STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-20-537

HUNTER STEWART, ET AL.

Plaintiffs

v.

ORDER

THE UNIVERISTY OF MAINE SYSTEM and DANIEL P. MALLOY

Defendants

Before the court is the Defendants, University of Maine System and Daniel P. Malloy's, Motion to Dismiss. At this initial stage of the litigation, stage, the court's inquiry is limited. The court must assume Plaintiff's allegations are true and consider only whether they state a legal claim. Defendants' Motion is denied with regard to Count I against the University of Maine System only. All other counts are hereby dismissed.

I. Factual Background

The following facts are taken from the Plaintiffs' Complaint and are considered true for the purposes of a Motion to Dismiss.

The named Plaintiffs, Hunter Stewart and Nehemiah Brown, were students at institutions within the University of Maine System during the spring semester of 2020. The Plaintiffs both paid tuition and mandatory fees to attend their institutions. The Plaintiffs allege that their tuition and fees were paid to the University System in exchange for in-person academic instruction and other in-person services such as computer labs, libraries, and other in-person facilities.

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The Plaintiffs allege that the University System agreed to offer specific in-person experiences in exchange for the Plaintiffs' enrollment with one of Maine's public Universities. According to the Plaintiffs, the University System claimed to offer specific in-person experiences through advertisements and other promotional materials provided to prospective students. The Plaintiffs allege that they accepted the System's offer to provide these specific in-person experiences when they paid the tuition and fees necessary to enroll with their respective institution. The Plaintiffs conclude that their payment of tuition and fees established a binding contract between Plaintiffs and the University System, under which the University System had a contractual obligation to provide the in-person instruction and in-person experiences advertised in the promotional materials.

The 2020 spring semester began on January 21, 2020 and was scheduled to run until May 1, 2020. Students attended in-person classes and were able to avail themselves of the in-person services until March 11, 2020. On March 11, the University System began adjusting its services and course structure in response to the health threats posed by COVID-19. All classes within the University System were moved to a fully remote format after March 23, 2020. The University also discontinued many of its in-person services that students were required to pay a fee for, including: healthcare facilities; fitness centers; student events; sports; and in-person commencement. The University System did not prorate or refund the tuition or fees charged for Spring 2020 semester.

The Plaintiffs have filed this Class Action Complaint on behalf of all students enrolled in the University System during the Spring 2020 semester. The Plaintiffs have named the University of Maine System as a Defendant, as well as its Chancellor, Daniel Malloy, in his individual capacity. The Defendants have moved to dismiss the Class Action Complaint pursuant to M.R. Civ. P. 12(b)(6).

II. Motion to Dismiss Standard

At the outset, the court notes that a motion to dismiss under the Maine Rules of Civil Procedure "tests the legal sufficiency of the allegations in the complaint, not the sufficiency of the evidence the plaintiffs are able to present." *Barnes v. McGough*, 623 A.2d 144, 145 (Me. 1993)(internal citations omitted). Maine has not imposed any heightened or plausible pleading requirements on complaints brought in state court, except perhaps in cases with a risk of abusive litigation. *See Bean v. Cummings*, 2008 ME 18, ¶ 11, 939 A.2d 676.

On a motion to dismiss pursuant to M.R. Civ. P. 12(b)(6), the court shall "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.*

III. Discussion

The Defendants argue that the Complaint should be dismissed because all claims are barred by certain applicable immunities, and alternatively, because the Plaintiffs have failed to state a claim upon which relief can be granted. The court will consider each argument in turn.

A. Immunities

The Defendants argue that the Plaintiffs' Complaint is barred against the University System based on sovereign immunity and also because the Plaintiffs' theory of recovery is grounded in the tort of educational malpractice that is not recognized under

Maine law. The Defendants also argue that the Complaint is barred by qualified immunity against Chancellor Malloy.

1. Sovereign Immunity

The university system is an instrumentality of the state. *See* 20-A M.R.S. §§ 10901, 10901-A, 10903. "Absent legislative authorization waiving sovereign immunity, an action to recover money from the State is barred by sovereign immunity[.]" *John F. Murphy Homes, Inc. v. State*, 2017 ME 67, ¶ 16, 158 A.3d 921. However, "the State may waive sovereign immunity and be sued when it enters into a contract pursuant to a statute granting it authority to do so[.]" *Id.; citing Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978). However, that waiver "is limited to actions arising out of a breach of that contract, and not alternative theories of recovery[.]" *Id.* "The student-college relationship is essentially contractual in nature." *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 38 (D. Me. 2005).

Here, the Plaintiffs allege that the University of Maine entered into a contract with its students for various in-person services. The Plaintiffs allege that the University breached that contract when it transitioned to a purely online format for all its services. Accordingly, Count I of the Plaintiffs' Complaint is not barred by sovereign immunity against the University System because it alleges a breach of contract claim. Moreover, Count's II-IV allege constitutional violations that are not the insulated by sovereign immunity. *See Farley v. Dept. of Hum. Servs.*, 621 A.2d 404, 406 (Me. 1993)("The defense of sovereign immunity will not insulate the State from liability if it is found to have committed an unconstitutional taking in violation of either the United States or Maine Constitutions."); *see also Foss v. Maine Turnpike Authority*, 309 A.2d 339, 342 (Me. 1973). Accordingly, Counts I-IV of the Plaintiffs' Complaint are not subject to dismissal based on sovereign immunity.

Count V, however, is barred by sovereign immunity. Count V alleges unjust enrichment based upon the theory that a student's payment of tuition and fees is a benefit conferred upon the University in exchange for in-person services. The Plaintiffs argue that it would be inequitable for the University to retain all of the money paid by students for the Spring 2020 semester because the University transitioned to a purely online platform. The legislature has not authorized recovery from the State on the basis of unjust enrichment and "[e]xceptions to sovereign immunity are strictly construed, with immunity the rule and any exceptions narrowly interpreted." *John F. Murphy Homes, Inc.*, 2017 ME 67, ¶ 16, 158 A.3d 921. Waiver of sovereign immunity is limited to actions arising out of a breach of contract and thus "alternative theories of recovery" do not apply. *John F. Murphy Homes, Inc.*, 2017 ME 67, ¶ 16, 58 A.3d 921. Accordingly, Count V is barred by sovereign immunity against the University System because it seeks to recover money from the state on an alternative theory that has not been authorized by the legislature.

2. Educational Malpractice

The Defendants' next argue that the Plaintiffs' claims are barred because they sound in educational malpractice which is not recognized under Maine law. It is widely held that educational malpractice is not a recognized cause of action. *See e.g. Ambrose v. New. Eng. Ass'n. & Colleges, Inc.*, 252 F.3d 488, 499 (1st Cir. 2001)("courts consistently have rejected students' claims of educational malpractice against schools"); *Ross v. Creighton Univ.*, 957 F.2d 410, 414 n.2 (7th Cir. 1992). Generally, educational malpractice is those claims where "the essence of the complaint is that the school breached is agreement by failing to provide an effective education" or ask the court to "review the soundness of the method of teaching that has been adopted by an educational institution." *Ross*, 957 F.2d at 416. Courts have consistently distinguished, however, between educational

malpractice claims and those which allege breach of contract arising out of the transition to online platforms in the wake of COVID-19. *See e.g. Patel v. Univ. of Vt. & State Agric. College*, 2021 U.S. Dist. LEXIS 51585, *14 (D. Vt. March 15, 2021)("At this stage, it does not appear that adjudication of Plaintiffs' claim necessarily requires an inquiry into the academic quality of the remote education that Plaintiffs received.); *Hiatt v. Brigham Young Univ.*, 2021 U.S. Dist. LEXIS 3269, *8 (D. Utah Jan. 7, 2021)(the return of tuition and fees for a breach of contract "does not require the Court to ask BYU to change is operations or otherwise interfere in BYU's academic decisions[.]"); *Chong v. Northeastern Univ.*, 2020 U.S. Dist. LEXIS 233923, *8 n.1 (D. Ma. Dec. 14, 2020)("The court is not convinced that plaintiffs' contract claim is merely a disguised educational malpractice claim[.]").

Here, the Plaintiffs and putative class seek to recover tuition and fees paid to the University for an alleged breach of contract. The Plaintiffs allege that their tuition and fees were given in exchange for various in-person services that were not provided when the University System transitioned to a fully remote platform. The court sees no reason to depart from the clear majority of cases which hold, at this initial stage, that a breach of contract claim arising out of a university's transition to remote services during COVID-19 does not sound exclusively in educational malpractice.

Moreover, the court must view the Complaint in the light most favorable to the Plaintiffs. The Plaintiffs have alleged that the putative class and the University System contracted for in-person services that were made unavailable through online learning. Plaintiffs' have identified specific in-person services, such as libraries or fitness and health facilities, that Plaintiffs' allege were material portions of the university and student contract for the Spring 2020 semester. These allegations provide a sufficient set of facts which might be proven on Plaintiffs' breach of contract theory that does not turn exclusively on the quality of education that was actually received. Accordingly, based

upon the record and deference required on the Defendants' Motion to Dismiss, the court cannot say that the Plaintiffs Complaint sounds exclusively in educational malpractice.

B. Failure to State a Claim

The Defendants next argue that the Complaint should be dismissed because the Plaintiff has failed to allege facts which, if true, would entitle the Plaintiff and putative class to relief. The remaining causes of action are: Count I, Breach of Contract against the University System only; Count II, unconstitutional taking under the United States Constitution; Count III unconstitutional taking under the Maine Constitution; Count IV, violation of state due process; and Count VI, conversion against the University System only. The court will address each cause of action in turn.

1. Breach of Contract

"[A] contract exists if the parties mutually assent to be bound by all its material terms, the assent is either expressly or impliedly manifested in the contract, and the contract is sufficiently definite to enable the court to ascertain its exact meaning and fix exactly the legal liabilities of each party." *Id.* "For a contract to be enforceable, the parties thereto must have a distinct and common intention which is communicated by each party to the other." *Stanton v. Univ. of Maine Sys.*, 773 A.2d 1045, 1051 (Me. 2000); *quoting Searles v. Trs. Of St. Joseph's Coll.*, 1997 ME 128, ¶ 13, 695 A.2d 1206. Courts have routinely held that "catalogues, bulletins, circulars, and regulations" of a university "made available to the [prospective student] becomes part of the contract." *Ross*, 957 F.2d at 416 (observing that "there seems to be no dissent from this proposition."); *quoting Zumburn v. Univ. of Southern California*, 25 Cal. App. 3d 1, Cal. Rptr. 499, 504 (Ct. App. 1972)(collecting cases from numerous states). Recovery on a breach of contract claim requires proof that "the defendant breached a material term of the contract and that the breach caused the plaintiff to suffer damages." *Tobin v. Barter*, 2014 ME 51, ¶ 10, 89 A.3d 1088.

The Plaintiffs have alleged facts which, if proven, are sufficient to pursue a breach of contract claim against the University System. The Plaintiffs entered into the recognized student and university contractual relationship when it paid tuition and fees to attend an institution with State University System. The Plaintiffs allege that the University System advertised itself to prospective students as providing in-person educational experiences and in-person services and facilities. The Plaintiffs further allege that these advertisements were communicated to the purported class through websites, catalogs, and other circulated materials prior to registration and became an express expectation under the terms of the student and university contract.

The Plaintiffs claim that the University System breached the student/university contract when it moved to a purely remote format on March 23, 2020. The Plaintiffs allege that they had a contractual expectation to receive in-person academic instruction and specific in-person services, such as libraries, fitness facilities, labs, etc. The Plaintiffs' further allege that the University System's transition to a purely online format denied Plaintiffs and putative class members the in-person services that they were allegedly entitled to receive under the terms of the contract. If true, the University System's transition to a purely online format could constitute a breach of contract. Accordingly, Plaintiffs have alleged facts which could entitle them and the prospective class members to relief on a breach of contract claim and dismissal is not warranted on the facts presented in the Complaint.

2. Property Interest

The Defendants next argue that Counts II, III, IV, and VI, should be dismissed because the Plaintiff has failed to allege facts sufficient to show that the Plaintiff and putative class members have a property interest in the tuition and fees paid to the University. Although a valid property interest is indeed a necessary element of each

remaining cause of action, the rules governing each present separate issues for this court to consider.

a. Unconstitutional Taking

Counts II and III allege that the University's transition to remote learning without providing a refund constitute an unconstitutional taking of Plaintiffs' property under the United States and Maine Constitutions. *See* U.S. Const. amend. V; *see also* Me. Const. Art. I. § XXI. Maine interprets the state takings clause as identical to its federal counterpart. *See Bell v. Town of Wells*, 557 A.2d 168, 177 (Me. 1989). "In order for there to be a taking . . . there must be a physical invasion of private property or a substantial impairment of its use and enjoyment." *Wellman v. Dept. of Hum. Serv's.*, 574 A.2d 879, 885 (Me. 1990).

The Law Court has held that "[t]he concept of a taking does not apply to the overpayment of money to the state by a citizen[.]" *Wellman*, 574 A.2d at 885. Additionally, the United States Supreme Court has held that a constitutionally protected property interest is more than "an abstract need or desire" or "unilateral expectation[,]" and must instead be based upon "a legitimate claim of entitlement" to the property at issue. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)(holding that a university employee did not have a constitutionally protected property interest in his university employment contract); *see also Student "A" v. Hogan*, 2021 U.S. Dist. LEXIS 6947, *15 (D. Md. Jan. 13, 2021)(rejecting tuition based takings claim against Maryland's public universities over COVID-19 online learning). Moreover, in lawsuits brought against universities in the wake of COVID-19, courts have rejected the claim that students have a constitutionally protected property interest in tuition and fees paid to a university. *See Brandmeyer v. Regents of the Univ. of Cal.*, 2020 U.S. Dist. LEXIS 219766 *22 (N.D. Cal., Nov. 10, 2020)(dismissing identical takings claim against the university based on a lack of valid

property interest); *see also Miller v. Bd. of Trs. Of the Cal. State Univ.*, 2021 U.S. Dist. LEXIS 22836 (C.D. Cal. Jan. 13, 2021).

Here, the Plaintiffs have failed to allege facts sufficient to establish that they and the putative class members have a constitutionally protected property interest in the tuition and fees paid to the University System. The Plaintiffs have not alleged any facts which would indicate that they have a legitimate claim of entitlement to any money paid to a University institution. There are no allegations that students had any expectation that they would recover any of the tuition or fees paid for the Spring 2020 semester and there are no allegations that the University System held any funds in trust for its students. Without more, the Plaintiffs cannot prove that they had any legitimate claim of entitlement to any money paid to the University System that would trigger a constitutionally protected property interest.

Moreover, there is nothing in the Plaintiffs' Complaint that would limit its property interest theory. As the court observed in *Brandmeyer*, "Plaintiffs' taking argument, extended to other contexts, leads to an absurd result" because any person who pays for a state service "could argue that their funds had been improperly seized . . . whenever that citizen was dissatisfied with those services[.]" *Brandmeyer*, 2020 U.S. Dist. LEXIS 219766, *23. Similar to the plaintiffs in *Brandmeyer*, the Plaintiffs here cannot establish entitlement to money that was paid to a university when that money was paid in exchange for nonmonetary services. Any claim to the money paid under that contract is indeed abstract and falls short of the legitimate entitlement standard necessary to establish a constitutionally protected property interest. To hold otherwise would allow individuals to maintain an unconstitutional taking claim every time such individuals were dissatisfied with the government's performance under the terms of a government contract.

Based on the forgoing, the Plaintiffs have failed to show that they and the putative class members have a constitutionally protected property interest in the tuition and fees paid to the University System. Counts II and III alleging an unconstitutional taking are properly dismissed based upon the circumstances presented.

b. Due Process Property Interest

Count IV alleges that the University System violated the state due process clause when it deprived students of their tuition and fees without affording adequate procedural protections. The Maine Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law[.]" Me. Const. art. I, § 6-A. The Law Court has held that where a Plaintiff lacks a constitutionally protected property interest at issue, sovereign immunity will bar an action to recover damages under the due process clause unless there is evidence of bad faith for a racially discriminatory or other constitutionally impermissible purpose. *See Farley*, 621 A.2d at 408 (denying both federal and state due process claims for want of a constitutionally protected property interest); *citing Thiboutot v. State*, 405 A.2d 230, 237 (Me. 1979).

Here, the Plaintiffs' due process argument must also fail. The Complaint fails to allege facts sufficient to show there is a constitutionally protected property interest in tuition and fees paid to a University institution. There is no allegation that the University System decision to transition to online services was motivated by any constitutionally impermissible purpose. Accordingly, Count IV must be dismissed.

c. Conversion Property Interest

Conversion requires a plaintiff to prove, among other things, that the plaintiff had a property interest in the property converted at the time the alleged conversion took place. *See Withers v. Hackett*, 1998 ME 164, ¶ 7, 714 A.2d 798. Courts have routinely rejected recent claims that university students have a property interest in tuition and fees

paid to a university for the purposes of a conversion cause of action. *See Omori v. Brandeis Univ.*, 2021 U.S. Dist. LEXIS 71969 *12 (D. Mass. April 13, 2021); *Espejo v. Cornell Univ.*, 2021 U.S. Dist. LEXIS 39227 *21 (N.D. N.Y. March 3, 2021); *Salerno v. Fla. S. Coll.*, 488 F.Supp.3d 1211, 1218-19 (M.D. Fla. Sept. 16, 2020).

Here, and for reasons outlined above, the Plaintiffs have failed to allege facts sufficient to show that they and the putative class have a property interest in their tuition and fees at the time of the alleged conversion. Moreover, the money alleged to have been converted was in the possession of the University System when it transitioned to purely online services. The Plaintiffs and putative class had no right to possess or ability to dictate how that money was allocated and did not have any expectation that the money would be returned. Accordingly, the Plaintiffs have failed to allege facts sufficient to show that they and the putative class had a property interest in the tuition and fees at the time of the alleged conversion.

C. Claims Against Chancellor Malloy

"Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for . . . [a]ny intentional act or omission within the course and scope of employment" unless such "actions are found to have been in bad faith[.]" 14 M.R.S. § 8111(1)(E). The Law Court has explicitly held that immunity for governmental employees in unaffected by the government's acquisition of liability insurance. *See Grossman v. Richards*, 1999 ME 9, ¶ 14, 722 A.2d 371.

Here, Chancellor Malloy is an employee of the University of Maine System. There are no allegations that Chancellor Malloy acted in bad faith or for any other improper motive when the University System transitioned to a purely online platform. Moreover, the decision to close in-person University services in response to the health threats posed

by COVID-19 is certainly a decision within the scope of the Chancellor's University employment. Accordingly, Counts I, V, and VI are subject to dismissal against Chancellor Malloy because each seeks to hold Chancellor Malloy civilly liable for intentional acts done within the scope of Chancellor Malloy's government employment.[1]

Counts II, III, and IV should also be dismissed against Chancellor Malloy. Although government employees may be held liable for certain constitutional violations, to defeat qualified immunity, the government official must violate a clearly established constitutional right of which a reasonable person would have known existed. *See Richards v. Town of Eliot*, 2001 ME 132, ¶ 23, 780 A.2d 281. The remaining counts against Chancellor Malloy allege constitutional violations that require a constitutionally protected property interest. As stated above, the Plaintiffs have failed to allege facts sufficient to show that they have a constitutionally protected property interest here. Accordingly, Chancellor Malloy cannot be held liable for any constitutional violation alleged. Counts II, III, and IV should therefore be dismissed against Chancellor Malloy in his individual capacity. Therefore, the Complaint against Chancellor Malloy is dismissed in full.

III. Conclusion

The relationship between student and university is one of contract. The Plaintiffs have alleged facts which, if true, could possibly establish that they contracted with the University of Maine System to receive in-person instruction and in-person services. As pled in the Compliant, the University System's transition to a purely online format for the Spring 2020 semester could constitute a breach of the student's contractual expectation to receive specific in-person experiences. At this stage, the court cannot say that recovery on Plaintiffs' breach of contract claim rests entirely on the quality of online

[1] Even if Chancellor Malloy were not immune, he would not be liable as a mere employee for the University's alleged breach of contract or tortious conduct.

instruction. Accordingly, the Plaintiffs' have alleged facts sufficient to pursue a breach of contract claim against the University of Maine System. However, for the reasons outline above, all other counts in Plaintiffs' Complaint should be dismissed.

The entry is:

Defendants' Motion to Dismiss is DENIED in regards to Count I against the University of Maine System.

Defendants' Motion to Dismiss is GRANTED in regards to Counts II, III, IV, V and VI against all Defendants.

The Complaint against Chancellor Malloy is DISMISSED in full.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: July 13th, 2021

Thomas McKeon
Justice, Superior Court