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George L. Christenson
Clerk of Circuit Court
2022CV002488

BY THE COURT:

DATE SIGNED: December 9, 2022

Robinsons v. USM

Electronically signed by Thomas J. McAdams
Circuit Court Judge

2022CV002488

This case comes before the court on the Defense's Motion to Dismiss for Failure to State a Claim. Earlier this year, the Plaintiffs, Mr. Craig Robinson and Mrs. Kelly Robinson, filed an amended complaint alleging six causes of action against the Defendant, the University School of Milwaukee (also referred to herein as "USM"). Attorney Kimberley Cy. Motley of *Motley Legal Services*, Charlotte, North Carolina and Attorney Jeffrey Bushofsky of *Ropes & Gray*, Chicago, Illinois represent the Plaintiffs. Attorneys Patrick Murphy and Lindsey Davis of *Quarles & Brady*, Milwaukee, Wisconsin and Attorneys Joel Aziere and Jennifer Williams of *Below Vetter Buikema Olson & Vliet, LLC*, Waukesha, Wisconsin represent the Defendant.[1] In brief, the Plaintiffs filed suit against USM

[1] Several other attorneys are on this case. The court has listed only those on the briefs.

because USM told the Robinson's two sons that the two sons would not be allowed to return to the school for the 2021-22 school year because the parents had violated the school's Common Trust pledge.[2]

The first section of this written decision will set forth the facts, which have to come exclusively from the Plaintiffs' Complaint because of the legal standard here. The second section will set forth the parties' arguments. The third part of this written decision will set forth the applicable law, which is largely agreed upon. Finally, the court will address each of the six claims.

[2] The Common Trust pledge is "to relate to one another with respect, trust, honesty, fairness, and kindness. To this important end, we ask that all school parents enter into and abide by the Parent-School Partnership, which emphasizes our expectations that parents respect the expertise and professionalism of the school's faculty, administrators, and staff and seek collaborative solutions to problems." (Document 21).

Findings of Facts

The legal standard is particularly important here. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the Complaint." *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. The court accepts as true all well pleaded facts and reasonable inferences to be drawn from them. *Id*. But "legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id*. "A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations. *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 305 (1987). The court must *liberally* construe the pleadings to do substantial justice to the parties. *Id.*

The relevant facts for this motion can be summarized briefly. The Robinsons enrolled their two sons at University School in 2016. By all accounts, the two boys were good students and did well. Prior to each school year, USM presented to each parent a written contract for the parents' signatures, which as relevant to this case, contained a provision that explicitly allowed USM to dismiss a student for "any reason." The specific contract language is as follows:

> RULES AND REGULATIONS OF UNIVERSITY SCHOOL: We expressly reserve the right to accept or reject a signed Enrollment Contract for any reason we deem reasonable. If we accept your Enrollment Contract, you agree to accept the rules, regulations, policies and procedures of University School as having been incorporated into this Enrollment Contract, including without limitation those that are stated above or which appear in the student handbooks, catalogues, parent mailings, and any other written or verbal communications from us to you and the student, including without limitation those related to behavior, academic progress, disciplinary action, participation in University School activities, and transportation. You agree that we have the right to discipline a student at any time during the school year for violating University School rules, regulations, policies or procedures, and to deny enrollment or reenrollment or dismiss a student if University School officials determine **for any reason** that enrollment is not in the best interests of the school, which reason may include our determination that the conduct of the student, **or of the parent** or guardian, is inappropriate, interferes with the University School's faculty, staff or operations, precludes a positive and constructive working relationship with teachers, administrators, or staff, is detrimental to the student's health or progress or to other students, or otherwise fails to satisfy any of the obligations, financial or otherwise, included in this Enrollment Contract. You agree that the Head of School, at his or her sole discretion, has the right to intervene in and to decide any disciplinary case or any other circumstance related to the University School.

[emphasis added].

Enrollment Agreement, Document 7.[3]

During the pandemic, USM went to remote learning for a period, during which Mrs. Robinson listened in on her sons' lessons. The Plaintiff's complaint alleges that the following then happened:

> ...The case arises from USM's vindictive and improper decision, directed by USM's Head of School [SH], to punish two model students in retaliation against their parents for raising valid concerns about USM's treatment of its students of color and other underrepresented stakeholders in the school.
>
> 2. The Robinsons are the parents of two young children of color who attended USM, an independent pre-kindergarten through secondary school in Milwaukee. The Robinsons' two children—A.O.R., an eleven-year-old boy, and A.Y.R., a nine-year-old boy (together, the "Robinson Children")—were accepted into the USM community in August 2016.
>
> 3. Unbeknownst to the Robinsons at the time, and notwithstanding its purported commitment to diversity and inclusion, USM had no intention of addressing the Robinsons' concerns about serious racial and socio-economic bias problems at the school. Instead, USM— led by [SH]—tried to silence the Robinsons by targeting for punishment two children that USM had voluntarily undertaken a duty to educate and nurture, and to treat with kindness and respect. On April 14, 2021, when A.O.R. was in the fifth grade, [SH] sent the Robinsons an email that suddenly and without prior notice or just cause, purported to terminate A.O.R. from the USM community. See Ex. A

Plaintiff's First Amended Complaint at p. 2.

[3] "Document" refers to the e-filing number.

On June 21, 2021, the school informed the Robinsons in a letter that their sons would not be allowed to return the following fall:[4]

> As I indicated in my April 15, 2021 correspondence to you, I have concluded that over the course of this school year, you have not fulfilled the foregoing commitments as partners with USM, and especially, with its Middle School teachers and administrators. You neither demonstrated respect for their expertise and professionalism nor consistently related with them in a respectful, trustworthy, fair, or kind manner. Rather—as USM endeavored to navigate the unprecedented challenges of a global pandemic—you repeatedly engaged in disrespectful and demanding communications with and about our teachers and administrators. This conduct—and the damaging repercussions of it—led to my decision to request that you locate another school for [your son] to continue his education next year.
>
> Since mid-April of this year, it has only become more evident that there has been a complete breakdown in your family's trust of and respect for USM. You have neither acknowledged your role in nor accepted any responsibility for the circumstances that led to our many meetings, correspondence, and the preliminary decision related to... enrollment. What's more, you openly misrepresented the events leading to USM's decision and disparaged the school and our devoted and hardworking teachers and administrators in the process. Considering the foregoing, during our meeting this week I expressed that I was having trouble seeing a path forward with your family and attempted to engage in a dialogue with you. Rather than collaborate or offer possible solutions, you commandeered the conversation, directed me to stand up to the board, and threatened about what was to come if I did not find a way to work this out.

Document 21 (June 21, 2021 letter from SH).

On April 18, 2022 the Robinsons filed this suit. The Defendant's Motion to Dismiss for Failure to State a Claim

[4] The April, 2021 email concludes as follows:

> Because we have concluded that your actions toward the Middle School team over the past year did not comport with our Parent-School Partnership, Common Trust, and Handbook, we respectfully request that you locate another school for [your son] to continue his education next year.

[Document 20].

was filed on May 19, 2022. The Plaintiff filed an amended complaint on June 8, 2022.[5] The court held a hearing on the motion on September 16, 2022.

The Parties' Arguments

Both sides submitted fine legal memoranda. This section will quote them directly. The court has made edits for content and punctuation.

A. Defendant-USM's Arguments to Dismiss the Complaint

...

As their first cause of action, the Robinsons claim USM breached the 2021-2022 enrollment contract (the "Enrollment Contract") by "terminating" the enrollment of the Robinsons children in June 2021, several months before the 2021-2022 school year began. [Dkt. #2, ¶ 3, 51; see also Dkt. #2, Ex. A]. This claim fails as a matter of law because the Enrollment Contract unambiguously allows USM to do precisely what USM did—to "deny enrollment or reenrollment or dismiss a student if University School officials determine for any reason that enrollment is not in the best interests of the school." [Dkt. #2; Ex. D, p. 3].

The Court may consider the Enrollment Contract in deciding this motion to dismiss because the Robinsons attach a copy of it to their Complaint. See Peterson v. Volkswagen of Am., Inc., 2005 WI 61, ¶ 15 (holding that an attachment to the complaint is "considered a part of the pleading"). And the construction of the Enrollment Contract is a matter of law for the Court, not a question of fact for the jury. See Levy v. Levy, 130 Wis. 2d 523, 528, 388 N.W.2d 170, 172 (1986).

The Court must construe the Enrollment Contract as it is written. See id. The terms must be given their plain or ordinary meaning. Goldstein v. Lindner, 2002 WI App 122, ¶ 12. The Court may not "insert what has been omitted or rewrite a contract made by the parties." Levy, 130 Wis. 2d at 528.

[5] The attachments include the April 14 email, the June 21, 2021 letter, the Mission Statement, the Enrollment Contract, the Common Trust pledge, the Student Handbook, and the Black Alumnae letter, which details a number of incidents.

Nor may the Court construe the Enrollment Contract in a way that renders meaningless any of the words the parties used to express their intention and bargain. See Dykstra v. Arthur G. McKee & Co., 100 Wis. 2d 120, 127, 301 N.W.2d 201, 205 (1981).

...

In Count Five of their Complaint, the Robinsons allege USM breached its duty of good faith and fair dealing by declining to reenroll the Robinson children for the 2021-2022 school year. [Dkt. #2, ¶¶ 80-81]. This claim too fails as a matter of law.

It is well-established a party may not "employ the good faith and fair dealing covenant to undo express terms of an agreement." Beidel v. Sideline Software, Inc., 2013 WI 56, ¶ 29. Nor may a party "violate the duty of good faith and fair dealing by taking an act that is specifically authorized by the parties' agreement." Aug. Res. Funding, Inc. v. Procorp, LLC, 482 F. Supp. 3d 808, 814 (W.D. Wis. 2020) (citing Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 431 N.W.2d 721, 726 (Ct. App. 1988) ("But where, as here, a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith."). Count Five ignores these rules entirely. ...

For their sixth cause of action, the Robinsons allege "arbitrary and capricious termination." No such cause of action exists under Wisconsin law. And the Robinsons identify no law or statute establishing the contrary. They instead cite a single case decided nearly 100 years ago as purported support for their claim, Frank v. Marquette, 209 Wis. 372 (1932)....

Specifically, the Wisconsin Supreme Court affirmed a trial court decision denying the student discovery as to disciplinary measures concerning ten of his classmates. Id. Only in passing did the Court note that it appeared "well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." Id. But the Court went on to confirm "[a] broad discretion is given to schools, colleges, and universities in such matters." Id. If any portion of the Frank decision somehow applies here it is the statement regarding the discretion given to schools when it comes to dismissals.
...

B. Plaintiff-Robinson's Responses

Under Wisconsin law, contracting parties participate in a "cooperative relationship," requiring good faith and fair dealing; as the parties' performance within the contractual relationship increases, "so too grows the scope and bite of the good faith doctrine." Metro. Ventures, LLC v. GEA Assocs., 291 Wis. 2d 393, 415 (2006). In addition, Wisconsin consumers. including the Robinsons, have the right not to be treated unfairly and lied to by their partners in commercial relationships.
...

As alleged in the Complaint, USM, by and through its headmaster [SH], retaliated against the Robinsons for asking too many questions for [SH's] liking regarding the school's current and historical racial discrimination, as well as serious academic deficiencies. [SH] swiftly and unilaterally ended the parties' five-year relationship simply because he could, according to USM's

Motion. Astoundingly, USM contends that it was entitled to terminate the Robinsons and oust the Robinson Children for any reason or no reason, so long as USM purportedly determined in its "sole discretion" that doing so was in the school's best interests—a post hoc, lawyer-crafted rationalization that USM never even mentioned before responding to the Robinsons' lawsuit. Even if USM's recently devised "school's best interests" excuse held water factually (it does not), USM could not be more wrong on the law.

...

The Robinsons have stated a claim by alleging "that a contract exists, the terms of the contract, and the breach of a duty under the contract." Loth v. City of Milwaukee, 315 Wis. 2d 35, 41 (2008). The Complaint explains that the Robinsons were required to sign Enrollment Contracts, which were written by USM without the opportunity for input by parents, for each of their children for each school year,... These Enrollment Contracts required USM to make enrollment determinations in the school's "best interests," and their express incorporation of certain USM rules and policies additionally required USM to make such determinations with "honesty" and "fairness" toward the Robinsons... As the Complaint details, USM breached these express obligations by abruptly terminating the Robinson Children's enrollment as retaliation against the Robinsons for raising uncomfortable truths about USM's inequitable treatment of students of color and other underrepresented students, as well as academic shortfalls at the school.

USM's primary response to these allegations is the bold claim that it may unilaterally dismiss any family at any time for any reason it deems sufficient. USM argues that the Enrollment Contract allowed USM "to do precisely what USM did" because "USM retained the right to deny reenrollment ... if USM officials, in their sole discretion, determined 'for any reason' that reenrollment was not in the best interest of the school." Br. at 3—4. USM asserts—in an unsubstantiated hearsay pronouncement that the Robinsons dispute—that because "USM in fact had" made such a determination, the Court's analysis should end there. Id. at 5. USM's argument fails because it is based on a fundamental misreading of the Enrollment Contracts and incorporated documents, and because it at best raises a contested factual issue that cannot be resolved at the pleadings stage.
...

USM's claim that the decision to deny reenrollment "is left to USM's sole discretion and is not subject to second-guessing, as USM officials can rely on any reason at all in reaching their conclusion," Br. at 5 (emphasis in original), not only ignores USM's contractual fairness obligations; it also vitiates the requirement that USM engage in a process to reach a determination regarding the school's "best interests." Such an interpretation would not only be inconsistent with the language and spirit of the Enrollment Contract and incorporated documents, which repeatedly require USM to act with "honesty" and "fairness," but would also run counter to Wisconsin law. ... This obligation is further confirmed by USM's own termination correspondence to the Robinsons, in which USM falsely claimed that the Robinsons were in violation ofthese very same Common Trust and Student Handbook obligations, ... Md. Arms Ltd. P'ship v. Connell, 326 Wis. 2d 300, 320 (2010) ("[Contract language should be construed to give meaning to every word, avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage."). USM's circular reasoning is that USM can terminate any student at any time for any or no reason without repercussion or accountability, because USM alone decides what is in the school's best interest. But the contract need not have said anything about a "determination" regarding the school's "best interests" if that was truly the parties' intent. Rather, the contract could have simply stated that USM reserves the right to terminate its students' enrollment at any time in its sole discretion. It says much more, however.

Contrary to USM's argument, the only cogent reading of the integrated agreement, giving meaning to every term, is that USM was required to go through a genuine process that was fair to the Robinsons and in which the school actually determined in good faith what was in the school's best interests before acting. USM dislikes this common-sense reading because, in fact, no such thing occurred...

Applicable Law

This is, of course, a motion to dismiss the complaint for failure to state a claim. There has been no testimony in court. The legal standard of proof for the Plaintiff to survive this motion is relatively low. It will get higher as the case moves on. The Defense posits that all six claims fail to meet even the low threshold here.

A. Relevant Statute

806.06 Defenses and objection; when and how presented; by pleading or motion; motion for judgment on the pleadings

...

(2) How presented. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

1. Lack of capacity to sue or be sued.
2. Lack of jurisdiction over the subject matter.
3. Lack of jurisdiction over the person or property.
4. Insufficiency of summons or process.
5. Untimeliness or insufficiency of service of summons or process.
6. Failure to state a claim upon which relief can be granted.

...

B. General Law[6]

The following paragraphs appear in *Remedies Law*, 2nd ed. Weaver et al and these paragraphs seem a nice summary of the relevant law:

> Just as courts are disinclined to require private clubs to "admit" members, they are also disinclined to prohibit clubs from expelling members. In some instances, an expelled member may have greater contractual rights against expulsion than it has in requiring admission. For example, if a club expels a member in violation of its charter or membership rules, the expelled member might be able to establish a cause of action. Nevertheless, courts are reluctant to order social clubs to readmit expelled members because of *concerns about foisting unwilling people on each other*.
>
> ...
>
> In *Tedeschi v. Wagner College*, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (App. 1980), a student was expelled from a private college for disruptive behavior including threats against a faculty member. Even though the college was a private institution, so that the constitutional requirement of due process did not apply, Tedeschi argued that she had been discharged in violation of college rules requiring (in her view) a hearing. The court concluded that the college complied with its rules, *but the court acknowledged that it would examine a non-academic suspension more closely than an academic suspension*...

[emphasis added].

[6] At least two ALR annotations touch on the issues presented here: 47 ALR. 5TH 1, Claudia Catalano, J.D., *Liability of Private School or Educational Institution for Breach of Contract Arising from Expulsion or Suspension of Student* and 50 ALR 1497, E.W.H., *Expulsion or Suspension from a Private School or College* (originally published in 1927). Having read both, it seems safe to say the cases are fact intensive and do not present much unifying rationale.

Decisions

The Defendant posits that the Plaintiffs' complaint fails to state a claim. At the outset, the court will state that the court is not bound by the manner in which the parties frame an issue. *Travelers Indem. Co. of Ill. v. Staff Right,* 2006 WI App 59, 291 Wis. 2d 249, 714 N.W.2d 219. Each claim will be addressed below.

A. Breach of Contract

The Defendant's motion argues that Count One in the Plaintiff's complaint must be dismissed because the Plaintiffs fail to identify any actionable breach of contract. The gravamen of this argument is that prior to the school year, each parent signed a written agreement allowing the school to dismiss or not reenroll any student "for any reason." USM essentially argues that this clause insulates them from court review of these dismissals. First, the court will state the

applicable rules of construction. Second, the court will construe this particular contract.

1. Rules of Construction

Contract interpretation generally seeks to give effect to the parties' intentions. *Seitzinger v. Community Health Network,* 2004 WI 28, ¶ 22, 270 Wis. 2d 1, 676 N.W.2d 426. However, "subjective intent is not the be-all and end-all." *Kernz v. J.L. French Corp*., 2003 WI App 140, ¶ 9, 266 Wis. 2d 124, 667 N.W.2d 751. Rather, "unambiguous contract language controls contract interpretation." *Id.* Where the terms of a contract are clear and unambiguous, a court will construe the contract according to its literal terms. *Maryland Arms Ltd. Partnership v. Connell*, 2010 WI 64, ¶ 23, 326 Wis. 2d 300, 786 N.W.2d 15 (quoting *Gorton v. Hostak, Henzl & Bichler*, S.C., 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998)). "We presume the parties' intent is evidenced by the words

they chose, if those words are unambiguous." *Kernz,* 2003 WI App 140 at ¶ 9.

If the terms of the contract are ambiguous, evidence extrinsic to the contract itself may be used to determine the parties' intent. *Seitzinger*, 2004 WI 28 at ¶ 22. "A contract provision is ambiguous if it is fairly susceptible of more than one construction." *Mgm't Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

Contract language is construed according to its plain or ordinary meaning, *Huml v. Vlazny*, 2006 WI 87, ¶ 52, 293 Wis. 2d 169, 716 N.W.2d 807, consistent with "what a reasonable person would understand the words to mean under the circumstances." *Seitzinger,* 2004 WI 28 at ¶ 22. For a business contract, that is "the manner that it would be understood by persons in the business to which the contract

relates." *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 2003 WI 38, ¶ 12, 261 Wis. 2d 70, 661 N.W.2d 776.

A court will not embrace any plausible interpretation created by a party for the purposes of litigation. *Hirschhorn v. Auto-Owners Ins. Co.,* 2012 WI 20 338, Wis. 2d 761, 809 N.W.2d 529. Similarly, "[t]he mere fact that a provision has more than one dictionary meaning, or that the parties disagree about the meaning, does not necessarily make the word ambiguous if the court concludes that only one meaning applies in the context and comports with the parties' objectively reasonable expectations." *Ruff v. Graziano,* 220 Wis. 2d 513, 524, 583 N.W.2d 185 (Ct. App. 1998).

Words and phrases are ambiguous when they are so imprecise and elastic as to lack any certain interpretation or are susceptible to more than one reasonable construction. Terms may be inherently ambiguous or may be ambiguous

when considered in the context of the agreement as a whole. Even unambiguous language may also be found ambiguous when read within the context of the entire agreement. *Van Erden v. Sobczak,* 2004 WI App 40, 271 Wis. 2d 163, 677 N.W.2d 718. Sometimes, a statute is ambiguous based purely on its words. *State of Wis. Dep't of Corrections v. Schwarz*, 2005 WI 34, ¶ 14, 279 Wis. 2d 223, 693 N.W.2d 703. At other times, ambiguity arises from "the words of the provision as they interact with and relate to other provisions in the statute [.]" *Id.*

Ultimately, the court's role is not to make contracts or reform them but to determine what the parties contracted to do. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, 363 Wis. 2d 699, 866 N.W.2d 679. It is not the function of the court to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than

had originally been anticipated. *Parsons v. Associated Banc-Corp*, 2017 WI 37, 374 Wis. 2d 513, 893 N.W.2d 212.

2. Construction

The parties disagree on what the dismissal standard in the contract means. The Plaintiff would interpret "any reason" to include a requirement of reasonableness and a process to determine what is in the school's best interest. Plaintiff's Brief at p. 6. The Defense, on the other hand, essentially argues that "for any reason" means "for any reason." For the reasons explained below, the court finds that the most natural and plain meaning construction is USM's.

There are several technical problems with the Plaintiff's position. First, "any reason" clearly has a plain language meaning. When the meaning of ordinary terms is contested, a dictionary may be utilized to guide the common, ordinary

meaning of words. *State v. Sample*, 215 Wis. 2d 487, 499–500, 573 N.W.2d 187 (1998). Thus, the court can consult a dictionary and when it does so here, this is what is listed for "any":

Adjective

> 1. one, a, an, or some; one or more **without specification or identification**: *If you have any witnesses, produce them. Pick out any six you like.*
>
> 2. whatever or whichever it may be: *cheap at any price.*
>
> 3. in whatever quantity or number, great or small; some: *Do you have any butter?*

[emphasis added].

Dictionary.com [last visited November 25, 2022].

The following statement of counsel at the motion hearing was persuasive as to construction:

> THE COURT:[7] ...So, are there any circumstances, Mr. [Defense Attorney], in which this decision is reviewable or actionable under a contract theory?
>
> [Defense]: **None.**
>
> THE COURT: What if it's a bad decision? What if---And I'm not---Nothing against anybody who is here or not here. Let's make it hypothetical. We'll call it College School. I don't know.

[7] The capitalization is in the original.

> What if it's harbored by or motivated by something invidious, or it's flat out wrong? You're saying it's not reviewable by a court because it was negotiated between the parties?
>
> [Defense]: That's not what I am saying, Your Honor. Let me clarify
>
> THE COURT: Please do.
>
> [Defense]: It is not a breach of contract. It may be something else. It may be a tort. It may be discrimination. It may be some other action may exist, but it is not breach of contract.

[emphasis added].

September 16, 2022 Transcript at pp-20-21.

Second, this is what the parties agreed to each and every year, so, in the court's opinion, this situation is not exactly a contract of adhesion. At oral argument, the following was stated:

> [Plaintiffs' Counsel]: ...This is a one-sided issue contract between a school that has the education care-taking of a nine year old and an eleven year old on the one side. A contract that USM's lawyers wrote and handed to the Robinsons.
>
> That contract says, we point out in the Complaint, you will pay us the twenty or thirty thousand dollars that is tuition for this year.

> And if you leave, someone dies, we expel your kid, it doesn't matter if they went to one day of school, you owe us all that.
>
> There is no parallel. There was no negotiation, no allegation there was any negotiation.
>
> So this is not an ordinary arm's-length contract. This is an adhesion contract.

September 16, 2022 Transcript at 32.

An adhesion contract is "a contract entirely prepared by one party and offered to another who does not have the time or the ability to negotiate about the terms." *Wisconsin Auto Title Loans, Inc. v. Jones,* 2006 WI 53, ¶52, 290 Wis. 2d 514, 714 N.W.2d 155. Frankly, this court is skeptical. Even assuming that the enrollment agreement was an adhesion contract, that fact alone is not sufficient to establish unconscionability. *Id.*, at ¶ 53 ("Ordinarily, however, adhesion contracts are valid."). Here, however, the parties all seem to have resources and thus seem to have relatively equal bargaining power. Certainly, there are other fine

private schools in the Milwaukee area, and there are many fine public schools as well. It seems a little strong to call this an adhesion contract on this record.

Third, courts are required to read and construe contract provisions *in pari materia*. *In pari materia* refers to statutes, regulations and contract provisions relating to the same subject matter or having a common purpose. Applying this canon on interpretation here, it is not difficult to square contract terms such as "...to relate to one another with respect, trust, honesty, fairness, and kindness" with the Defendant's construction of "any reason." The two seem to fit together. A court should construe statutes[8] in a way that harmonizes the whole system of law of which they are a part, and any apparent conflict should be reconciled if possible.[9]

[8] Contracts and statutes are construed similarly. The same canons of construction typically apply.

[9] A more poetic expression of the same rule of law written by a Columbia University Professor is "[a court] . . . must take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that

District No. 9 v. WERB, 35 Wis. 2d 540, 556, 151 N.W.2d 617 (1967). There is no conflict here.

Third, the Plaintiffs' construction would require something akin to constitutional due process, a concept courts have repeatedly rejected on numerous occasions in the private school context. *See, generally, Tedeschi v. Wagner College*, 49 N.Y.2d 652, 404 N.E.2d 1302, 427 N.Y.S.2d 760 (App. 1980). Additionally, another maxim of statutory construction is that courts should not add words to a statute or a contract to give it a certain meaning." *Fond du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989); *see also Dawson v. Town of Jackson*, 2011 WI 77, ¶42, 336 Wis. 2d 318, 801 N.W.2d 316 ("We decline to

play, and a court's duty is to play it well, and in harmony with the other music of the legal system." *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed,* 3 Vand. L. Rev., 395, 399 (1950). The article famously challenged the view that the canons of statutory construction provide neutral, predictable legal rules that lead courts to one "correct" reading of a statute. Its most feted feature is a list of twenty-eight pairs of canons and countercanons, which Llewellyn labeled "thrusts" and "parries."

read into the statute words the legislature did not see fit to write."; *State v. Wiedmeyer,* 2016 WI App 46, ¶13, 370 Wis. 2d 187, 881 N.W.2d 805 ("It is not up to the courts to rewrite the plain words of statutes[.]"). [R]ather, [a court] interprets the words actually used. *State v. Fitzgerald*, 2019 WI 69, ¶30, 387 Wis. 2d 384, 929 N.W.2d 165.

In sum, this court has to favor a plain meaning construction here. Even liberally construing the pleadings as required here, this court can state that no relief can be granted for this contracts claim under any set of facts that the Plaintiffs can prove in support of their allegations.[10]

B. Deceptive Trade Practices Act

For their second cause of action, the Robinsons allege that USM violated Wisconsin's Deceptive Trade Practices Act

[10] Just to be clear, the court finds that "any reason" is *not* ambiguous. Also, the court is *not* finding that the Robinson's violated the pledge or that they did anything wrong.

(WDTPA), Wis. Stat. § 100.18. *Dkt*. #2 at 15. Section 100.18 prohibits "intentionally inducing the public to purchase merchandise either directly or indirectly, by an announcement, statement, or representation containing any assertion, representation or statement of fact which is untrue, deceptive or misleading." *Staudt v. Artifex Ltd*., 16 F. Supp. 2d 1023, 1031 (E.D. Wis. 1998) (internal quotations omitted). To succeed on a section 100.18(1) claim, the plaintiff must prove three elements: (1) the defendant made a representation[11] to "the public," with the intent to induce an

[11] The representations in question here are as follows:

89. As described above, USM made multiple, repeated representations to the public, including Plaintiffs, about USM's commitment to diversity, equity, and inclusion, with the intent to induce the Robinsons to enroll the Robinson Children at USM. These representations occurred repeatedly over the course of five years, from 2016 to 2021.

90. The representations made by USM to the public and Plaintiffs include, but are not limited to, representations that USM would: (i) "foster an equitable and inclusive community for students, their families, and our administration, faculty, and staff"; (ii) "embrace[] diversity in all of these various forms, including race, ethnicity, national origin, socioeconomic status, religion, sexual orientation, ability, gender, and age"; and (iii) recognize "and respect [that] the diversity of backgrounds and experiences is fundamental to building a learning community[.]"

91. As a result of those misrepresentations, Plaintiffs heavily invested in USM by enrolling the Robinson Children at USM for five years, signing ten separate, yearly enrollment contracts and paying private school tuition fees for each child and for each year, volunteering time and money for USM events, and engaging in dialogue regarding the betterment of USM. Each of these years,

obligation; (2) "the representation was untrue, deceptive, or misleading"; and (3) "the representation caused the plaintiff a pecuniary loss." *K&S Tool & Die Corp v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶27, 301 Wis. 2d 109, 732 N.W.2d 79.

USM argues that the Robinsons are not members of "the public" and stopped being members of the public once they first enrolled their children at USM in 2016. *Dkt. #31* at 7. USM further argues that because the Robinsons stopped being members of the public in 2016, their claim is also time barred, as section 100.18 is subject to a three-year statute of repose. *See* Wis. Stat. § 100.18(11)(b)(3).

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including for the 2020-2021 school year, USM's repeated false and misleading representations induced Plaintiffs to sign a new Enrollment Contract with USM for each child, as USM had intended. Plaintiffs repeatedly chose to reenroll the Robinson Children and forgo other educational opportunities in reliance on USM's representations and alleged commitment to diversity…

Plaintiff's First Amended Complaint at p. 26.

While the WDTPA does not define the phrase "the public," various courts have interpreted it. In *State v. Automatic Merchandisers of America, Inc.,* 64 Wis. 2d 659, 221 N.W.2d 683 (1974) the court concluded that statements made in private, to individuals, can be statements that are made to "the public." *Id*. at 664. The court noted that the most important factor is whether there is some "particular relationship" between the parties, but the court did not further define this phrase. *Id*. While there is no bright line rule, courts have given some further guidance. The Wisconsin Court of Appeals has held that plaintiffs have a particular relationship to the defendants, and stop being members of "the public," once plaintiff has entered into a contract to purchase the offered item. *Kailin v. Armstrong*, 2002 WI App 70, ¶44, 252 Wis. 2d 676, 643 N.W.2d 132. In *Kailin*, the court concluded that "[o]nce the contract was

made, the Kailins were no longer 'the public' under [§ 100.18(1)] because they had a particular relationship with Armstrong---that of a contracting party to buy the real estate that is the subject of his post-contractual representation." *Id.* at ¶ 44.

Courts have determined that the existence of a particular relationship is a question of fact based upon the circumstances of the case. *K&S Tool & Die Corp,* 2007 WI 70 at ¶19. If, based on the evidence, a reasonable jury could have conflicting inferences over whether the Plaintiffs were members of "the public," the court must submit the question of fact to the jury. *Id.* at ¶30. In doing so, the court must determine if the evidence provides for an opportunity for a reasonable jury to have conflicting inferences that it becomes a question of fact, or if the evidence is obvious enough to come to the legal

conclusion that the Robinsons were not members of "the public."

USM argues that the Robinsons are not a member of the public, because they have a contractual relationship with USM. They further argue that the Robinsons stopped being members of the public in 2016, when they first entered into a contract with USM, and this therefore bars their § 100.18 claim because it falls outside of the three year statute of repose. Wis. Stat. § 100.18(11)(b)(3) states: "No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action."

The Robinsons argue that even though they engaged in separate contractual relationships with USM during each individual school year, it does not mean they ceased being members of "the public" with respect to subsequent years. The Robinsons cite several cases in which courts found

Plaintiffs with previous relationships to Defendants to be members of the public, or found that it was a question of fact for the jury. *See Hinrichs v. Dow*, 2019 WI App 15, 386 Wis. 2d 351, 927 N.W.2d 156 (Table) (holding that because of conflicting inferences of a particular relationship, dismissal of a Wis. Stat. § 100.18 claim was improper)[12]; *Commonwealth Assisted Living, LLC v. 3M Resident Monitoring, Inc.*, 2017 WL 4281025 (Wis. Ct. App. Sept. 26, 2017) (finding that a "jury could reasonably infer from the fact that Commonwealth had no obligation to make any purchases from 3M RM . . . that Commonwealth was a member of the public for purposes of § 100.18"). Because the Robinsons argue that they did not cease to be members of the public, they further argue that their claim is not time barred.

[12] Wis. Stat. § 809.23(3)(b) allows courts to cite to unpublished opinions after 2010 for their persuasive value.

A motion to dismiss under Wis. Stat. § 802.06(2)(a)(6) will only be granted if it is clear from the complaint that under no circumstance can the party recover. *Wilson v. Continental Ins. Companies*, 87 Wis. 2d 310, 317, 274 N.W.2d 679 (1979). Due to unclear jurisprudence on what "particular relationship" or "the public" means, and the history of courts treating it as a question of fact for the jury, it is not clear to this court that it can come to the legal conclusion that the Robinsons were not members of "the public." Because of the conflicting inferences in this case, dismissal at this stage is inappropriate, and the court denies USM's motion to dismiss on this count.

C. Unfair Trade Practices Act

In Count Three of their First Amended Complaint, the Robinsons Allege that USM violated Wis. Stat. §100.20(1t). The statute reads:

> It is an unfair trade practice for a person to provide any service which the person has the ability to withhold that facilitates or promotes an unfair method of competition in business, an unfair trade practice in business, or any other activity which is a violation of this chapter.

The section of the statute that gives a private right of action is § 100.20(5) which states: "Any person suffering pecuniary loss because of a violation by any other person of s. 100.70 or any order issued under this section may sue for damages..." Wis. Stat. § 100.20(5).

Generally, courts have interpreted the statute to allow for a private remedy for consumers who fall victim to activity prohibited by general orders of the Department of Agriculture, Trade and Consumer Protection (DATCP). *See Emergency One, Inc. v. Waterous Co.,* 23 F. Supp. 2d 959 (E.D. Wis. 1998) (holding that "[N]o private cause of action exists under § 100.20, except for violation of an order issued by the Department under this section."); *Gallego v. Wal-Mart Stores, Inc.*, 2005 WI App 244, ¶ 22, 288 Wis. 2d 229, 707 N.W.2d 539 (holding that "a private right of action is available to [plaintiff]

under Wis. Stat. § 100.20(5), and this conclusion is based on the fact that DATCP has declared by rule that violations of certain food-labeling regulations are unfair trade practices"); *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 2009 WI App 65, ¶9, 318 Wis. 2d 802, 767 N.W.2d 394 (stating of section 100.20(5), "this language provides a private remedy for consumers who fall victim to the unfair methods of competition and trade practices prohibited by, *inter alia,* general orders of the Department of Agriculture, Trade and Consumer Protection promulgated under § 100.20(2)"); *Stuart v. Weisflog's Showroom Gallery, Inc.,* 2008 WI 22, 308 Wis. 2d 103, 746 N.W.2d 762 (explaining that the statute "unambiguously requires that in order to obtain double damages and attorneys fees, a claimant must show that he or she suffered 'pecuniary loss' 'because of' a violation of an 'order issued' under § 100.20.)

When courts interpret a statute, if the statutory language yields a plain, clear, statutory meaning, there is no ambiguity and that statute must be applied according to this ascertainment of its meaning. *Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶ 43–44, 271 Wis. 2d 633, 681 N.W.2d 110. Section 100.20(5) unambiguously requires a plaintiff to show he or she suffered a pecuniary loss because of a violation of an "order issued" under § 100.20. *Stuart v. Weisflog's Showroom Gallery, Inc*., at 2008 WI 22, ¶ 85, 208 Wis. 2d 103, 746 N.W.2d 762. The Robinson's allege no violation of a DATCP order in their complaint. As such, their claim under § 100.20(lt) fails, and this Court will grant USM dismissal on this count.

D. Promissory Estoppel

In Count Four of the Amended Complaint, the Robinsons allege USM breached promissory estoppel. In *Hoffman v. Red Owl Stores, Inc.,* 26 Wis. 2d 683, 133 N.W.2d 267 (1965), the Wisconsin Supreme Court wrote the following:

> Many courts of other jurisdictions have seen fit over the years to adopt the principle of promissory estoppel, and the tendency in that direction continues. As Mr. Justice McFaddin, speaking in behalf of the Arkansas court, well stated, that the development of the law of promissory estoppel 'is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings.' Peoples National Bank of Little Rock v. Linebarger Construction Company (1951), 219 Ark. 11, 17, 240 S.W.2d 12, 16. For a further discussion of the doctrine of promissory estoppel, see 1A Corbin, Contracts, pp. 187, et seq., secs. 193-209; 3 Pomeroy's Equity Jurisprudence (5th ed.), pp. 211, et seq., sec. 808b; 1 Williston, Contracts (Jaeger's 3d ed.), pp. 607, et seq., sec. 140; Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine 98 University of Pennsylvania Law Review (1950), 459; Seavey Reliance Upon Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913; Annos. 115 A.L.R. 152, and 48 A.L.R.2d 1069.
>
> The Restatement avoids use of the term 'promissory estoppel,' and there has been criticism of it as an inaccurate term. See 1A Corbin, Contracts, p. 232, et seq., sec. 204. On the other hand, Williston advocated the use of this term or something equivalent. 1 Williston, Contracts (1st ed.), p. 308, sec. 139. Use of the word 'estoppel' to describe a doctrine upon which a party to a lawsuit may obtain affirmative relief offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action. See Utschig v. McClone (1962), 16 Wis. 2d 506, 509, 114 N.W.2d 854. 'Attractive nuisance' is also a much criticized term. See concurring opinion, Flamingo v. City of Waukesha (1952), 262 Wis. 219, 227, 55 N.W.2d 24. However, the latter term is still in almost universal use by the courts because of the lack of the better substitute. The same is also true of the wide use of the term 'promissory estoppel.' We have employed its use in this opinion not only because of its extensive use by other courts but also since a more accurate equivalent has not been devised.
>
> Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it.

The Robinsons assert here that they relied on the promise of enrollment to their detriment.

Promissory estoppel exists when: (1) the promise was one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise did induce such action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. *Id*. at 698. Promissory estoppel rests on a different theory from contract, and therefore promissory estoppel only arises when there is no contract. *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 53, 262 Wis. 2d 127, 663 N.W.2d 715.

However, an exception to this rule exists. The Supreme Court of Wisconsin found that "in situations where the contract fails to embody essential elements of the total business relationship of the parties," the "existence of a

contract does not bar recovery under promissory estoppel." *Kramer v. Alpine Valley Resort, Inc.*, 108 Wis. 2d 417, 421, 321 N.W.2d 293 (1982). The Robinsons argue that their situation fits under this exception.

Wisconsin courts have been clear that promissory estoppel only arises when there is no contract, unless the contract does not embody the essential elements of the business relationship. *See Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶53, 262 Wis. 2d 127, 663 N.W.2d 715; *Teff v. Unity Health Plans Ins. Corp.,* 2003 WI App 115, ¶53, 265 Wis. 2d 703, 666 N.W.2d 38. Even though the 2021-2022 enrollment contract was unsigned, the existence of the 2020-2021 enrollment contract ends the Robinson's promissory estoppel claim. The situation in *Kramer* in which promissory estoppel was granted despite the existence of a contract is easily distinguishable from the case at bar. The contract in

Kramer was very limited in scope and ignored essential features of the business relationship.[13] *Kramer* at 297. The enrollment of A.O.R. and A.Y.R. at USM is the basis of the relationship between the Robinsons and USM. It follows that the enrollment contract contains the essential features of the relationship between the Robinsons and USM. The enrollment contract here is much more robust than the contract in *Kramer* and it sets forth tuition rates and various USM policies, including USM's right to deny enrollment or reenrollment. Additionally, the enrollment contract incorporates by reference the Common Trust and the Student Handbook, which further express USM's policies and procedures. Therefore, the enrollment contract is not limited

[13] The *Kramer* court wrote as follows:

> Our holding today is based on the finding that the lease agreement failed to embody the total business relationship between the parties. Specifically, this is evidenced by the fact that the narrowly drawn lease agreement dealt with one minor aspect, rent and space, of a much larger business relationship, a workshop-gallery open daily to the public. Since the lease agreement entered into between Foxfire and plaintiff is so limited in scope that it fails to provide for essential elements of the parties' total business relationship, it cannot be used to preclude recovery under promissory estoppel.

in scope and covers numerous policies, procedures, and expectations governing the relationship between USM and the Robinsons. Therefore, the Robinson's promissory estoppel claim does not fit into the narrow exception provided by *Kramer*. It is clear, therefore, that the Robinsons would be unable to recover on the promissory estoppel claim, and thus this Court grants dismissal on this count.

E. Good Faith and Fair Dealing

In Count Five of their First Amended Complaint, the Robinsons allege a Breach of the Implied Covenant of Good Faith and Fair Dealing. In Wisconsin, every contract includes the implied promise of good faith and fair dealing between the parties. *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶ 10, 348 Wis. 2d 360, 842 N.W.2d 240. The Court of Appeals has stated as follows:

> A duty of good faith is implied in every contract, and is a guarantee by each party that he or she 'will not intentionally and purposely do anything to prevent the other party from

> carrying out his or her part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Tang v. C.A.R.S. Protection Plus, Inc., 2007 WI App 134, ¶ 41, 301 Wis. 2d 752, 734 N.W.2d 169.

Behaviors recognized as lack of good faith include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference or failure to cooperate in the other party's performance." *Id.*

"The duty of good faith arises because parties to a contract, once executed, have entered into a cooperative relationship and have abandoned the wariness that accompanied their contract negotiations, adopting some measure of trust of the other party." *Metropolitan Ventures, LLC v. GEA Associates*, 2006 WI 71, ¶ 36, 291 Wis. 2d 393, 717 N.W.2d 58. "As the parties' performance in executing the contract increases, so too grows the 'scope and bite of the

good faith doctrine.'" *Id.* "Following the letter but not the spirit of an agreement" may be "a violation of the covenant." *Beidel*, 2013 WI 56. A claim for breach of the implied duty of good faith and fair dealing can be maintained separately from a breach of contract claim. *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 541 N.W.2d 203 (Ct. App. 1995).

"To state a claim for breach of the duty of good faith, a plaintiff must allege facts "that can support a conclusion that the party accused of bad faith has actually denied the benefit of the bargain originally intended by the parties." *Zenith Insurance Co. v. Employers Insurance*, 141 F.3d 300, 308 (7th Cir. 1997).

In their briefs, USM argues that this claim fails as a matter of law, because "it is well-established a party may not 'employ the good faith and fair dealing covenant to undo express terms of an agreement." *Beidel*, 2013 WI 56 at ¶ 29.

USM argues that it cannot have violated the duty of good faith and fair dealing because the enrollment contract states USM may decide not to reenroll students "for any reason." USM highlights to two cases in particular, the *Beidel* case and *Super Valu Stores, Inc*. v. *D-Mart Food Stores, Inc,* 126 Wis. 2d, 431 N.W.2d 721 (Ct. App. 1988). In *Super Valu*, the Wisconsin Court of Appeals held that the franchise agreement at issue "specifically authorized" the franchisor to act in a way that potentially harms the franchisee. *Id.* at 572. The "retail sales agreement" gave Super Value "the right to choose and select its ... retailers and to enter into Super Valu Retailer Agreements with other parties at Super Valu's sole choice and discretion." *Id.* at 571. Because the franchise agreement explicitly stated that the franchisor had the "sole choice and discretion" to enter into other franchise agreements in the

same area, the Court found that there could not be a breach of the implied duty. *Id*.

The Robinsons argue that while the enrollment contract with USM gave USM discretion to deny reenrollment "for any reasons," its discretion is limited and must be used reasonably and with a proper motive.

The case at bar can be distinguished from *Super Valu* and *Beidel*. In those cases, the action under the contract was explicitly allowed. In this case, however, the contract gives USM the capacity to determine the best interests of the school in its sole discretion. That discretion is not unlimited.

Here, the "express" right in the Enrollment Contract is to grant or deny reenrollment. This right is conditioned on a discretionary determination of the school's best interests. Because the agreement leaves things to USM's discretion, the Robinson's case can be distinguished from *Super Valu* and

Beidel. Even if a party has sole discretion, that discretion must comply with the duty of good faith and fair dealing.[14]

The question of whether a party has breached its implied duty of good faith is a question of fact for the factfinder. *Tang v. C.A.R.S. Protection Plus, Inc.*, 2007 WI App 134 at ¶ 41. The court must take all facts alleged in the complaint to be true. Based on the facts alleged, there exists a question of whether USM used its discretion appropriately in determining to deny reenrollment to the Robinson children. Looking at the facts in the complaint, the Court finds that it cannot conclude that under *no* circumstances can the Robinsons recover. As such, the Court will deny the motion to dismiss on this count.

[14] The Plaintiffs cite the *Pabst* case, which has a similar issue that was before another branch of this circuit court. *Pabst Brewing Co. v. MillerCoors LLC*, Order on Mots, for Summ. J., to Dismiss, and to Compel, No. I6CV2536, Dkt. No. 340 at 10 (Mil. Cir. Ct. Apr. 9, 2018),

F. Arbitrary and Capricious Dismissal

The Defense also argues that the Plaintiff's sixth cause of action for "arbitrary and capricious termination" does not exist under Wisconsin law. The Defense states as follows:

> No such cause of action exists under Wisconsin law. And the Robinsons identify no law or statute establishing the contrary. They instead cite a single case decided nearly 100 years ago as purported support for their claim, *Frank v. Marquette*, 209 Wis. 372 (1932)....

Defense Brief in Support of Motion at p. 12.

The Plaintiffs respond as follows:

> In *Frank v. Marquette University*, 209 Wis. 372 (1932), however, the Wisconsin Supreme Court held that an educational institution may not arbitrarily or capriciously dismiss a student or deny him the right to continue his course of study therein. Id. At 377. Other Wisconsin state and federal courts have recognized a resulting cause of action. *See,e.g.., Cosio v. Med. Coll, of Wis., Inc.*, 139 Wis. 2d 241, 246-47 (Ct. App. 1987*); Dumessa v.Concordia Univ. Wis. Campus,* No. 21-CV-0702-BHL, 2022 WL 2238896, at (E.D. Wis. June22, 2022). Wisconsin is just one of many states that allow such claims. *See, e.g., Robinson v.University of Miami,* 100 So. 2d 442, 444 (Fla. Dist. Ct. App. 1958); Woods v. Simpson, 126 A.882, 883 (Md. 1924*); Mitchell v. Long Island Univ.*, 62 Misc. 2d 733,735(N.Y. Sup. Ct. 1970);*Maitland v. Wayne State Univ. Med. Sch.*, 257 N.W.2d 195, 198-99 (Mich. Ct. App. 1977); *Ochsner Health Sys.,* No. 21-205, 2022 WL 656200, at *8 (E.D. La. Mar. 4, 2022); *cf Coveney v. President & Trs. Of Coll, of Holy Cross*, 445 N.E.2d 136, 138-39 (Mass. 1983) (*citing Frank*)

At the motion hearing, wise counsel for the Plaintiff said the following:

> THE COURT: The cases that I've read are littered with that phrase arbitrary and capricious, where does that come from? Is it a contract law concept or—

> [Plaintiff's Counsel]: That's a good question, Your Honor. I understand that the origins of arbitrary and capricious are probably in equity. And then when equity and law were combined, the concepts were imported into contract cases.

September 16, 2022 Transcript at p. 51. In sum, the legal issue here is if a single case such as *Frank* from 1930 is enough still to establish a cause of action?

Having reviewed the case law here and in other jurisdictions, the court has to agree with learned Defense counsel that this area is underdeveloped and somewhat dated. Nevertheless, for the reasons stated below, the claim survives for now. First, following up on what Plaintiff's counsel said at the motion hearing, the court will discuss what a claim in equity is. Second, the court will summarize the *Frank* case. Third, the court will touch upon more recent cases from other jurisdictions for confirmation.

A. What is "Equity"?

The Cornell University Law School website says the following about courts of equity:

> Traditionally, English courts followed a distinction between courts of law and courts of equity. A court of equity is a type of court that hears cases involving remedies other than monetary damages, such as injunctions, writs, or specific performance and a court of law, only hears cases involving monetary damages. The Court of Chancery was an example of an early English court of equity.[15]
>
> Equity courts were widely distrusted in the northeastern United States following the American Revolution. A serious movement for merger of law and equity began in the states in the mid-19th century, when David Dudley Field II convinced New York State to adopt what became known as the Field Code of 1848. The federal courts did not abandon the old law/equity separation until the promulgation of the Federal Rules of Civil Procedure in 1938.
>
> This distinction between the two types of courts has now largely been dissolved. In the United States, the adoption of Federal Rules of Civil Procedure in 1938 gave courts a combined jurisdiction over matters of law and equity. Bankruptcy courts and certain other state courts (in Delaware, Mississippi, New Jersey, South Carolina, and Tennessee) can be considered as remaining examples of courts of equity.
>
> After US courts merged law and equity, American law courts adopted many of the procedures of equity courts. The procedures in a court of equity were much more flexible than the courts at common law. In American practice, certain devices such as joinder, counterclaim, cross-claim and interpleader originated in the courts of equity.

See https://www.law.cornell.edu/wex/court_of_equity [last visited November 14, 2022].

[15] The Chancery Division was reportedly established during the 13th century by the King of England to deal with requests to the King for mercy.

Wisconsin circuit courts are undoubtedly courts of law *and* of equity. Wisconsin Statute Section 753.03 states the following:

> **753.03. Jurisdiction of circuit courts**
>
> The circuit courts have the general jurisdiction prescribed for them by article VII of the constitution and have power to issue all writs, process and commissions provided in article VII of the constitution or by the statutes, or which may be necessary to the due execution of the powers vested in them. The circuit courts have power to hear and determine, within their respective circuits, all civil and criminal actions and proceedings unless exclusive jurisdiction is given to some other court; and they have all the powers, ***according to the usages of courts of law and equity,*** necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to review by the court of appeals or the supreme court as provided by law. The courts and the judges thereof have power to award all such writs, process and commissions, throughout the state, returnable in the proper county.

[emphasis added].

B. The Maxims of Equity

Every law student at some point in his or her legal education learns that one feature of courts of equity is the use of and reverence for, the "Maxims of Equity." The Cornell Law School's website states the following about the maxims of equity:

> Maxims of equity are legal maxims that serve as a set of general principles or rules which are said to govern the way in which equity operates. They tend to illustrate the qualities of equity, in contrast to the common law, as a more flexible, responsive approach

> to the needs of the individual, inclined to take into account the parties' conduct and worthiness. They were developed by the English Court of Chancery and other courts that administer equity jurisdiction, including the law of trusts. Although the most fundamental and time honored of the maxims, listed on this page, are often referred to on their own as the 'maxims of equity' or 'the equitable maxims',The first equitable maxim is 'equity delights in equality' or equity is equality[1][2] Like other kinds of legal maxims or principles, they were originally, and sometimes still are, expressed in Latin.

See https://www.law.cornell.edu/wex/court_of_equity [last visited November 14, 2022].

The maxims of equity include the following:

- Equity regards as done what ought to be done
- Equity will not suffer a wrong to be without a remedy
- Equity is a sort of equality
- One who seeks equity must do equity
- Equity aids the vigilant not the indolent
- Equity imputes an intent to fulfill an obligation
- Equity acts *in personam* (i.e. on persons rather than on objects)
- Equity abhors a forfeiture
- Equity does not require an idle gesture
- He who comes into equity must come with clean hands
- Equity delights to do justice and not by halves
- Equity will take jurisdiction to avoid a multiplicity of suits
- Equity follows the law
- Equity will not assist a volunteer
- Equity will not complete an imperfect gift
- Where equities are equal, the law will prevail
- Between equal equities the first in order of time shall prevail

- Equity will not allow a statute to be used as a cloak for fraud
- Equity will not allow a trust to fail for want of a trustee
- Equity regards the beneficiary as the true owner

Wisconsin courts have cited maxims of equity on numerous occasions. *See, e.g., Prince v. Bryant,* 87 Wis. 2d 662, 674, 275 N.W.2d 676, 681 (1979); *American Med. S., Inc. v. Mutual Fed. S. & L.,* 52 Wis. 2d 198, 205, 188 N.W.2d 529, 533 (1971); *Town of Fond du Lac v. City of Fond du Lac,* 22 Wis. 2d 525, 126 N.W.2d 206 (1964); *Dekker v. Wergin,* 214 Wis. 2d 17, 570 N.W.2d 861 (1997), *review denied* 215 Wis. 2d 425, 576 N.W.2d 281 (1997).

C. The *Frank* Case

The Plaintiffs cite the *Frank* case in support of their cause of action. In *Frank v. Marquette*, 209 Wis. 372 (1932), a medical student who had been expelled appealed a trial court order denying forms of discovery. In a rather short opinion

as was wont in that time period, the Wisconsin Supreme Court wrote the following:

> The plaintiff's petition for an order to compel inspection of certain records of defendant university, relating to certain contemplated or executed disciplinary actions concerning certain classmates of the plaintiff, was made ...
>
> **The law is apparently well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein. So long as they act in response to sufficient reasons and not arbitrarily or capriciously, their acts may not be interfered with by the courts.** Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N. S.) 447; People ex rel. Cecil v. Bellevue Hospital Medical College, 60 Hun, 107, 14 N. Y. S. 490; Valentine v. Independent School District, 187 Iowa, 555, 174 N. W. 334, 6 A. L. R. 1525; Hamlett v. Reid, 165 Ky. 613, 177 S. W. 440; State ex rel. Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294, 17 L. R. A. (N. S.) 930.
>
> A broad discretion is given to schools, colleges, and universities in such matters. United States ex rel. Gannon v. Georgetown College, 28 App. D. C. 87; Gott v. Berea College, 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (N. S.) 17; State ex rel. Stallard v. White, 82 Ind. 278, 42 Am. Rep. 496.
>
> The issue in the pending action is whether the action of the faculty of defendant university or its medical school, in dismissing the plaintiff, and in refusing to graduate him, was, under the circumstances to be proven, reasonable or unreasonable, arbitrary, and capricious. What disciplinary measures were at some time or other contemplated or in fact executed as to certain of the plaintiff's classmates is, in the view we take, quite immaterial. In dealing with students who have violated rules or who have been guilty of conduct requiring discipline, differences may exist requiring or at least reasonably permitting, differences in treatment. In taking disciplinary action against different students, numerous intangibles may exist which tend to influence action one way or the other. To illustrate: Two students may, at a given time, be guilty of substantially similar infractions of disciplinary rules, and yet disciplinary actions quite dissimilar may properly be taken without subjecting the severer action to the charge of being unreasonable, arbitrary, or capricious. We know of no yardstick which either a faculty or a court may apply to the many situations which arise in educational institutions with respect to discipline. To hold that a faculty, for sufficient reasons, may not expel a student because, in a similar action, it had failed to expel another student, would unreasonably embroil educational institutions in long drawn out controversies and trials involving almost everything except the merits of the particular action, or the justness or reasonableness of the act complained of.
>
> These considerations dispose of the very earnest contention of the plaintiff that we should apply to situations of this kind the underlying principles of the equality provisions of both the Federal and State Constitutions. Const. U. S. Amend. 14, Const. Wis. art. 1, § 1. Plaintiff's contention, in substance, is as follows: That, if it appears in a controversy like this that certain disciplinary action has been taken with respect to one which was not so taken at another time with respect to others who were apparently guilty of similar misconduct, such action as to the one is discriminatory and therefore arbitrary and

> capricious. Counsel cites no authority to support his contention, and we doubt that any court has ever substantially so held.
>
> In the view we take, the records of the university relating to disciplinary actions taken by the faculty in other cases are wholly immaterial to the merits of this controversy, and the circuit court therefore did not abuse its discretion in denying the petition of the plaintiff for an order permitting the inspection of the university's records as to contemplated or executed disciplinary measures concerning certain of the plaintiff's classmates who were granted diplomas.
>
> In view of the conclusions reached, we deem it unnecessary to consider other questions raised by the plaintiff.
>
> Order affirmed.

[emphasis added].

While the court appreciates the Defense argument that *Frank* is merely about a discovery issue, and not strictly about whether or not the cause of action exists, it is not possible for this trial court to ignore the Wisconsin Supreme Court's description of the law here as "well settled." It is not dictum. This claim sounds in equity.

D. Case Law

The court's independent research found no published cases in Wisconsin with the fact pattern that a private school expelled a student based on parental conduct. However, the court found a number of cases in other jurisdictions. These

cases are not mandatory here like *Frank* is, but they do provide persuasive support for Plaintiff's contention that this claim exists.

For example, in *Bloch v. Hillel Torah North Suburban Day School*, 426 N.E.2d 976 (Ill. Ct. App. 1st Dist. 1981), the court remanded the case to permit the parents to file an amended complaint requesting money damages. The appellate court appears to have decided that the allegation in the parents' complaint that a private religious grade school had expelled their daughter because of their leadership role in combating an epidemic of head lice at the school. The school contended that the child was expelled for excessive tardiness and absences. The court held that Illinois recognized the availability of monetary damages for wrongful expulsion by a private school that was in breach of contract. Interestingly, the court also granted the school's motion for summary

judgment because the parents had requested specific performance, which is generally an equitable remedy.

In *Buffalo Seminary v. Tomaselli,* 435 N.Y.S.2d 507, 107 Misc. 2d 536 (1981), the court was found that the private secondary school unjustifiably "withdrew from its performance" of a contract to educate a student by suspending her in May of the school year, when it did so, not for any fault of the student but due to her parent's nonpayment of tuition. The school, by means of the enrollment contract, reserved the right to charge a "late-payment fee" if tuition was not paid when due. Just as in this case, the contract stated that students were subject to dismissal *"at any time in [the school's] absolute discretion."* The court concluded that the school had not substantially performed the indivisible contract and was not entitled to any tuition for the year.

In *Allen v. Casper,* 87 Ohio App.3d 338, 622 N.E.2d 367 (8th Dist. 1993) the court held that the parents had failed to produce any evidence that the school had violated their contractual rights or clearly abused its discretion by dismissing their children from the school based on the mother's conduct. The mother had stated that a school administrator was "un-Christian" and "working with the devil." The mother had not agreed with the way in which the school administrator had handled three incidents in which boys purportedly had touched inappropriately or spat upon her third-grade daughter. The mother had voiced her objections, sometimes "loudly," to him, and once to the church minister. After the third incident, the mother became very angry and made the statements described above to the administrator. The school told the parents to withdraw both of their children from the school, or they school would

dismiss them. The court stated that there was no question that the relationship between the parties was contractual, that the terms of the relationship might be expressed in school publications and might govern the circumstances under which a student might be expelled. Because contracts for private education have "unique qualities," the court continued, courts have construed them in a manner which leaves the school broad discretion and courts will not interfere with a school's enforcement of its policies, absent a clear abuse of discretion by the school. The court recited several passages from a copy of the school's admission policies, a parents' agreement, and the school handbook, including one which stated that the refusal by a parent to follow high standards and Biblical principles jeopardized the continued enrollment of the student. The handbook also required parents to "demonstrate a spirit of cooperation,"

and one whereby parents agreed not to complain to other parents about difficulties at school, but "with a prayerful Christian spirit," to complain only to the appropriate teacher or administrator. Another provision in the handbook governing the procedures to be followed if a parent had a grievance, also relied upon by the court, notified parents that their final recourse, should they be unable to accept the administrator's decision, was to seek a meeting with the school board. The court found that the administrator had promptly responded to the mother's complaints, but that she had refused to agree to his disposition of the matters, bypassed proper grievance procedures, and engaged in confrontational tactics. The parents had not shown, the court concluded, that the school had violated their contractual rights or acted **arbitrarily or capriciously** in removing the two children. Rather, the evidence proved to the court that

the parents had failed to comply with admission policies and the student handbook, and the school had acted within its proper discretion.

Finally, in *Van Loock v. Curran*, 489 So. 2d 525 (Ala. 1986), the court held that the parents stated a contract claim against the school. The parents there alleged *inter alia* that the private parochial school had expelled their children, or refused to permit them to return the next term, without cause and without adherence to established procedures. The three boys in question had attended the school all of their lives. All, in fact, were honor students. The parents showed that the boys had been promoted to the next grade and that the parents had preregistered them for the upcoming school year. On the last day of the school year, however, the school principal returned the registration fees and notified the parents that the boys would not be re-enrolled. The parents

brought suit, alleging that the boys were model students and that they had been at all times in complete compliance with the school's academic and conduct requirements, and that their dismissal without cause violated the educational contract. They alleged also that the superintendent of schools had considered evidence outside the record, in breach of contract, when she overturned the decision by a grievance committee to allow the boys to continue at the school, and that the superintendent had not been an impartial reviewer since she initially had recommended to the principal that the children be expelled. The parents requested declaratory judgment, specific performance, both equitable remedies, and monetary damages. The court looked to the terms of the student-parent handbook and found there were the following prerequisites for fall term admission: spring registration, payment of the registration fee, and, for already-enrolled

students, no delinquent tuition. The court determined that the parents had complied with each condition and that the school had accepted the registration. The court found that the parents had alleged facts showing an offer and acceptance supported by consideration, and breach of contract. The court concluded that the school impliedly had agreed to educate the boys during the upcoming term in exchange for the payment of the preregistration fee and continued compliance with school rules and regulations. It was obvious to the court that the school had the discretion to suspend or expel a student for a reason set forth in the handbook, but it observed that the parents had alleged that the boys had complied with all the rules. The court also said that the parents had sufficiently alleged that the school denied them the protections promised in a pamphlet governing grievance procedures. The court rejected in turn the school's argument

that the contract failed for lack of mutuality because the parents had not paid the entire tuition for the upcoming term. The court also rejected the argument that the court did not have jurisdiction over the purely spiritual matter involved, and the argument that the request for specific performance rendered the question moot because the school year had ended.

In summary, several things can be said about these cases where courts considered parental conduct. First, courts almost always note in their opinions that private schools like USM have a substantial measure of discretion in reenrollment matters. Second, courts usually state that there is a reluctance to interfere with or second-guess choices school administrators make. Third, the cases seem to intertwine

contract law and equity claims and remedies.

E. Conclusion

Thus, while the court agrees with the defense that this is a somewhat underdeveloped and perhaps nebulous area of law in Wisconsin, the court has to deny dismissal at this point in the case for several reasons. First, *Frank* is old, but it is a Wisconsin Supreme Court case and is, therefore, mandatory authority for a trial court in this state. Nothing has been presented or argued that the court can say some sort of desuetude has taken place. Second, while courts clearly are substantially deferential to the decisions of academic institutions, the court cannot state at this early point in the case that under *no* set of facts can the defense prevail. The authorities the court cites above clearly show that while courts are deferential and mindful of "foisting" people on

another,[16] that hesitance does not mean there is no possible existence of a claim here.

Legal Conclusions and Orders

1. USM is correct that the complaint does not state a claim for breach of contract as the court under the rules of construction interprets the contract to allow termination with "*any* reason."

2. The complaint does state an initial claim under DTPA.

3. USM is correct that the complaint fails to state a claim for unfair trade practices under Wis. Stat. Sec. 100.20(1t) as no such private cause of action exists.

4. USM is correct that the complaint fails to state a claim for promissory estoppel.

5. The complaint does state a possible claim for possible violation of good faith and fair dealing.

6. The complaint does state a possible claim for arbitrary and capricious dismissal under the *Frank* case.

Dated this 9th Day of December, 2022

[16] USM's case here seems to be bolstered by the fact that this is a decision not to reenroll, and not an expulsion.

Thomas J. McAdams
Branch 7
Milwaukee County