IMPLIED CONTRACTS IN COLLEGES AND UNIVERSITIES DURING COVID-19

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INTRODUCTION

Recent iterations of this article have focused on inadvertent contract formation via email.[1] Here, we address how another recent phenomenon has impacted a different area of contract law. We explore implied contracts between students and colleges and universities during the COVID-19 pandemic when educational institutions transitioned to remote learning.

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1. *See, e.g.*, Stephen Ryck, *Inadvertent Contract Formation Via Electronic Communications Under New York Law: An Update*, 71 SYRACUSE L. REV. 59, 59–60 (2021).

Specifically, we assess five cases in which, applying New York law, courts held that the college or university's offer was sufficient to form an implied contract. We then analyze four cases where courts ruled that there was no enforceable implied contract. As discussed below, the distinguishing factors in each of these cases were (1) the specificity of the language in the college or university's offer of services and, in some cases, (2) whether the student paid fees in exchange for the services at issue. The cases demonstrate that defining just how specific a promise must be to create an implied contract, however, is not always clear cut.

I. IMPLIED CONTRACTS OVERVIEW

To establish a meeting of the minds as to the parties' obligations, it is certainly preferred that a contract is reduced to a signed writing. However, contracts need not be in writing to be enforceable in New York.[2] Indeed, under New York law there an implied contract is created under numerous circumstances, including between a student and their college or university.[3] Such a contract is formed when a university accepts a student for enrollment.[4] The implied contract necessarily requires the student to comply with the university's terms and complete the required courses, and in return, the university awards the student with a degree.[5] Also implicit in this agreement is "that an academic institution . . . act[s] in good faith in its dealings with its students."[6]

New York courts consider a variety of surrounding circumstances, including the terms contained in bulletins, circulars, regulations, and other materials available to students to determine the extent of the conduct covered by and enforceable under the terms of

2. *See, e.g.*, Cosy Goose Hellas v. Cosy Goose U.S., Ltd., No. 06 Civ. 4363, 2009 U.S. Dist. LEXIS 153565, at *17 (S.D.N.Y. Feb. 26, 2009).

3. *See* Rolph v. Hobart & William Smith Colls., 271 F. Supp. 3d 386, 405 (W.D.N.Y. 2017) (citing Routh v. Univ. of Rochester, 981 F. Supp. 2d 184, 207 (W.D.N.Y. 2013)).

4. *See* Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 93 (2d Cir. 2010) (first citing Carr v. Saint John's Univ., 17 A.D.2d 632, 633, 231 N.Y.S.2d 410, 412 (2d Dep't), *aff'd*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); and then citing Clarke v. Trs. Of Columbia Univ., No. 95 Civ. 10627, 1996 U.S. Dist. LEXIS 15620 at *5 (S.D.N.Y. Oct. 23, 1996)).

5. *Id.*

6. Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 414, 402 N.E.2d 1150, 1153, 426 N.Y.S.2d 248, 251 (1980).

the alleged implied contract.[7] To plausibly allege a claim for breach of such an implied contract, "a student must identify 'specifically designated and discrete promises.'"[8] Courts have made clear that "'[g]eneral policy statements' and 'broad and unspecified procedures and guidelines' will not suffice."[9] Rather, courts will look for specific promises upon which to base a breach of contract claim.[10]

II. RECENT DEVELOPMENTS CONCERNING IMPLIED CONTRACTS BETWEEN COLLEGES, UNIVERSITIES, AND STUDENTS

Colleges and universities were no exception to COVID-19's upending of life as we know it. Countless students were sent home mid-semester to continue their education remotely.[11] However, this transition to remote learning gave way to a flood of litigation as many students asserted that this online education was "less" than what they contracted for when enrolling and paying the required tuition and fees.[12] Specifically, students from a variety of universities brought claims for, *inter alia*, breach of implied contract.[13] The following cases illustrate the ways in which "promises" contained in various aspects of a school's publications were deemed to have either created an enforceable implied contract or were found to be unspecific enough to void the university from potential claims of breach. The cases demonstrate the importance of the phrasing a university's marketing and publications—a change in a few terms may be the difference between contractual liability and a lack thereof.

7. *See* Vought v. Tchrs. Coll., Columbia Univ., 127 A.D.2d. 654, 655, 511 N.Y.S.2d. 880, 881 (2d Dep't 1987) (citing Prusack v. State, 117 A.D.2d. 729, 730, 498 N.Y.S.2d. 455, 456 (2d Dep't 1986)).

8. Nungesser v. Columbia Univ., 169 F. Supp. 3d 353, 370 (S.D.N.Y. 2016) (quoting Ward v. N.Y. Univ., No. 99 Civ. 8733, 2000 U.S. Dist. LEXIS 14067, at *11 (S.D.N.Y. Sept. 28, 2000)).

9. *Id.* (quoting *Ward*, 2000 U.S. Dist. Lexis, at *11) (citing Gally v. Columbia Univ., 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998)).

10. *See Gally*, 22 F. Supp. 3d at 207.

11. *See* Stacy Cowley et al., *New York City to Close Schools, Restaurants and Bars*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/nyregion/new-york-coronavirus.html ("Cornell was one of the first universities in the country to suspend classes on campus, and the college has given students a three-week break to make the journey home before online courses begin.").

12. *See* Collin Binkley, *Unimpressed by Online Classes, College Students Seek Refunds*, ABC NEWS (May 4, 2020, 4:30 PM), https://abcnews.go.com/Politics/wireStory/unimpressed-online-classes-college-students-seek-refunds-70483390.

13. *See infra* text accompanying notes 18–217.

A. Applicable Law

New York law provides that a contractual relationship exists between a higher education institution and its students.[14] "The rights and obligations of the parties as contained in the university's bulletins, circulars and regulations made available to the student, become a part of this contract."[15] Therefore, in order to sufficiently allege an implied contract claim against a university, "a student must identify specific language in the school's bulletins, circulars, catalogues and handbooks which establishes the particular contractual right or obligation alleged."[16] Indeed, to sustain a contract claim a student must point to clear provisions that guarantee specific services, rather than general statements of policy or statements of opinions or puffery.[17]

B. Enforceable Implied Contracts

1. Ford v. Rensselaer Polytechnic Institute

On March 10, 2020, due to concerns about the spread of COVID-19, Rensselaer Polytechnic Institute ("RPI") cancelled all university sponsored events.[18] The following day, RPI required students to move out of on-campus housing.[19] By March 16, 2020, RPI had moved all classes exclusively online.[20] As a result, plaintiffs, residents of New Jersey, Massachusetts, and Connecticut, brought suit against RPI

14. *See* Prusack v. State, 117 A.D.2d 730, 730, 498 N.Y.S.2d 455, 456 (2d Dep't 1986) (first citing State v. Fenton, 68 A.D.2d 951, 951, 414 N.Y.S.2d 58, 59 (3d Dep't 1979); and then citing Eden v. Bd. of Trs., 49 A.D.2d 277, 282, 374 N.Y.S.2d 686, 691 (2d Dep't 1975)).

15. Vought v. Tchrs. Coll., Columbia Univ., 127 A.D.2d 654, 655, 511 N.Y.S.2d 880, 881 (2d Dep't 1987) (citing *Prusack*, 117 A.D.2d at 730, 498 N.Y.S.2d at 456).

16. Flatscher v. Manhattan Sch. of Music, No. 20 Civ. 4496, 2021 U.S. Dist. LEXIS 135046, at *13 (S.D.N.Y. July 20, 2021) (first citing Marbury v. Pace Univ. (*In re* Columbia Tuition Refund Action), 523 F. Supp. 3d 414, 419–20 (S.D.N.Y. 2021); and then citing Keefe v. N.Y. L. Sch., 905 N.Y.S.2d 773, 773 (Sup. Ct. New York Cty. 2009), *aff'd* 71 A.D.3d 569, 897 N.Y.S.2d 94 (2010)).

17. See Baldridge v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002) (quoting Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982)); Bader v. Siegel, 238 A.D.2d 272, 272, 657 N.Y.S.2d 28, 29 (1st Dep't 1997) (first citing *Paladino*, 89 A.D.2d at 92, 454 N.Y.S.2d at 873; then citing *id.* at 94, 454 N.Y.S.2d at 874; and then citing Sirohi v. Lee, 222 A.D.2d 222, 222, 634 N.Y.S.2d 119, 120 (1st Dep't 1995)).

18. *See* Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406, 412 (N.D.N.Y. 2020).

19. *See id.* Defendant issued refunds for Spring 2020 room and board fees but reduced the reimbursements by the net of a reimbursed student's financial aid.

20. *See id.*

alleging claims of breach of contract and other torts under New York law seeking to recover the difference between the in-person education they expected and the online education received.[21] Specifically, plaintiffs assert claims of breach of contract on behalf of those who paid tuition for Spring 2020 or Arch 2020 semesters; breach of contract on behalf of those who paid fees for Spring 2020 or Arch 2020 semesters; breach of contract on behalf of those who paid for on-campus housing during the Spring 2020 semester; and breach of contract for those who paid for students' meal plans for the Spring 2020 semester.[22]

In response, RPI moved to dismiss plaintiffs' claims pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) on various grounds including, *inter alia*, that plaintiffs failed to allege a specific breach of contract claim because they failed to allege that defendant breached a clear and unambiguous promise.[23] Plaintiff pointed to two sources of specific promises by RPI.[24] First, plaintiffs asserted that the nature of defendant's dealings demonstrated an implied promise for on-campus instruction.[25] However, as defendant noted, breach of contract between a school and student "must be grounded in a text, such as a school's bulletins, handbooks, catalogs, or circulars."[26] No matter, plaintiffs also asserted that the CLASS program, defined in defendant's circulars, describe a mandatory on-campus learning experience integral to attending the school.[27] Defendants claimed that these were merely goals, not policies.[28] The court disagreed.[29]

Plaintiffs alleged that a reason they were drawn to RPI rather than other universities was, in large part, because of a school specific framework of programs "designed to afford its students a unique educational experience."[30] In the plan, RPI states that it "will . . . [o]ffer a complete student experience, highlighted by[ ] Clustered

21. *See id* at 411.

22. *See id.* at 412.

23. *See Ford*, 507 F. Supp. 3d at 412.

24. *See id.* at 414.

25. *See id*.

26. *Id.* (first citing Keefe v. N.Y. L. Sch., 71 A.D.3d 569, 570, 897 N.Y.S.2d 94, 95 (1st Dep't 2010); and then citing Maas v. Cornell Univ., 94 N.Y. 2d 87, 91–92, 721 N.E.2d 966, 968, 699 N.Y.S.2d 716, 718 (1999)).

27. *See id.*

28. *Ford*, 507 F. Supp. 3d at 414. (The defendant also argues that the document on which plaintiffs rely for these specific promises is improper. The Court disagreed with such an assertion.)

29. *See id*.

30. *See id*. at 411.

Learning, Advocacy, and Support Students ('CLASS')."[31] This program is "designed to improve counseling, academic skill development, community building, and other purported benefits that 'originate within the residential setting.'"[32] To facilitate CLASS, defendants mandate that all first-and second-year students live on campus.[33] In addition to CLASS, RPI offers the program "The Arch," which requires all second year students to live on campus during the summer between their second and third years.[34] During the summer, the students take specific classes "intended to afford more meaningful interaction with defendant's professors."[35] Following such programs, third year students typically spend a semester away from campus in an experiential learning opportunity.[36]

The court found that the description of the programs that the University would provide "a 'time-based clustering and residential commons program' touted as an 'award-winning First-Year Experience' that 'extends learning across the spectrum of student residential life' fits the bill of a specific promise" for purposes of establishing the existence of an implied contract.[37] RPI argued that such statements amounted to mere "aspirational goals and statements of policy, which . . . [could] not support a specific promise."[38] Defendants furthered that such statements were similar to cases wherein courts struck down breach of contract claims based on anti-discrimination polices and statements involving vague terms.[39] Specifically, defendants pointed the court to *Paynter v. New York University*, 319 N.Y.S.2d 893, 94 (Sup. Ct. App. Div. 1st Dep't 1971), where a breach of contract claim was dismissed after the university shut classes down due to civil unrest, and *Chong v. Northeastern University*, 494 F. Supp. 3d 24 (D. Mass. 2020), where a breach of

31. *Id.*

32. *Id.*

33. *See, e.g.*, *Ford*, 507 F. Supp. 3d at 411.

34. *See, e.g.*, *id*.

35. *Id.*

36. *See id.* at 412.

37. *Id.* at 414–15 (first citing FED. R. CIV. P. 12(b)(6); and then citing Andre v. Pace Univ. 655 N.Y.S.2d 777, 779 (Sup. Ct. Westchester Cty. 1996)).

38. *Ford*, F. Supp. 3d at 415.

39. *Id.* (citing Faiaz v. Colgate Univ., 64 F. Supp. 3d 336, 359–60 (N.D.N.Y. 2014)).

contract claim was dismissed after the university shut down in-person classes due to COVID-19.[40]

The court distinguished *Paynter*—in agreement with plaintiffs—finding that cancelling a few classes to protect students was vastly different than "not affording students services and benefits for an extended period of time despite such a promise."[41] Thus, it did not control.[42] In *Chong*, the plaintiffs failed to "provide any promise more concrete than a document that amounted to an agreement to pay tuition in exchange for classes."[43] However, the court found this circumstance to be contrary to those presented before it in *Ford*.[44] Indeed, in *Ford*, the plaintiffs pointed to the plan and the published catalogs which articulate a specific promise for in-person instruction,[45] none of which the university ultimately provided to the students who were transitioned to remote learning due to COVID-19.[46]

The court therefore made clear that generic statements such as those cited by defendants in support of their claim—including that students would receive "fair and equal treatment"—are of "entirely different character" than the specific programs defendant promised which plaintiffs cited to here.[47] Thus, plaintiffs' claims sufficiently set forth a plausible breach of implied contract claim.[48]

2. Bergeron v. Rochester Institute of Technology

On March 15, 2020, in response to the COVID-19 pandemic, Rochester Institute of Technology ("RIT"), moved all classes online for the spring 2020 semester.[49] All students were required to move out of on-campus housing by April 5, 2020.[50] RIT did not offer any refunds for tuition or student fees.[51] As a result, plaintiffs filed claims

40. *See id.* at 415 (first citing Paynter v. N.Y.U., 66 Misc.2d 92, 92, 319 N.Y.S.2d 893, 893–94 (1st Dep't 1971); and then citing Chong v. Ne. Univ., 494 F. Supp. 3d 24, 26 (D. Mass. 2020)).

41. *Ford*, 507 F. Supp. 3d at 415 (citing *Paynter*, 319 N.Y.S.2d at 894).

42. *Id.*

43. *Id.* (citing *Chong*, 494 F. Supp. 3d at 28–29).

44. *Id.* at 415–16 (citing *Chong*, 494 F. Supp. 3d at 26).

45. *Id.* at 416.

46. *Ford*, 507 F. Supp. 3d at 411, 416.

47. *Id.* at 415 (citing Faiaz v. Colgate Univ., 64 F. Supp. 3d 336, 359–60 (N.D.N.Y. 2014)).

48. *Id.* at 419.

49. Bergeron v. Rochester Inst. of Tech., No. 20-CV-6283, 2020 U.S. Dist. LEXIS 241125, at *7 (W.D.N.Y. Dec. 18, 2020).

50. *Id.*

51. *Id.* at *7.

for, *inter alia*, breach of contract for students who paid tuition for the Spring 2020 semester but were denied live, in-person instruction and forced to use online distance learning platforms; breach of contract for students who paid fees for in-person classes at RIT; and unjust enrichment.[52] In response, RIT moved to dismiss the complaint on the grounds that plaintiffs failed to state a claim for three reasons.[53] First, RIT argued that plaintiffs' claims are barred by RIT's Student Financial Responsibility Agreement; second, RIT argued that plaintiffs did not identify any specific promise made by RIT to provide exclusively in-person instruction; and third, RIT argued that there are no cognizable damages.[54] This article will focus solely on RIT's second argument—a lack of specific promise as required to establish an implied contract.

As an initial matter, RIT offers both in-person and fully online programs.[55] Students enrolled in the online program are not allowed to enroll in on-campus classes, and the tuition for the online program is less than the on-campus program.[56] The programs are marketed through the website and other publications.[57] The in-person program is specifically promoted as "'face-to-face interaction with professors, mentors, and peers,' 'hands-on learning and experimentation,' 'networking and mentorship opportunities,' and 'experiential learning.'"[58] Additionally, "RIT promises to provide 'undergraduates the opportunity to work directly with faculty members in their labs to investigate, explore, and . . . learn hands-on skills that become the foundation of scientific research.'"[59] The publications are "'full of references to the on-campus experience, including numerous references to student activities; campus amenities; class size; campus diversity; campus location, and the like.'"[60] The webpage advertises numerous clubs and organizations, on-campus and off-campus events, performances, and locations for dining social fraternities and sororities.[61] Finally, RIT promises students who are enrolled in the in-person program, that they will "have access to some of the finest

52. *Id.* at *8.
53. *Id*. at *15.
54. *Bergeron*, 2020 U.S. Dist. LEXIS 241125, at *15.
55. *Id.* at *3.
56. *Id.* at *3–4.
57. *Id.* at *4.
58. *Id.*
59. *Bergeron*, 2020 U.S. Dist. LEXIS 241125, at *4.
60. *Id.*
61. *Id.*

laboratories, technology and computing facilities available on any university campus."[62] This includes, a post office, laundry, computer labs, game rooms, fitness facilities, and service skills centers.[63]

In evaluating whether an implied contract existed between plaintiffs and RIT, the court indicated that it would look for "specifically designated and discrete promises."[64] Indeed, the court made clear that "'[g]eneral policy statements' and 'broad and unspecified procedures and guidelines' w[ould] not suffice."[65]

No matter, the court identified

> a number of promises made by RIT with respect to the benefits of enrollment in the more expensive in-person, on-campus program, including: the opportunity to work directly with faculty members in their labs, multi-faceted experiential learning, vibrant campus life, 'access to the finest laboratories, technology, and computing facilities available on any campus,' and 'a strong and robust network of support on campus to help [students] succeed.'[66]

The court found that such allegations by RIT extended beyond coursework to the actual educational experience that students should expect.[67] Such statements were located on RIT's website.[68] And, the Student Activity Fee and Student Health Services Fee supported the services, events, and programs discussed in such promises.[69]

Therefore, the court concluded that the promises were specific enough to establish a breach of contract claim and survive a motion to dismiss.[70]

3. *Espejo v. Cornell University*

On March 13, 2020, Cornell University announced that all classes were immediately suspended and required all students leave campus

62. *Id.* at *5.
63. *Bergeron*, 2020 U.S. Dist. LEXIS 241125, at *5.
64. *Id.* at *14 (citing Nungesser v. Columbia Univ., 169 F. Supp. 3d 353, 369 (S.D.N.Y. 2016) (quoting Ward v. N.Y.U., No. 99 Civ. 8733, 2000 U.S. Dist. LEXIS 14067, at *10 (S.D.N.Y. Sept. 28, 2000)).
65. *Id.* (first citing *Nungesser*, 169 F. Supp. 3d at 369; and then citing Doe v. Rensselaer Polytechnic Inst., No. 1:20-CV-01359, 2020 U.S. Dist. LEXIS 207946, at *17 (N.D.N.Y. Nov. 6, 2020)).
66. *Bergeron* 2020 U.S. Dist. LEXIS 241125, at *19–20.
67. *Id* at *20.
68. *Id.* at *21.
69. *Id.*
70. *Id.* (citing FED. R. CIV. P. 12(b)(6)).

no later than March 29, 2020, as a result of the COVID-19 pandemic.[71] On April 6, 2020, instruction began online.[72] Sometime thereafter, Cornell announced that it would issue room and board fees to be prorated from the March 29, 2020 closure but refused to offer refunds on any tuition or other fees.[73] In response, plaintiffs brought a claim asserting breach of contract, unjust enrichment, and conversion, due to the transition of all Spring 2020 classes into an online format.[74] Cornell moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6).[75]

As an initial matter, the parties agreed that an implied contractual relationship existed between the two.[76] However, the parties did not agree to the extent of the conduct governed by this implied contractual relationship.[77]

First, Cornell asserted that plaintiffs' claims for breach of contract for failing to refund tuition must fail because plaintiffs cannot point to a specific promise for in-person instruction.[78] However, plaintiffs claimed that Cornell's Class Roster, which indicated whether a course was in-person and included a building and classroom assignment, demonstrated a specific promise for in-person instruction.[79] The court noted that this type of publication by a university had previously been deemed an insufficient statement to constitute a specific promise for in-person instruction.[80] Again, the court did not find it sufficient to establish an implied contract here.[81]

Next, plaintiffs pointed to Cornell's academic policies—specifically, the section titled "Attendance and Class Meeting Times."[82] However, the court pointed out that such section lacks any

71. Espejo v. Cornell Univ., No. 3:20-CV-467, 2021 U.S. Dist. LEXIS 39227, at *3 (N.D.N.Y. Mar. 3, 2021).

72. *Id.* at *4.

73. *Id.*

74. *Id.* at *2.

75. *Id.* at *2–4 (first citing FED. R. CIV. P. 12(b)(6); and then citing Patane v. Clark, 508 F.3d 106, 111–12 (2d Cir. 2007)).

76. *Espejo*, 2021 U.S. Dist. LEXIS 39227, at *9.

77. *Id.*

78. *Id.* at *9–10.

79. *Id.* at *10.

80. *Id.* (citing Hassan v. Fordham Univ., 515 F. Supp. 3d 77, 87 (S.D.N.Y. 2021)).

81. *Espejo*, U.S. Dist. 2021 LEXIS 39227, at *10 (citing *Hassan*, 515 F. Supp. 3d at 84, 87).

82. *Id*.

reference to in-person classes.[83] Plaintiffs further asserted that the marketing materials which talk about various student activities, the beauty of the local area, diversity among the population, amenities, library, study spots, and cafes, for example, demonstrate a specific promise for in-person education.[84] Again, the court indicated that other courts have considered such allegations and found them insufficient to establish a promise for in-person instruction.[85]

While such allegations were all deemed insufficient to establish specific promises for in-person instruction, the court found that one of plaintiffs cited to promises was sufficient for establishing a plausible breach of contract claim.[86] The promise was Cornell's mission statement, which provided that:

> Cornell's mission is to discover, preserve, and disseminate knowledge; produce creative work; and promise a culture of broad inquiry throughout and beyond the Cornell community . . . Within the context of great diversity, a Cornell education comprises formal and informal learning experiences in the classroom, on campus, and beyond.[87]

Importantly, in discussing what a "Cornell education" includes, the mission statement specifically highlights students' "experiences in the classroom" and "on campus".[88] Thus, based on these statements, the court determined that plaintiffs plausibly alleged a specific promise for in-person instruction and the motion to dismiss was denied on the tuition claim.[89]

Plaintiffs also alleged that the parties entered into an implied contract concerning the mandatory fees students were required to pay, which was breached due to the defendant's response to COVID-19.[90]

83. *Id.*

84. *Id.* at *11 (citing Oyoque v. DePaul Univ., 520 F. Supp. 3d 1058, 1061, 1064 (N.D. Ill. 2021)).

85. *Id.* (citing *Oyoque*, 520 F. Supp. 3d at 1061, 1064).

86. *Espejo*, 2021 U.S. Dist. LEXIS 39227, at *12.

87. *Id.*

88. *Id.* at *13.

89. *Id.* at *14 (first citing Hassan v. Fordham Univ., 515 F. Supp. 3d 77, 88 (S.D.N.Y. 2021); and then citing Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406, 411–12 (N.D.N.Y. 2020)). Plaintiffs claim for breach of contract was dismissed with respect to the room and board issue. *Id.* at *15–16. Specifically, because the court found that the students were not required to leave the university before March 29, 2020 but were merely encouraged. *Espejo*, U.S. Dist. 2021 LEXIS 39227, at *15. "[A]bsent allegations that Cornell attempted to prevent Plaintiffs from accessing their housing before March 29, 2020, is not sufficient to constitute breach of contract." *Id.* at *15–16.

90. *Espejo*, 2021 U.S. Dist. LEXIS 39227, at *16.

Specifically, plaintiffs paid a Student Activity Fee, fitness center fees, and student health fees in exchange for Cornell making available the services, access, and programs related to such fees.[91] Defendant claimed that these fees are too vague and conclusory to constitute a specific promise for the purposes of establishing an implied contract.[92] No matter, the court determined that, because the fees at issue provided *access* to facilities and services—necessarily requiring a student to be in-person—they were not too vague to establish a breach of contract claim, as students were in fact denied *access* to facilities and services upon the transition to remote education due to COVID-19.[93] Therefore, defendant's motion to dismiss such claim was denied.[94]

4. In re Columbia Tuition Refund Action

Plaintiffs, students at Columbia University and Pace University in the Spring 2020 semester, sued their respective universities for the actions taken in response to the COVID-19 virus.[95] Specifically, both universities moved all classes online from mid-March 2020 to the end of the semester, closed many campus facilities, cancelled various campus activities, and encouraged students to vacate the dormitories.[96] Plaintiffs brought class action lawsuits on the grounds that the universities breached their contractual obligations to provide in-person instruction and on-campus services in exchange for tuition and fees, seeking a *pro rata* refund of tuition and fees, reflecting the difference in "fair market value of the services that they were allegedly promised and the services that they actually received."[97] Defendant

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91. *Id.*

92. *Id.* (citing Chong v. Ne. Univ., 494 F. Supp. 3d 24, 29 (D. Mass. 2020)). In *Chong*, the court examined whether fees supported certain facilities during the term. 494 F. Supp. 3d at 29. The court distinguished between the fees that were intended to support certain facilities for students enrolled in classes and fees that allowed students to gain access to on-campus facilities or resources. *Id.* The fees which provided students access to facilities and services established an implied breach of contract. *Id.*

93. *Espejo*, 2021 U.S. Dist. LEXIS 39227, at *11 (citing Oyoque v. DePaul Univ., 520 F. Supp. 3d 1058, 1063–64 (N.D. Ill. 2021)).

94. *Id.* at *15.

95. Marbury v. Pace Univ. (*in re* Columbia Tuition Refund Action), 523 F. Supp. 3d 414, 419 (S.D.N.Y. 2021).

96. *Id.* at 420.

97. *Id.*

Columbia moved to dismiss the case for failure to state a claim and defendant Pace moved for judgment on the pleadings.[98]

In evaluating the sufficiency of the claims, the court made clear that, "to sustain a contract claim against a university, a student must point to a provision that guarantees 'certain specified services,' not merely to a '[g]eneral statement[] of policy,' or to statements of 'opinion or puffery.'"[99] In applying such standards, the court determined that only some of plaintiffs' claims survived.[100]

First, the court determined that Pace's course registration portal, which stated that "'[o]n-campus' courses would be 'taught with *only* traditional in-person, on-campus class meetings,'" was a specific promise to provide such services.[101] In response, Pace asserted that a disclaimer in the course catalog, which stated that "unforeseen circumstances may necessitate adjustment to class schedules," as well as the disclaimer that the school was not responsible for a refund of tuition and fees in the event of such unforeseen circumstances, prevented the university from being held responsible for such a claim.[102] While the court agreed that such disclaimers may excuse a defendant from what would otherwise be a contractual obligation, the disclaimer here was ambiguous as to whether online classes

98. *Id.* at 419. The court noted that the cases were not formally consolidated, but because of the similarities in each, the motions were evaluated together. *Id.*

99. In re *Columbia Tuition Refund Action*, 523 F. Supp. 3d at 421 (first quoting Baldridge v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002); then quoting Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982); and then quoting Keefe v. N.Y. L. Sch., 905 N.Y.S.2d 773, 773 (Sup. Ct. New York Cty. 2009); and then quoting Bader v. Siegel, 238 A.D.2d 272, 272, 657 N.Y.S.2d 28, 29 (1st Dep't 1997)).

100. *Id.* at 423 (first citing quoting Ward v. N.Y.U., No. 99 Civ. 8733, 2000 U.S. Dist. LEXIS 14067, at *10 (S.D.N.Y. Sept. 28, 2000); and then citing Novio v. N.Y. Acad. of Art, 317 F. Supp. 3d 803, 812 (S.D.N.Y. 2018)). Plaintiffs claim that Columbia breached its specific promise to provide in-person instruction was dismissed. *Id.* at 419. In support of the claim, plaintiffs relied on: (1) the classes which students expected to have in-person began in-person, and the syllabi, polices, handbooks, and course registration portal indicated meeting schedules, locations, and physical attendance requirements; (2) Columbia's offer of certain classes and degrees fully online; and (3) various provisions of its publications describing the on-campus experience. *Id.* at 422. The court however determined that the teaching of classes in-person prior to the pandemic does not imply an entitlement to continued instruction; the offering of "fully online" programming does not necessitate that students in other programs were contractually entitled to exclusively in-person instruction; and the description of on-campus experiences are mere opinions or puffery too vague to be deemed a contract. *Id.* at 423 (quoting *Bader*, 238 A.D.2d at 272, 657 N.Y.S.2d at 29).

101. *Id.* at 424.

102. In re *Columbia Tuition Refund Action*, 523 F. Supp. 3d at 424.

constituted as an adjustment to a class schedule.[103] Therefore, the disclaimer was resolved in favor of the plaintiff and the claim survived the motion to dismiss.[104]

Next, the court determined that plaintiffs' claim that Columbia breached its contractual agreement to provide access to facilities and activities in exchange for fees was deemed sufficient to survive dismissal.[105] Specifically, plaintiffs asserted that the following fees were paid for the respective purposes:

1. Facilities Fee: for "access to the facilities at the Dodge Physical Fitness Center and Lerner Hall, and library and computer network privileges;"
2. Student Activity Fee: to "cover the costs of student events, activities, and . . . help fund student organizations;"
3. Health and Related Services Fee: for "access [to] the programs and services provided through Columbia Health's five departments, including 24/7 support from Counseling & Psychological Services, Medical Services, and Sexual Violence Response."[106]

The plaintiffs asserted that during the Spring 2020 semester, the Dodge Center and Lerner Hall closed, student events and activities were cancelled, student organizations were not operational, and libraries and other buildings closed.[107]

In arguing that this insufficiently establishes specific promises for purposes of a breach of an implied contract, Columbia asserted that the plaintiffs are required to allege bad faith or arbitrariness to set forth such a claim and they failed to do so.[108] However, the court indicated that cases which required such allegations by plaintiffs are cases which involve decisions regarding academic standards, such as suspension or expulsion, or the awarding of a degree, rather than the circumstances present here, where the court is solely concerned with whether the university breached its specific promise to provide

103. *Id.* at 425.

104. *Id.* (citing Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie, 784 F.3d 78, 86 (2d Cir. 2015) ("On a motion to dismiss a breach of contract claim," the court must "resolve any contractual ambiguities in favor of the plaintiff.")).

105. *Id.* at 426.

106. *Id.*

107. In re *Columbia Tuition Refund Action*, 523 F. Supp. 3d at 426.

108. *Id.*

discrete services.[109] Thus, the claims were deemed sufficient to survive the motion to dismiss.[110]

Similarly, plaintiff argued that the mandatory fees at Pace University created a contractual obligation which was breached when the university closed due to COVID-19.[111] The fees at issue included:

1. General Fee: to cover "costs associated with . . . tutoring and writing centers, library services, co-op and career services, inter-campus transportation, safety and security, parking, and athletic activities;"
2. Activity Fee: to cover "a range of student activities;"
3. Health Center Fee: to cover costs for the Health Care Unit;
4. Technology Fee: to provide access to "'the latest instructional technology resources available,' including on-campus computer labs."[112]

When Pace cancelled most activities and closed most buildings without refunding any such fees, plaintiff claims a breach of contract occurred.[113] For the same reasons the court found such a claim was sufficiently stated against Columbia, it found the claim was sufficiently alleged here.[114]

5. Goldberg v. Pace University

On March 10, 2020, Pace University transitioned all classes to online learning in response to the COVID-19 pandemic.[115] Plaintiff, a full-time student in Pace University's Master of Fine Arts program at

109. *Id.* at 426–27 (first citing Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 657, 404 N.E.2d. 1302, 1304, 427 N.Y.S. 760, 762 (1980); then citing Olsson v. Bd. of Higher Educ., 49 N.Y.2d 408, 413, 402 N.E.2d 1150, 1153, 426 N.Y.S.2d 248, 251 (1980)*;* and then citing Susan M. v. N.Y. L. Sch., 76 N.Y.2d. 241, 247, 556 N.E.2d. 1104, 1107, N.Y.S.2d 297, 300 (1990)).

110. *Id.* at 432.

111. *See id.* at 421, 428 (first quoting Baldridge v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002); then quoting Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982); and then quoting Keefe v. N.Y. L. Sch., 905 N.Y.S.2d 773, 773 (Sup. Ct. New York Cty. 2009); and then quoting Bader v. Siegel, 238 A.D.2d 272, 272, 657 N.Y.S.2d 28, 29 (1st Dep't 1997); and then quoting Radin v. Albert Einstein Coll. of Med. of Yeshiva Univ., No. 04 Civ. 704, 2005 U.S. Dist. LEXIS 9772, at *1, *32 (S.D.N.Y. May 20, 2005)).

112. In re *Columbia Tuition Refund Action*, 523 F. Supp. 3d at 428.

113. *Id.* at 428.

114. *Id.* at 426, 428, 431.

115. Goldberg v. Pace Univ., No. 20 Civ. 3665, 2021 U.S. Dist. LEXIS 76762, at *6 (S.D.N.Y. Apr. 21, 2021).

The Actors Studio Drama School, was a third-year student in the Actors Studio program at the time the University made the transition.[116] The program, which anticipates an in-person education, advertised that the students in the program would train "side-by-side" for three years with actors, directors, and playwrights.[117] Pace further advertised that the program's "black-box studios for professional training are designed and equipped according to state-of-the-art standards," and discussed the benefits of the New York City location.[118]

A key feature of the program in which plaintiff was enrolled was the Repertory Season (Rep-Season).[119] The Rep-Season involves student actors, directors, and playwrights working together to create and perform professionally produced plays for professionals and the public.[120] Preparation for the season begins with the first-year playwriting classes.[121] The second year is workshopped to prepare the students for the production in the following year, and in the third year the students "hone" the production.[122] The program was advertised as a distinguished aspect of the program and a unique opportunity that would "introduce graduating students to the professional world and the public in fully-professional productions of the work [the students] . . . created."[123]

Additionally, the third-year program includes the course, the "Process Lab," where students are workshopped and rehearsed.[124] The syllabus for the course indicates that the course would be in person and explains that "emails have proven to be counter-productive, [and] all issues regarding the project shall be dealt with in the classroom sessions face-to-face."[125]

However, due to the pandemic, and the transition to remote education, the Rep-Season never occurred.[126] The University advised the participants that it planned to reschedule the program as soon as

116. *See id.* at *2.
117. *Id.*
118. *Id.* at *3.
119. *Id.*
120. *Goldberg*, 2021 U.S. Dist. LEXIS 76762, at *3–4.
121. *Id.* at *4.
122. *Id.*
123. *Id.*
124. *Id.* at *5.
125. *Goldberg*, 2021 U.S. Dist. LEXIS 76762, at *5.
126. *Id.* at *6.

possible during the summer and fall terms.[127] Additionally, the Process Lab was postponed, to be held at a later date in conjunction with the Rep-Season.[128] As a result, plaintiff sued Pace University for breach of contract for the tuition and mandatory fees he paid. These included the General Institution Fee, covering costs for services provided to students not covered by tuition; the University Health Care fee; and the Technology Fee,[129] none of which were reimbursed by the school.[130] In response, Pace filed a motion to dismiss the case.[131]

The specific services plaintiff alleged Pace breached include services for "(1) in-person instruction, (2) the . . . Rep-Season production, (3) the Process Lab course, and (4) services covered by Pace's General Institution, Health Care, and Technology Fees."[132] The promises plaintiff alleged established the implied contract arose from the "advertisements, emails, syllabi, welcome letters, webpages describing the curriculum, and Graduate Catalog" that the university made available to current and prospective students.[133] The court determined that only one of plaintiff's claims was sufficiently pled.[134]

Indeed, the court found that plaintiff plausibly alleged that the university breached its contract to provide access to on-campus facilities and activities covered by the mandatory fees that the students paid when it restricted access to campus.[135] In reaching the decision, the court noted that the various fees required to be paid by students covered services which students no longer had access to, including, for example, the library, the ability to participate in student activities,

127. *Id.* at *6.

128. *Id.* at *7.

129. *Id.* at *8–9.

130. *Goldberg*, 2021 U.S. Dist. LEXIS 76762, at *8.

131. *Id.* at *9 (citing FED. R. CIV. P. 12(b)(1), (c)).

132. *Id.* at *18.

133. *Id.* at *18–19.

134. Plaintiff's remaining claims were dismissed. *Id.* at *41. Specifically, the claim that the university expressly promised in-person learning was deemed insufficient on the grounds that the statements which plaintiff relied on did not contain any specific promise. Rather, they describe the regular practice of courses. *Goldberg*, 2021 U.S. Dist. LEXIS 76762, at *21–22 (citing Ward v. N.Y.U., No. 99 Civ. 8733, 2000 U.S. Dist. LEXIS 14067, at *4 (S.D.N.Y. Sept. 28, 2000). Plaintiff's claim that the university breached its promise to hold the Rep-Season was deemed not yet ripe for determination as the university continued to claim that it would hold such a season in the future. *Id.* at *29 (quoting Texas v. U.S., 523 U.S. 296, 300 (1998)). Likewise, plaintiff's claim that the postponement of the Process Lab course was not yet ripe for determination as the university stated that it would hold the Process Lab once the Rep-Season officially resumed. *Id.* at *30.

135. *Id.* at *32.

access to the in-person university healthcare unit, and access to the computer labs.[136] The court determined that because the details alleged here were similar to those pled in *Columbia*, 523 F. Supp. 3d 414—where the court found plaintiff sufficiently alleged a claim—plaintiff's claim for breach here necessarily survived dismissal.[137]

C. No Enforceable Implied Contract

1. Hassan v. Fordham University

Fordham University suspended in-person education on March 9, 2020.[138] Fordham asked students to leave campus by no later than March 22, 2020 and indicated that no refunds would be issued.[139] In response, just over a month later, Fordham undergraduate student Kareem Hassan filed suit against Fordham on behalf of himself and a putative class for, *inter alia*, breach of contract.[140] Hassan sought "refund of tuition for in-person educational services, facilities, access, and/or opportunities that [Fordham] has not provided" on the grounds that "remote-learning opportunities were 'subpar in practically every aspect'" when compared to in-person education.[141] After Hassan amended his complaint, Fordham moved to dismiss the complaint.[142]

Hassan alleged that "he and Fordham 'entered into a contractual relationship where Plaintiff would provide payment in the form of tuition and fees, and [Fordham], in exchange, would provide in-person educational services, experiences, opportunities, and other related services.'"[143] According to Hassan, Fordham breached that agreement when it transitioned to online learning midway through the spring 2020 semester.[144] The court did not agree.[145]

"In keeping with the restrained approach that courts take with respect to disputes involving educational institutions, a cause of action for breach of contract . . . requires a contract which provides for

136. *Id.* at *31–32.

137. *Goldberg*, 2021 U.S. Dist. LEXIS 76762, at *33 (citing In re *Columbia Tuition Refund Action* 523 F. Supp. 3d 414, 425 (S.D.N.Y. 2021).

138. Hassan v. Fordham Univ., 515 F. Supp. 3d 77, 82 (S.D.N.Y. 2021).

139. *Id*.

140. *Id.*

141. *Id*.

142. *Hassan*, 515 F. Supp. 3d at 82–83.

143. *Id*. at 85.

144. *Id*. at 82, 85.

145. *Id.* at 95.

certain *specified* services."[146] A court's review of "contractual claims is circumscribed to enforcing *specific* promises."[147] The court found that Hassan failed to plead "a sufficiently specific promise to provide in-person educational services, and breach of the contract between Fordham and its students."[148]

In assessing whether Hassan met his burden, the court determined that the allegations in the complaint did not rise beyond a "speculative level."[149] Hassan's main support for his claims was a course catalog detailing, *inter alia*, whether the course was in-person or online.[150] He also relied on Fordham's Academic Policies and Procedures, which stated that students are expected to "attend" classes, as well as Fordham's policy not to provide credit to students who have taken online courses at other institutions.[151] None of these were sufficient to create an implied contract, the court wrote, as they did not promise to provide certain specified services.[152] In fact, the course catalogue was mere "informational guidance,"[153] while the other materials were "more akin to general statements of policy than to specifically designated and discrete promises."[154]

Notably, the *Hassan* court specifically rejected Hassan's citations to *Ford*.[155] The *Hassan* court emphasized the *Ford* court's finding that "RPI made 'bold claims' about its in-person programming and 'hammered repeatedly on the benefits of those programs.'"[156] Without

146. *Hassan*, 515 F. Supp. 3d at 86 (first quoting Baldridge v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002); quoting Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982)) (internal quotations omitted) (emphasis added).

147. *Hassan*, 515 F. Supp. 3d at 86 (first citing Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406, 414 (N.D.N.Y. 2020); then citing Ansari v. N.Y., No. 96 Civ. 5280, 1997 U.S. Dist. LEXIS 6863, at *3 (S.D.N.Y. May 16, 1997); then citing Gally v. Columbia Univ., 22 F. Supp. 2d 199, 207–08 (S.D.N.Y. 1998); and then citing Chira v. Columbia Univ., 289 F. Supp. 2d 477, 485 (S.D.N.Y. 2003)) (emphasis added).

148. *Id.* at 85–86.

149. *Id*. at 87 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

150. *Id.*

151. *Id*.

152. *See Hassan*, 515 F. Supp. 3d at 89 (first quoting *Baldridge*, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002); then quoting Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982); and then quoting Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406, 411 (N.D.N.Y. 2020)).

153. *Id.* at 88.

154. *Id*. (quoting Ward v. N.Y. Univ., No. 99 Civ. 8733, 2000 U.S. Dist. LEXIS 14067, at *3 (S.D.N.Y. 2001) (internal quotations omitted)).

155. *Id.* at 94 (quoting *Ford*, 507 F. Supp. 3d at 420–21).

156. *Id*. at 88 (quoting *Ford*, 507 F. Supp. 3d at 416).

delving into any further detail, the *Hassan* court concluded that another decision regarding the same issue, *Lindner v. Occidental College*, CV 20-8481-JFW., 2020 U.S. Dist. LEXIS 235399, (C.D. Cal. Dec. 11, 2020), was more persuasive.[157]

Having dispatched with Hassan's allegation that Fordham had made an implied promise to provide in-person classes, the court turned to the breach element.[158] In order to plead an actionable breach, the student must show that the university acted "in bad faith or in an arbitrary or irrational manner."[159] After rejecting Hassan's argument that such a deferential standard was not applicable, the court ruled that the complaint did not allege bad faith.[160] In fact, the complaint conceded that Fordham's transition from in-person to online education was "because of" COVID-19.[161] The court noted that Hassan's briefing argued that Fordham's decision to refund some fees but not others was arbitrary.[162] But the complaint made no allegations regarding bad faith.[163] Accordingly, Hassan failed to plead a breach.[164]

Having failed to plead two essential elements, the court granted Fordham's motion to dismiss.[165]

2. Zagoria v. New York University

In the spring of 2020, Daniel Zagoria was a "graduate student enrolled in NYU's Schack Institute of Real Estate" ("Schack").[166] When NYU transitioned to remote learning on March 16, 2020, it continued to require students to pay full tuition and certain fees.[167] Zagoria sued the university for a tuition refund, alleging that "online education devoid of campus interaction and facilities plainly is not equivalent in nature or value to the traditional in-classroom on-campus

157. *See Hassan*, 515 F. Supp. 3d at 88–89 (citing Lindner v. Occidental Coll., No. CV 20-8481, 2020 U.S. Dist. LEXIS 235399, at *2 (C.D. Cal. Dec. 11, 2020)).

158. *See id.* at 89.

159. *Id.* at 89 (quoting Pell v. Trs. of Columbia Univ., No. 97 CIV. 0193, 1998 U.S. Dist. LEXIS 407, at *61 (S.D.N.Y. Jan. 21, 1998)) (citing Babiker v. Ross Univ. Sch. of Med., No. Civ. 1429, 2000 U.S. Dist. LEXIS 6921, at *6–7, 25 (S.D.N.Y. May 19, 2000)).

160. *Id.* at 91.

161. *Id.*

162. *Hassan*, 515 F. Supp. 3d at 91.

163. *Id.*

164. *Id.* at 92.

165. *Id.* at 95.

166. Zagoria v. N.Y. Univ., No. 20 Civ. 3610, 2021 U.S. Dist. LEXIS 50329, at *2 (S.D.N.Y. Mar. 17, 2021).

167. *Id.* at *1, 2.

education for which NYU students matriculated and paid."[168] NYU moved to dismiss.[169]

According to the court, an implied contract between universities and students in New York is "straightforward."[170] "[I]f the student complies with the terms prescribed by the university and completes the required courses, the university must award [the student] a degree."[171] But "a student must identify specifically designated and discrete promises."[172]

Zagoria alleged that the promise made by NYU was to "provide on-campus in-classroom instruction or an in-person teaching experience."[173] The basis for this purported promise were certain "marketing and recruitment materials" with course descriptions.[174] The key language, according to Zagoria, found on Schack's website, stated that students would receive "[d]irect engagement with industry, through the nation's leading conferences, regular speakers, internships, and more."[175] Moreover, Zagoria contended that his coursework "was supposed to 'include visits to Paris and Amsterdam to survey actual real estate properties,'" which instead took place virtually.[176] The court emphasized that Zagoria failed to point to any NYU materials making this representation.[177]

According to the court, "NYU's alleged statements do not rise to the level of a specific promise to provide in-person educational services."[178] The court elaborated that Zagoria "has not pointed to any express language that demonstrates NYU 'relinquished its authority' to alter the method of academic instruction."[179] As in *Hassan*, Zagoria

168. *Id*.

169. *Id*. at *3.

170. *Id*. at *8.

171. *Zagoria*, 2021 U.S. Dist. LEXIS 50329, at *8 (quoting Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 93 (2d Cir. 2010).

172. *Id*. (quoting Nungesser v. Columbia Univ., 169 F. Supp. 3d 353, 370 (S.D.N.Y. 2016) (internal quotations omitted)).

173. *Id*. at *9 (internal quotations omitted).

174. *Id*.

175. *Zagoria*, 2021 U.S. Dist. LEXIS 50329, at *9 (quoting *Schack Institute of Real Estate*, NEW YORK UNIV. SCH. OF PRO. STUD., https://www.sps.nyu.edu/homepage/academics/divisions-and-departments/schack-institute-of-real-estate.html (last visited Apr. 3, 2022)).

176. *Id*. at *9–10.

177. *Id*. at *10 (quoting *Baldridge* v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002).

178. *Id*.

179. *Id*.

pointed the court not only to the *Ford* decision but also to *Bergeron*.[180] The *Zagoria* court emphasized that RPI "hammered repeatedly" its promises to Ford.[181] Similarly, the court noted that the *Bergeron* court was "presented with specific statements" regarding RIT's offerings to Bergeron.[182] But "[those] cases are too factually dissimilar to be persuasive. The NYU statements identified by Plaintiff simply do not rise to this level of detail regarding promises for in-person instruction."[183]

Finally, Zagoria contended that NYU's conduct created an implied contract.[184] Zagoria argued that because Shack offers some courses online, and because Zagoria chose in-person classes, then the "natural consequence" is "NYU agreeing to provide in-person instruction."[185] The court found this "unavailing," as the implied agreement "must be grounded in a text."[186] The court expounded that the argument was undercut by Zagoria's decision to enroll in fully online classes for summer 2020.[187] Thus, the court granted NYU's motion to dismiss.[188]

3. Beck v. Manhattan College

After Manhattan College moved to online classes and required students to vacate campus in March 2020, Czigany Beck filed suit against the college seeking a refund equal to "the difference in fair market value between what the students contracted for and what they received."[189] Beck claimed that there were two breaches of contract, one related to tuition and one related to fees.[190]

180. *See Zagoria*, 2021 U.S. Dist. LEXIS 50329, at *10–11 (first citing Ford v. Rennsselaer Polytechnic Inst., 507 F. Supp. 3d 406, 412 (N.D.N.Y. 2020); then citing Bergeron v. Rochester Inst. of Tech., No. 20-CV-6283, 2020 U.S. Dist. LEXIS 241125, at *7–8 (W.D.N.Y. Dec. 18, 2020)); *Hassan*, 515 F. Supp. 3d at 83 (first citing *Ford*, 507 F. Supp. 3d at 412; and then citing *Bergeron*, 2020 U.S. Dist. LEXIS 241125, at *2).

181. *Id*. at *11 (quoting *Ford*, 507 F. Supp. 3d at 416).

182. *Id*. (quoting *Bergeron*, 2020 U.S. Dist. LEXIS 241125 at *4–5).

183. *Id*. at *11–12.

184. *Id.* at *12.

185. *Zagoria*, 2021 U.S. Dist. LEXIS 50329, at *12.

186. *Id.* (quoting *Ford*, 507 F. Supp. 3d 406 at *414).

187. *See id*. at *12.

188. *See id*. at *15.

189. Beck v. Manhattan Coll., No. 20-CV-3229, 2021 U.S. Dist. LEXIS 87972, at *2 (S.D.N.Y. May 7, 2021).

190. *See id*. at *2–3.

Beck's tuition claim was based on statements on Manhattan College's website, which touted its location in various ways.[191] Indeed, the school emphasized that its courses "use New York City as a classroom" and the campus "offer[ed] a serene escape from city life with easy access to the culture and opportunities of midtown Manhattan."[192] Beck referenced other statements related to various experiences available on campus, including sporting events and dining options.[193] None of these, according to the court, were "specific enough to promise in-person classes or access to specific on-campus facilities or services. They merely advertise and describe the experience of studying and living on the College's New York City campus."[194] Beck also contended that educational customs, course attendance requirements, and in-person classes for the first half of the spring 2020 semester amounted to an implied promise.[195] But none of these were a *written* promise to provide particular services.[196] After quoting *Ford* to reiterate the requirement that "promise must be written and specific for that promise to be enforced as a term of the implied educational contract between student and university," the court granted Manhattan College's motion to dismiss the breach of contract claims.[197]

4. Doe v. New York University

Doe v. New York University[198] provides a different lens through which to assess implied contracts between a student and his or her

191. *See id.* at *3.

192. *Id.* at *3–4 (internal quotations omitted).

193. *See* Beck, 2021 U.S. Dist. LEXIS 87972, at *4.

194. *See id.* at *5.

195. *Id.* (first citing Marbury v. Pace Univ. (*In re* Columbia Tuition Refund Action) 523 F. Supp. 3d 414, 423 (S.D.N.Y. 2021); then citing Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406, 414 (N.D.N.Y. 2020); then citing Hassan v. Fordham Univ., 515 F. Supp. 3d 77, 86 (S.D.N.Y. 2021); and then citing Gertler v. Goodgold, 107 A.D. 481, 485, 487 N.Y.S.2d 565, 568 (1st Dep't 1985)).

196. *Id.* (first citing *Columbia*, 523 F. Supp. 3d at 423; then citing *Ford*, 507 F. Supp. 3d at 414; then citing *Hassan*, 515 F. Supp. 3d at 86; and then citing *Gertler*, 107 A.D. at 485, 487 N.Y.S.2d at 568).

197. *Id.* at *6 (first citing *Ford*, 507 F. Supp. 3d at 414; then citing In re *Columbia*, 523 F. Supp. 3d at 421; then citing Baldridge v. State, 293 A.D.2d 941, 943, 740 N.Y.S.2d 723, 725 (3d Dep't 2002); then citing Paladino v. Adelphi Uni., 89 A.D.2d 85, 92, 454 N.Y.S.2d 868, 873 (2d Dep't 1982); then citing Keefe v. N.Y. L. Sch., 905 N.Y.S.2d 773, 773 (Sup. Ct. New York Cty. 2009); and then citing Bader v. Siegel, 238 A.D.2d 272, 272, 657 N.Y.S.2d 28, 29 (1st Dep't 1997)). The court dispensed with Beck's fees-based breach of contract claim in summary fashion.

198. No. 21-CV-2199, 2021 U.S. Dist. LEXIS 81122 (S.D.N.Y. Apr. 28, 2021).

university or college. Each of the aforementioned cases arose out of an educational institution's mid-semester transition from in-person classes to remote learning.[199] But the events at issue in *Doe* took place almost a year later, in January 2021.[200] NYU was open for in-person classes for the fall 2020 semester, when Jane Doe began college as a freshman.[201] Unsurprisingly, NYU implemented and strictly enforced a stringent set of policies to limit the spread of COVID-19 on campus.[202] The University revised these policies for spring 2021.[203]

On January 30, 2021, Doe attended an off-campus dinner with friends.[204] As the dinner concluded, the group of seven took a photo in which they were not wearing masks.[205] That photograph was posted on social media, and another student submitted an anonymous complaint to the school alleging that Doe and others had violated the Student Conduct Policy and possibly the COVID Access Policy.[206] NYU conducted an investigation, which led to the finding that Doe and three others violated

> Section B1 of the Student Conduct Policy, which prohibits "behavior(s) that, by virtue of their intensity, repetitiveness, or otherwise, endanger or compromise the health, safety, or well-being of oneself, another person, or the general University community," and Section E3, for violating the NYU COVID-19 Access Policy "or any related governmental orders issued concerning public health."[207]

The four students, including Doe, were suspended for the remainder of the semester.[208] Notably, the decision indicates that this was not Doe's first violation of the COVID restrictions.[209] In fact, NYU had previously sent Doe an email reminding her of the applicable policies, which included a warning to "stay away from gatherings where there are no masks or distancing, even at off-campus private residences."[210]

199. *See Hassan v. Fordham Univ.*, 515 F. Supp. 3d 77, 82 (S.D.N.Y. 2021).
200. *Doe*, 2021 U.S. Dist. LEXIS 81122, at *8.
201. *Id*. at *4–5.
202. *Id*.
203. *Id*. at *6.
204. *Id*. at *8.
205. *Doe*, 2021 U.S. Dist. LEXIS 81122, at *8–9.
206. *Id.* at *9.
207. *Id.* at *9–10.
208. *Id.* at *11.
209. *Id.* at *11–12.
210. *Doe*, 2021 U.S. Dist. LEXIS 81122, at *13 (emphasis removed).

In March, Doe sought a preliminary injunction prohibiting NYU from enforcing the suspension, contending that NYU breached an implied contract, as "the Student Conduct Policy was a 'binding compact' between NYU and its students, which did not allow the university to sanction conduct at off-campus, private events."[211] The court held that Doe had not shown a likelihood of success on the merits and denied her motion for a preliminary injunction.[212]

The court found that NYU's policies were not exclusive to on-campus conduct and also incorporated government orders regarding COVID-19 restrictions.[213] Even more important, according to the court, were the policies that Doe did not address in her arguments.[214] Doe's "contention that NYU never expressed a clear intent to regulate off-campus conduct . . . holds no weight."[215] Indeed, "NYU issued *repeated*, *clear*, forceful notices to the student body that its Student Conduct Policy applied to off-campus conduct."[216] Thus, Doe could not overcome the fact that "the university repeatedly communicated, in no uncertain terms, the off-campus applicability of its policies," and there was no implied contract to the contrary.[217]

CONCLUSION

The cases discussed herein suggest that a university or college's use of clear language in publications regarding what services and amenities will be provided to students are critical in establishing a sufficient breach of implied contract claim. Indeed, where language explicitly discusses in-person benefits offered or uses clear limiting language such as "*only* in classroom," the courts have determined such language creates an implied contract. On the other hand, where a university merely describes a course as meeting in-person, the express language and additional surrounding circumstances will determine whether or not such language creates an implied contract.

While the main focus of the analysis, the specificity of language is not the only factor. Courts require that the implied promise must be written. Conduct alone is insufficient to create an implied contract. As

211. *Id*. at *14.

212. *Id*. at *15 (first quoting Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs., 769 F.3d 105, 110 (2d Cir. 2014); and then quoting Lynch v. City of N.Y., 589 F.3d 94, 98 (2d Cir. 2009)).

213. *Id.* at *24.

214. *Id.* at *25–26.

215. *Doe*, 2021 U.S. Dist. LEXIS 81122, at *26.

216. *Id.* (emphasis added).

217. *Id*. at *29.

noted in *Ford*, the frequency of the college or university's statements can also be the distinguishing factor.[218] Moreover, the recent decisions seem to suggest that various fees which are paid by students in exchange for the university's service of explicit activities or resources such as a library, computer lab, student activities, or health care create an implied contract for access to such services.

But whether the language at issue is sufficiently specific to rise to the threshold of creating an implied contract is not always clear. For example, in *Hassan*, the court, without explanation, found an out-of-state, non-precedential case to be more persuasive than *Ford* and ruled that the university's statements were not specific enough to create an implied contract.[219] Ultimately, each of these cases are fact-specific and will turn on the judgment of finder of fact. We note that all of the decisions discussed herein were at the motion to dismiss stage. It remains to be seen whether the students whose claims have survived the motion to dismiss stage will ultimately prevail on the merits or be upheld on appeal.

For students, the ability to point the court to clear express language indicating a promise for either access or service will be necessary to state a claim. For universities, crafting the various publications to describe practices rather than guarantee services or access thereto will be crucial to avoid liability for breach of implied contracts. To be sure, courts will continue to wrestle with implied contracts between students and colleges and universities during the remainder of the COVID-19 pandemic and well beyond. The outcomes of this burgeoning area of litigation, though seemingly very specific, will no doubt have implications for the future of implied contract formation.

218. *See* Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d at 406, 416 (N.D.N.Y. 2020).

219. Hassan v. Fordham Uni., 515 F. Supp. 3d 77, 88–89 (S.D.N.Y. 2021) (first citing Lindner v. Occidental Coll., No. CV 20-8481, 2020 U.S. Dist. LEXIS 235399, at *21 (C.D. Cal. Dec. 11, 2020); and then citing *Ford*, 507 F. Supp. 3d at 414)).