-73 (5th Cir. 2000) ("It is within the district court's discretion to deny a motion to amend if it is futile.")

[4] The Court has reviewed the parties' extensive supplemental authority and finds none of it to be binding on this Court.

case which exemplifies the educational malpractice doctrine. 89 A.D.2d 85 (N.Y. App. Div. 2nd Dept. 1982) (claims barred by educational malpractice doctrine but speculating that a contract claim "might be viable" if a school agreed, but failed, to provide "certain specified services, such as for example, a designated number of hours of instruction."). Def.'s Mot. to Dismiss at 19; Pl.'s Resp. at 11; Def.'s Reply at 7–8. However, neither party has identified either Fifth Circuit or Texas precedent that either recognizes educational malpractice as a cause of action or that has adopted the doctrine that expressly forbids such a claim.

The Court does note that Federal courts are "reluctant to interfere with academic evaluations, particularly at the higher education levels." *Senu-Oke v. Jackson State Univ.*, 283 F. App'x 236, 240 (5th Cir. 2008). This caution is because federal courts are "not the appropriate forum in which to review, evaluate, and adjudge the substance of the multitude of academic decisions that are made daily by experts" who are, "after all, the best judge[s] of [their] students' academic performance and their ability to master the required curriculum." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 85 n. 2, (1978).

"School decisions since *Ewing* have followed its mandate, according no deference to the factfinder; reviewing for minimum 'professional judgment' evidence"; and such evidence is sufficient to justify a judgment against a student as a matter of law. *Eiland v. Wolf*, 764 S.W.2d 827, 835 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (collecting federal courts of appeals cases). In *Guinn v. Texas Christian University*, the court declined to "intrude into a university's educational process" or "meddle in its student evaluations procedures and decision-making" because courts "should show great respect for a faculty's professional judgment" in what "is genuinely an academic decision." 818 S.W.2d 930, 931 (Tex. App.—Fort Worth 1991, writ

denied). The *Guinn* court acknowledged that courts should "refuse to override [a university's genuine academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* (citing *Horowitz*, 435 U.S. at 92, 98 S.Ct. 948 (1978)). [5]

Nonetheless, analyzing King's claims as sounding in education malpractice—or whether such claims are forbidden under Texas law—is not important to the Court's analysis. As previously noted, King has not identified an ambiguity in the contract nor sufficiently stated a breach of contract claim. *See* Section I, *supra*. The Court, therefore, declines the parties' invitation to wade into what appears to be a rapidly developing area of the law.

IV. Plaintiff's Motion for Appointment of Interim Class Council should be denied.

Finally, King also seeks appointment of interim class council. *See* Pl.'s Mot. for Appt. of Interim Class Council. A district court "may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The designation of interim class counsel "clarifies responsibility for protecting the interests of the class during precertification activities." Manual for Complex Litig., § 21.11 (4th ed. 2004). Because the Court recommends dismissal on the merits, it concludes that the appointment of interim class counsel is not necessary. The Court, therefore, **RECOMMENDS** that Plaintiff's Motion for Appointment of Interim Class Counsel be **DENIED**, consistent with the Court's recommendation on the Motion to Dismiss.

[5] For what it is worth, if Texas or the Fifth Circuit adopted the prohibition on educational malpractice, King's claims would likely be forbidden by the doctrine. Her claims seem to sound in the evaluation of the "efficacy of . . . pedagogical methods" and the quality of an education, the precise analysis that the doctrine forbids. *Paladino v. Adelphi Univ.*, 89 A.D.2d 85, 90 (N.Y. App.Div. 1982).

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error, failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150-53; *Douglass*, 79 F.3d at 1415.

SIGNED this 29th day of January, 2021.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE