IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

AMY AVALOS, CHELSIE CARTER, SHELBY HUGHES, MARCELLA MADRID, MARGARITA MELENDEZ, FRANCINE SIMMS, JEAN SMITH and ANGELA CAVENDER, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY in its capacity as the body politic for NEW MEXICO STATE UNIVERSITY and DOÑA ANA COMMUNITY COLLEGE,

Defendant-Appellant.

App. Ct. No. 35,251
Dist. Ct. No. D-307-CV-2013-01113
Dona Ana County

PLAINTIFFS/APPELLEES' ANSWER BRIEF

Oral Argument Requested

TREINEN LAW OFFICE PC
ROB TREINEN
500 Tijeras Ave NW
Albuquerque, New Mexico 87102
(505) 247-1980/(505) 843-7129 (fax)

THE PICKETT LAW FIRM LLC
LAWRENCE M. PICKETT
P.O. Box 1239
Las Cruces, New Mexico 88004-1239
(575) 526-3338/(575) 526-6791 (fax)

ALMANZAR & YOUNGERS PA
JOLEEN K. YOUNGERS
P.O. Box 7256
Las Cruces, New Mexico 88006-7256
(575) 541-8000/(575) 541-9000 (fax)

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INTRODUCTION

Defendant/Appellant the Board of Regents for New Mexico State University in its capacity as the body politic for New Mexico State University and Dona Ana Community College ("DACC"), through a Writ of Error predicated on immunity derived from NMSA § 37-1-23(A), asks this Court to ignore the traditional role of the jury and provide its own interpretation of a written contract term, before the jury has had an opportunity to do so. The terms of the contract between DACC and the students are set forth in writing. DACC sends a form offer letter to nursing program applicants. Prospective students must sign this form to indicate that they have accepted DACC's offer of admission, and must sign another form to acknowledge that they have received a handbook, that they have read it and that they will follow it. These documents provide ample evidence that specific and definite statements about core academic matters in the handbook should be construed as contract terms. The statement in the handbook where DACC states its nursing program is nationally accredited is precisely such a statement.

DACC contends that these writings are insufficient to support a claim of breach of contract arising out of the loss national accreditation. It further argues that the disclaimer in its handbook allowed it to unilaterally change or disregard this term. Finally, it argues that the students' claim for breach of written contract really amounts to a claim for educational malpractice.

None of these arguments have merit. The issue before the Court in this § 37-1-23(A) collateral appeal is whether there is adequate evidence of a written contract. Whether DACC's loss of national accreditation is a breach of the identified contract term is a question for another day, after the jury has interpreted the handbook language, in addition to other DACC writings assuring that the program was accredited. If the jury decides in favor of the students, and if DACC decides to appeal, the matter can then be brought before this Court via a substantial evidence challenge. Moreover, if the Court decides to look at the question of breach – and not just the question of whether there exists adequate proof of a written contract dealing with national accreditation – it is plain that a reasonable jury could interpret the handbook statement involving national accreditation as supporting a claim for breach.

DACC's fallback arguments fare no better. The handbook disclaimer does not provide DACC free rein to alter or remove core academic terms like national accreditation. Nor can the students' breach of written contract claim be recast by DACC as a claim for educational malpractice.

The trial court's denial of DACC's motion for summary judgment should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. DACC Loses National Accreditation Causing the Students Harm

This lawsuit concerns the loss of national accreditation by the nursing program at DACC, which is part of the New Mexico State University ("NMSU") system of colleges. The trial court has already determined that according to the National League for Nursing Accrediting Commission ("NLNAC") – which was the name used by the national accrediting body for DACC's nursing program during the relevant time – "the loss of accreditation was caused by DACC's failure to take steps that would have allowed for continued accreditation, such as hiring instructors with a Master's degree or having in place a systematic student review system."[1] [7 RP 1259 (Findings ¶¶ 4, 6)]. The trial court determined that "NLNAC formally informed DACC of the loss of national accreditation via a letter dated July 30, 2012." [*Id.* (Findings ¶ 7)].

The trial court has also entered unchallenged findings concerning the impact that the loss of national accreditation had on the students. When the students learned of the loss, many transferred to NMSU's nursing program, with NMSU waiving tuition, so that they could finish with a nationally accredited degree, which

[1] The trial court further determined that "[s]imilarly situated nursing programs – like the Nursing Program at NMSU-Carlsbad – have been able to meet NLNAC accreditation requirements and maintain national accreditation." [7 RP 1259 (Findings ¶ 10)].

is "required by some educational institutions offering further studies in nursing and by some employers."[2] [7 RP 1259-60 (Findings ¶¶ 5, 18, 19)]. The transfer to a nationally accredited program meant that all the class members "had to retake classes," were subject to "other attendant costs – such as for testing fees, uniforms, and fees related to classes that had to be repeated – that were not covered by DACC," and, most significantly, were delayed in entering the workforce for "an average of one year."[3] [7 RP 1260 (Findings ¶¶ 21, 22, 25)].

B. The Students Bring a Claim for Breach of Written Contract

On May 10, 2013, Plaintiffs, who are eight students harmed by DACC's loss of national accreditation, came together and filed a class action complaint on behalf of themselves and the other students who had been similarly harmed. [1 RP 1-17]. They brought a claim for breach of contract based on DACC's student handbook and other writings, plus other claims which were later dropped.[4] [1 RP 14; 7 RP 1311-12]. This handbook contains a disclaimer that reads:

> The Division Dean of Health and Public Service and the Nursing Program faculty reserve the right to alter without prior notice all policies, faculty assignments, time schedules, course assignments, courses, grading, curricula, and all other matters contained in the DACC Nursing Program Handbook.

2 Some of the students, and one of the class representatives, finished up at a nationally accredited program other than NMSU and thus incurred tuition costs. [7 RP 1260 (Findings ¶ 20)].
3 The trial court has determined that these financial damages "are significant, exceeding $52,000 per person for [the] delay" alone. [7 RP 1262 (Findings ¶ 42)].
4 Plaintiffs did not ever bring a claim for educational malpractice. [1 RP 1-17].

[6 RP 1001].

Via discovery it was revealed that DACC had used a form letter when it offered qualified prospective students a position in the nursing program. This form letter required the prospective student to mark a blank space if the student wished to accept DACC's offer of admission. [6 RP 986-90]. The text next to this blank space reads "I wish to accept the offer to enter the Nursing Program . . .." [6 RP 986].

Students accepting DACC's offer of admission were also required to sign a form acknowledging that they had received the handbook, read it and would abide by it. [6 RP 1003-09]. This handbook contains an unequivocal statement about national accreditation: "The DACC Nursing Program is accredited by the National League for Nursing Accreditation."[5] [6 RP 1011].

C. The Trial Court Certifies the Class

When the students moved the trial court for class certification, a central issue was whether the breach of written contract claim was amenable to class-wide proof. [3 RP 451-65; 4 RP 636-45; 4 RP 746-54]. The students pointed the trial court to the form offer letter that required them to mark a blank space indicating

[5] This statement about national accreditation appears at the end of what is essentially an academic ledger, which DACC provided, as part of the handbook, for the students to use to keep track of their progress with the curriculum that they need to graduate. [6 RP 1010-11].

that they accepted DACC's offer of admission; the acknowledgement form that incoming students were required to sign whereby they acknowledged that they had received the handbook, read it and would abide by it; and the handbook itself which plainly stated that DACC's nursing program was nationally accredited.[6] [4 RP 752].

Two years after the filing of the complaint, the trial court certified the class. [7 RP 1274-76]. In connection with its decision to certify the class on the breach of written contract claim, the trial court entered extensive findings of fact. [7 RP 1258-1263]. The trial court determined:

> During the relevant time, entry into DACC's Nursing Program was accomplished via submission of a written application from prospective students, then DACC determined which students would be offered a position and sent each a form offer letter. The students who accepted DACC's offer did so by signing and submitting a form that required them to check the first of two spaces, with those two spaces reading:
> _____ I wish to accept the offer to enter the Nursing Program . . .
> _____ I do not wish to accept the offer to be admitted to the Associate Degree Nursing Program.[7]

6 The students also noted that the handbook required that they read the DACC Catalog, which also stated that the program was accredited, a fact that the trial court recited in its Findings. [2 RP 302; 4 RP 752; 6 RP 1000-01; 7 RP 1260 (Findings ¶¶ 13, 14)].

7 The trial court noted that this language in the form offer letter sometimes differed slightly, but the difference is of no import. The trial court stated, "In some years, the DACC form changed slightly so that it read "I wish to accept the offer to be admitted to the ADN Program . . .."" [7 RP 1259 (Findings ¶ 11 (ellipsis in original))].

[7 RP 1259 (Findings ¶ 11 (ellipsis in original))].[8] It further determined:

> The students had to sign a form acknowledging that they had received the Student Handbook and would abide by it.

[7 RP 1260 (Findings ¶ 12)].[9]

> DACC stated in writing in its 2011-2012 Student Handbook and in its corresponding Catalog that students in the Nursing Program would receive a nationally accredited education.

[7 RP 1260 (Findings ¶ 13)].[10]

> The contract that was formed between DACC and the students whereby DACC was obligated to provide a nationally accredited education, as alleged by Plaintiffs, is centered in written form documents.

[7 RP 1262 (Findings ¶ 50)].

D. The Trial Court Denies DACC's Motion for Summary Judgment

DACC elected not to appeal class certification even though the rules allow for such a collateral appeal. *See* NMRA 12-203A. Instead, after the trial court certified the class, it sought a decision on its pending motion for summary judgment. It made the same arguments below as it makes here: that there exists no

[8] Plaintiffs also relied on this form offer letter to counter DACC's summary judgment arguments. [6 RP 986-90].
[9] Plaintiffs also relied on this handbook acknowledgement form to counter DACC's summary judgment arguments. [6 RP 1003-09].
[10] Plaintiffs also relied on this statement in the handbook, echoed again in the catalog, to counter DACC's summary judgment arguments. [6 RP 1010-11; 6 RP 1114-16]. DACC's website also stated, during the relevant time, that the nursing program was nationally accredited. [6 RP 1012-13].

written contract because the term about national accreditation could be interpreted as a factual description about the nursing program being nationally accredited at the time; that no written contract can exist because the disclaimer in the handbook allows DACC to unilaterally change or disregard the term about national accreditation, and that Plaintiffs' claim for breach of contract must fail because this claim is really an impermissible claim for educational malpractice. [5 RP 770-810; 7 RP 1225-47].

The trail court's decision on DACC's motion for summary judgment built on the earlier class certification ruling and findings of fact, which had not been challenged by DACC. The same documents that led to the finding that Plaintiffs' breach of written contract claim could be proven up on a class-wide basis also provided the basis for denial of DACC's summary judgment motion. [6 RP 986-90; 6 RP 1003-09; 6 RP 1010-11; 6 RP 1114-16; 7 RP 1259 (Findings ¶ 11); 7 RP 1260 (Findings ¶ 12); 7 RP 1260 (Findings ¶ 13); 7 RP 1262 (Findings ¶ 50)]. In denying summary judgment, the trial court stated: "I think that it's clear that there is a written contract, there is a written offer and a written acceptance and there is a written representation that the product being promised is a product that has a national accreditation." Tr. of 11/30/14 hearing at 10:05:11.[11]

[11] The summary judgment hearing has been transcribed. Plaintiffs attached the transcript to their Response Brief in Opposition to Petition for Writ of Error. In addition to the audio recording, the quoted language appears in this attached

ARGUMENT

I. There Exists a Written Contract that Obligated DACC to Provide a Nationally Accredited Nursing Education

DACC's first argues that the trial court "completely ignored the record evidence in this case" when it concluded that sufficient evidence of a written contract concerning national accreditation existed to allow this lawsuit to proceed. Appellant's Brief at 9. This first argument is the one most properly rooted in NMSA § 37-1-23(A), which provides state entities with immunity "except [for] actions based on a valid written contract," and which provides the sole basis for DACC to bring this appeal. NMSA § 37-1-23(A).

What is most telling about DACC's argument is its failure to grapple with critical and established facts. DACC only obliquely addresses the offer letter and the form document that incoming students were required to sign acknowledging that they had received the student handbook and would abide by it. Appellant's Brief at 8-9. DACC does not and cannot overcome the clear import of these documents to the written contract analysis that is proper under § 37-1-23(A).[12]

transcript. *See* Brief filed 1/22/16 at Exhibit 4, 49:21 - 50:1.

12 DACC's lack of "specific attack" on the trial court's particular findings about the offer letter and the handbook acknowledgement form requires that those "findings . . . be deemed conclusive," and that any substantial evidence challenge "shall be deemed waived." NMRA 12-213(A)(4). *See also University of New Mexico Police Officer's Association v. University of New Mexico*, 2005-NMSC-30 at ¶ 7 (rejecting defendant's § 37-1-23(A) argument because the trial court had

Rather than directly address the plain meaning of these documents, DACC tries to obscure the key role played by them below, including in the summary judgment ruling that DACC now appeals. First, DACC argues that the offer letter and handbook acknowledgement form are not mentioned in Plaintiffs' complaint. *Id.* at 8. Rather, DACC argues, in the complaint, Plaintiffs centered their breach of written contract claim on the statement in the handbook concerning national accreditation. *Id.* DACC also asserts that the trial court "stated only that it found a written offer and written acceptance, but did not identify which documents it relied on in reaching this conclusion." *Id.* at 9.

These arguments are flimsy. New Mexico endorses a liberal notice pleading regime. *See Zamora v. St. Vincent Hospital*, 2014-NMSC-35. A plaintiff is not required to recite in the complaint every component of factual support for his claim as long as the theory for liability is adequately set forth. *Id.* at ¶ 12 ("It is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim; specific evidentiary detail is not required at the complaint stage of the pleadings.") (quotation marks, editorial parenthesis and citation omitted).

entered findings that the contract was properly interpreted to contain the dispositive term and the defendant "did not dispute these factual findings below").

Moreover, the offer letter and handbook acknowledgement form were central to the rulings of the trial court below and to the arguments that led to those rulings. "When issues not specifically raised in the pleadings are litigated with either the express or implied consent of the parties, the issues are treated as if they had been set forth in the pleadings." *San Juan Water Commission v. Taxpayers and Water Users of San Juan County*, 1993-NMSC-50, ¶ 10 (citation omitted). As shown above, the offer letter and handbook acknowledgement form provided the factual grounds for the trial court's ruling that class certification was appropriate because the breach of written contract claim could be resolved on a class-wide basis. *See infra* at 5-7. These documents were central to Plaintiffs' arguments in response to DACC's motion for summary judgment. *See infra* at 8. And they formed the basis for the trial court's denial of DACC's summary judgment motion. *See id.* DACC's assertion that the trial court did not rely on these specific documents in determining what constituted the written contract is contradicted by the record below.

The handbook acknowledgement form required incoming students to acknowledge, by signing the form, that they had received the handbook and would abide by the policies set forth in it. In this handbook, DACC stated: "The DACC Nursing Program is accredited by the National League for Nursing Accreditation." DACC does not dispute these facts. Appellant's Brief at 3. Thus, the written

contract relied on by the students obligated DACC to provide a nationally accredited education. DACC argues that this term may not support a claim for breach at the point in time where DACC lost its national accreditation, but, as is explained below, this is a question of interpretation, not formation, and DACC's quibbling does not raise a valid challenge for § 37-1-23(A) immunity purposes. *See infra* at § II.

The three documents relied on by the trial court – the offer letter, the handbook acknowledge form and the handbook itself – comprise a written contract wherein DACC stated that the education to be provided was a nationally accredited nursing education. *See Garcia v. Middle Rio Grande Conservancy District*, 1996-NMSC-29, ¶ 9 ("Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration and mutual assent.") (quotation marks and citation omitted). Offer and acceptance are shown by the offer letter. The relevant contract term – that the education to be provided will be a nationally accredited nursing education – is evidenced by the statement in the handbook where DACC stated exactly this: that the program is nationally accredited. That this statement is a contract term is further supported by the handbook acknowledgement form that all incoming students had to sign.

As to the other two elements of contract – consideration and mutual assent – DACC challenges neither element, nor could it. The students provided

consideration in the form of tuition, attending classes and abiding by the policies in the handbook. DACC provided consideration by making available the classrooms and instructors and other components of the promised education. Mutual assent is self-evident by the fact that the students paid tuition and attended classes until DACC lost its national accreditation, at which time DACC arranged to have the students continue in a different nationally accredited program, although at great personal and financial cost to the students.

Other writings further confirm that DACC obligated itself to provide a nationally accredited education, but these other writings are not needed to establish the formation of a written contract for purposes of § 37-1-23(A) immunity. These additional writings echo the handbook statement about a nationally accredited education, including statements in DACC's Catalog and statements on its website, *see infra* at 7, n.10, but, because the statement about national accreditation in the handbook itself is so unambiguous, these further writings are not necessary for § 37-1-23(A) immunity purposes.

Of course, to the extent DACC argues at trial that the handbook statement does not provide a basis for breach at the point when DACC lost its accreditation, the students will point to these additional writings as confirming evidence that the handbook statement constituted a promise that accreditation would exist until graduation for the students who accepted admission under that handbook. *See*

Mark V, Inc. v. Mellakas, 1993-NMSC-1. But consideration of such extrinsic evidence, to the extent it is ever even needed here, is a matter of contract interpretation for the jury. *Id.* at ¶ 13. *See also infra* at § II. And, in any event, it should be remembered that under New Mexico law, the handbook statement must be interpreted against DACC, the drafter of the handbook. *See Montoya v. Villa Linda Mall, Ltd.*, 1990-NMSC-53, ¶ 10 ("uncertainties are construed against the drafter") (citation omitted).

Contrary to DACC's arguments, nothing need be implied to show there exists a written contract that the education to be provided will be a nationally accredited education. The contract language in the predicate documents is all that is needed to show a written contract sufficient to overcome § 37-1-23(A) immunity. The question of whether the term remained in effect when DACC lost its accreditation is a question of interpretation, not formation, and goes beyond what is to be considered in a § 37-1-23(A) collateral appeal. *See infra* at § II.

DACC also argues that, as a matter of law, a student handbook can never furnish contract terms. Appellant's Brief at 10-15. DACC relies on a misreading of *Reugsegger v. Board of Regents of Western New Mexico University*, 2007-NMCA-30, ¶ 23 *cert. denied* 140 N.M. 845 (N.M. 2006), to push this argument. DACC is wrong. *Reugsegger* does not stand for the proposition that New Mexico courts can never find a written contract based, in part, on a statement that appears

in a student handbook.

It is well established that a contract can consist of several related writings. *See Crow v. Capitol Bankers Life Insurance Company*, 1995-NMSC-18, ¶ 29. And although New Mexico has not yet decided whether a student handbook, by itself, "creates a contractual relationship between a student and a post-secondary educational institution," *Ruegsegger*, 2007-NMCA-30 at ¶ 23, that is not the situation here. Here, the offer letter and the handbook acknowledgement form – the latter of which specifically references the handbook as the document that governs the respective obligations of DACC and the students – are what give the handbook the necessary characteristics of a contract.

The present lawsuit does not require this Court to endorse a theory that all or even most of the statements in a student handbook could be construed as contract terms. Rather, consistent with *Ruegsegger*, this lawsuit only requires this Court to endorse student handbook language that is imbued with "definiteness, specificity, or explicit nature of the representation at issue." *Id.* at ¶ 24. The handbook statement about national accreditation is precisely such language. It reads: "The DACC Nursing Program is accredited by the National League for Nursing Accreditation."

It must be remembered that in *Ruegsegger* this Court engaged in analysis of whether a student handbook could form a written contract, "assum[ing] without

deciding" that such analysis was proper. *Id.* at ¶ 22. This Court ultimately decided no written contact existed regarding the university's handling of a rape investigation, but the Court did so because the handbook language was indefinite, setting forth only procedures, but no standards, for sexual assault investigations. *See id.* at ¶ 28. Moreover, the result in *Ruegsegger* was guided by out-of-state opinions where courts had found student handbooks to form a contract where the matter at issue dealt with "promises related to academic matters." *Id.* at ¶ 32. Here, the handbook statement plainly concerns one of the most, if not the most, important core academic matters: national accreditation.

Public policy considerations also support a narrower construction of *Ruegsegger* than that sought by DACC. As stated in *Ruegsegger*, this Court "look[s] to cases that have arisen in the employment context for guidance" when considering whether a student handbook constitutes a contract in the higher education context. *Id.* at ¶ 23. In the employment context and in the educational context, there exist the same "imbalance of power between the parties" that counsels for the finding of a valid written contract that "enforces the reasonable expectations" that the superior party – the employer or the educational institution – "creates in their" employees or students.[13] *See Campos de Suenos*, 2001-NMCA-

[13] In the higher education context, the circumstances lend themselves more readily to the finding of a valid written contract than in the employment context. While the employment relationship in New Mexico is presumed to be at-will, *Garcia v.*

43 at ¶ 26. In both contexts, the Legislature cannot have intended the "injustice" that would result if employees or students could never sue for breach of contract "no matter how egregious the breach and no matter how well-documented" the contract. *Id.* at ¶ 28.

With the present lawsuit, this Court has before it a highly compelling set of facts with which to establish under what circumstances a student handbook can furnish contract terms. The offer letter and the handbook acknowledgement form provide strong objective indicia of a written contract. The handbook statement is definite and specific and goes directly to the core academic matter that is at issue in this lawsuit: national accreditation. It is entirely within students' and higher education institutions' objectively reasonable expectations to believe that when an

Middle Rio Grande Conservancy District, 1996-NMSC-29, ¶ 10, the general rule is that "the relationship between a university and its students is contractual in nature." *Basch v. George Washington University*, 370 A.2d 1364, 1366 (D.C. Ct. App. 1977). *See also Anderson v. Regents of the University of California*, 22 Cal. App. 3d 763, 769, 99 Cal. Rptr. 531, 535 (Cal. Ct. App. 1972) ("That, by reason of plaintiff's enrollment as a student, there arose a contract between him and the university may not be questioned."); *Behrend v. State of Ohio*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977) ("Generally it may be stated that when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature."); *Deen v. New School University*, No. 05-CV-7174, 2007 U.S. Dist. LEXIS 25295 at *7 (S.D.N.Y. Mar. 27, 2007) ("the relationship between a university and its students is contractual"); *Kashmiri v. Regents of the University of California*, 156 Cal. App. 4th 809, 824, 67 Cal. Rptr. 3d 635, 646 ("there seems to be almost no dissent from the proposition that the relationship between a public post-secondary educational institution and a student is contractual in nature") (quotations, ellipsis, editorial parenthesis and citation omitted).

institution says its program is nationally accredited, it will deliver a nationally accredited education. *See Ruegsegger*, 2007-NMCA-30 at ¶ 24 (student handbook can create contractual rights where the language at issue provides for a "reasonable expectation" of such rights). *See also Behrend v. State of Ohio*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977) ("where one enrolls in a college or university in order to obtain instruction in a given professional discipline, he or she does so with the reasonable thought that such college or university has been accredited by the appropriate accrediting agency").

The reasonableness of such an expectation is reflected in the actions that DACC itself took when it lost accreditation. Once national accreditation was lost, DACC arranged to have the students continue in a different nationally accredited program, although at great personal and financial cost to the students. To hold that DACC's handbook statement about national accreditation means nothing would allow a grave injustice to go without remedy.

II. Whether DACC Can Be Held Liable for Breach of Contract Because National Accreditation Was Lost Does Not Implicate § 37-1-23(A) Immunity

DACC argues that the handbook statement about national accreditation cannot support a claim for breach of contract because the statement was not expressly conveyed as a promise. Appellant's Brief at 11, 13-16. DACC further argues that the written statement cannot support a claim for breach because such a

construction would require DACC to maintain accreditation forever. *Id.* at 5, 10. Both these arguments are tangential to the immunity issue before this Court. Both these arguments do not go to whether there exists a valid written contract for a nationally accredited education as much as they go to whether there is adequate support for a claim for breach given that DACC later lost its accreditation. Both these arguments are too far afield from the immunity issue – that is, whether there is adequate evidence of a valid written contract – to be grounds for reversal via a Writ of Error.

It is true that New Mexico jurisprudence sometimes allows, through a Writ of Error, review of the denial of summary judgment involving contract issues where the defendant is a state entity entitled to § 37-1-23(A) limited immunity. *See Handmaker v. Henney*, 1999-NMSC-43. However, the only legal question in this species of collateral appeal is whether a valid written contract exists. *Handmaker*, 1999-NMSC-43, ¶ 15 ("our review by writ of error is necessarily limited by the nature of immunity . . . under Section 37-1-23(A) [which] is limited to unwritten contracts and does not apply to a contract action against the government that is based on a valid written contract"). Where the argument on appeal is more centered on whether the contract language provides for a valid claim for breach, the Writ of Error must be denied. *Id.* ("Determinations at the

summary judgment stage as to whether genuine issues of material fact exist on a claim of breach of contract do not require immediate appeal.").

This is so because "the collateral order doctrine [does] not apply [where] the defendant's arguments [are] inseparable from the merits of the claim," such as when the issue is one of the meaning of the contract language. *Id.* at ¶ 16 *citing Johnson v. Jones*, 515 U.S. 304, 314 (1995). Where the appeal involves interpretation issues, rather than solely whether or not a written contract exists, the traditional finality factors of "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources" outweigh the more tangential immunity concerns. *Id. quoting Johnson*, 515 U.S. at 317. It follows that considerations of § 37-1-23(A) immunity via Writ of Error should be limited to "cases presenting more abstract issues of law." *Id. quoting Johnson*, 515 U.S. at 317. *See also Campos de Suenos, Ltd. v. County of Bernalillo*, 2001-NMCA-43, ¶ 17 *cert. denied* No. 26,934 (June 28, 2001) ("Our immediate review of immunity claims by writ of error is usually reserved for discrete legal issues that do not depend on extensive factual analysis for their resolution.").

In *University of New Mexico Police Officer's Association v. University of New Mexico*, 2005-NMSC-30, ¶ 10, the New Mexico Supreme Court endorsed a helpful dichotomy for determining when there is sufficient evidence of a written contract to overcome § 37-1-23(A) immunity. On the one hand, the facts that

underlie *Handmaker* and *Garcia* exemplify where there is adequate evidence of a valid written contract and thus any Writ of Error should be denied because the dispute is really about the "details of [the] existing . . . relationship." *Id.* Conversely, *Campos de Suenos* and *Trujillo v. Gonzales*, 1987-NMSC-119, show circumstances where adequate evidence of a written contract is lacking, so reversal on a Writ of Error would be appropriate. *Id.*

The facts here belong squarely on the *Handmaker* and *Garcia* side of the dichotomy. In *Handmaker*, there was no real dispute about whether Dr. Handmaker had entered into a written employment contact that included language about his position as the director of a program. 1999-NMSC-43 at ¶ 17. The issue in dispute was whether the contact language provided him a cause for breach when he was later removed from the director position. *See id.* at ¶ 20 ("The true issue raised in UNM's motion for summary judgment was not whether a written contract with a governmental agency existed, but, instead, the meaning of the terms and conditions of an existing written contract between UNM and Dr. Handmaker, specifically the terms of removal from administrative positions."). But because this issue "require[d] the interpretation of a written contract," it was too "unrelated to [the] assertion of sovereign immunity" to provide for reversal. *Id.*

The same is true here. At issue is not whether the handbook states that DACC's nursing program is nationally accredited. That fact is undisputed. What

DACC is really arguing is that it is not fair to interpret this language as allowing for a claim for breach when it later lost its national accreditation. But that question goes to the interpretation of the written term, not to whether the predicate language exists in a writing that can be fairly interpreted as contractual.

Similarly, in *Garcia*, the employee was "offered and accepted employment" and the terms of the employment were defined in a Personnel Policy that was adequately "specific so that employees may rely on its provisions and may expect that the [governmental entity] will conform as well." 1996-NMSC-29 at ¶¶ 1, 9, 12. Because the Personnel Policy included language specific to standards for demotion, § 37-1-23(A) immunity was not triggered. *Id.* at ¶¶ 12, 20. Again, like here, the written document that set forth the contract terms contained language specific to the obligation that the plaintiff alleged had been breached, so what was really at issue was interpretation of the language, not the existence of a written contract.

As implicitly conceded by DACC's own arguments, the key issue in the present appeal is whether the handbook statement is sufficient to allow for the students' breach claim once DACC lost national accreditation. Per *Handmaker* and *Garcia*, that is more an issue of contract interpretation, and less a formation issue, and thus § 37-1-23(A) immunity is not validly invoked.

An examination of *Campos de Suenos* and *Trujillo* bolsters this conclusion. In *Campos de Suenos*, the sale to a state entity of a ballpark was negotiated for months, but "the parties could never agree to the terms" and as a result "[n]o written contract for the sale of the ballpark was ever executed." 2001-NMCA-43 at ¶ 3. In light of this failure, this Court "reject[ed] the proposition that evidence of partial writings sufficient to satisfy the common-law statute of frauds would constitute compliance with § 37-1-23(A)," especially given that the proffered writings were nothing more than the debris of the failed contract negotiations, "such as transcripts of meetings, staff summaries, and the like." *Id.* at ¶¶ 19, 23. The evidence of a valid written contract in *Trujillo* was even weaker. In *Trujillo*, the only evidence of a written contract for two years of employment were meeting minutes that record Mr. Trujillo was hired on an at-will basis coupled with allegations of an oral promise that the employment would last for at least two years. 1987-NMSC-119 at ¶¶ 2, 6, 7.

In contrast, here the statement about national accreditation was not oral but appears in writing in the handbook, the very document that sets forth DACC's and the students' respective duties and obligations, a fact made exceedingly clear by the handbook acknowledgement form that incoming students were required to sign. Moreover, the writings that evince offer, acceptance and the relevant terms are not what was left on the floor after failed negotiations, but constitute exactly what one

would expect to see when a student accepts an offer of admission to a higher education institution.

In short, DACC's arguments about how the handbook statement should be interpreted do not raise an issue that validly implicates § 37-1-23(A) immunity. Rather, New Mexico jurisprudence mandates that the jury must decide such interpretation issues. *See Mark V*, 1993-NMSC-1 at ¶ 13 ("factual issues, if any, presented by an ambiguity must be resolved by the jury"), with DACC free to appeal the jury's decision, if adverse, after final judgment. To decide otherwise would turn the limited appeal rights conferred by § 37-1-23(A) into an unfettered route to collateral appeal, displacing the role that juries serve to resolve factual matters, *see Mark V*, 1993-NMSC-1 at ¶ 13, eviscerating New Mexico's disfavor of piecemeal appeals, *see Executive Sports Club, Inc. v. First Plaza Trust*, 1998-NMSC-8, ¶ 11 (policy of discouraging piecemeal appeals rooted in providing for judicial efficiency, allowing for meaningful appellate review and "protecting against the premature exercise of appellate jurisdiction"), and upending the proper role of the appellate courts. *See Albuquerque National Bank v. Albuquerque Ranch Estates*, 1982-NMSC-142, ¶ 56 ("The function of an appellate court is to view the evidence in a light most favorable to support the findings and conclusions of the trial court.").

Moreover, DACC's arguments in support of its curious interpretation of the

handbook statement are insubstantial. *See Whittington v. State of New Mexico Department of Public Safety*, 2004-NMCA-124, ¶ 9 (rejecting similar argument, noting "Defendants did not provide with their motion any evidence that would support the conclusion that the Manual merely contains general statements of policy not binding on the parties"). The contract does not require DACC to maintain national accreditation until the end of time. It need only maintain accreditation for the students, like those within the Class, who accepted the offer of admittance into the nursing program where the handbook at the time stated that DACC had national accreditation. If, at some future point in time, DACC decided to voluntarily surrender national accreditation, it need only graduate the students who contracted for an accredited program and then change its handbook and advertising and let incoming students know that the program will no longer be nationally accredited.

Moreover, as stated above, *see infra* § I, it is objectively reasonable to believe that when a higher education institution says its program is nationally accredited, it will deliver a nationally accredited education. *See also Campos de Suenos*, 2001-NMCA-43 at ¶ 10 ("Once the decision has been made to review a summary denial of immunity, we resolve evidentiary issues as we do in any summary judgment case, that is, in the light most favorable to the party opposing the motion.") (quotation marks and citation omitted). Indeed, DACC itself acted as

if this were always the expectation. Once national accreditation was lost, DACC arranged to have the students continue in a different nationally accredited program, although at great personal and financial cost to them.

III. The Disclaimer in DACC's Handbook Does Not Allow It to Unilaterally Change or Disregard Core Academic Contract Terms Like National Accreditation

DACC also argues that the disclaimer in the handbook allowed it to change the handbook in any way and whenever it wanted, rendering any contract illusory. Appellant's Brief at 16-17. But the disclaimer is not that broad. It is telling that DACC does not recite the actual language of the disclaimer in its Brief. The disclaimer reads:

> The Division Dean of Health and Public Service and the Nursing Program faculty reserve the right to alter without prior notice all policies, faculty assignments, time schedules, course assignments, courses, grading, curricula, and all other matters contained in the DACC Nursing Program Handbook.

The disclaimer does not mention national accreditation. *Contra Rodi v. Southern New England School of Law*, 532 F.3d 11, 17 (1st Cir. 2008) *cert. denied* 555 U.S. 1175 (2009) (affirming summary judgment against student's claims where "law school catalogue contained a disclaimer which provided: 'The Law School makes no representation to any applicant or student that it will be approved by the American Bar Association prior to the graduation of any matriculating student.'"). It talks specifically only of changes to "policies, faculty assignments,

time schedules, course assignments, courses, grading [and] curricula," not about core academic matters like national accreditation. *See Deen v. New School University*, No. 05-CV-7174, 2007 U.S. Dist. LEXIS 25295 at *9-14 (S.D.N.Y. Mar. 27, 2007) (denying university summary judgment based on similar disclaimer, stating disclaimer should be interpreted narrowly not to encompass changes that impact "the program's fundamental identity"). Most importantly, the disclaimer does not state that statements in the handbook cannot create a contract. *Contra Ruegsegger*, 2007-NMCA-30 at ¶ 29 ("the Handbook states that its provisions 'are not to be regarded as a contract' and [the university] specifically reserves the right to amend the handbook at any time 'as required for effective management of the University.'").

Nor can DACC excuse its breach by removing the term about national accreditation after the breach. If this was the law, there could never be a successful breach of contract action, because all the breaching party would have to do was remove the contract term once it breached the contract.

In any event, under New Mexico law, the meaning of the handbook disclaimer is a jury question to be resolved with reference to extrinsic matters. *See Beggs v. City of Portales*, 2009-NMSC-23, ¶ 20 ("even where a personnel manual purports to disclaim any intentions of forming contractual obligations enforceable against an employer, a fact finder may still look to the totality of the parties'

statements and actions, including the contents of a personnel manual, to determine whether contractual obligations were created"); *West v. Washington Tru Solutions, LLC*, 2010-NMCA-1, ¶ 17 (where there exist "contrary representations in the Handbook" then "disclaimers are not dispositive"). DACC's very limited disclaimer cannot be the basis for reversal on a Writ of Error limited to § 37-1-23(A) immunity.

IV. The Students Have Not Brought a Claim for Educational Malpractice

DACC spends a substantial portion of its Brief discussing opinions where courts have held that no claim for educational malpractice should be recognized. Appellant's Brief at 20-29. That courts do not recognize a claim for educational malpractice is immaterial for the simple reason that Plaintiffs did not bring a claim for educational malpractice or even a claim that can reasonably be interpreted as a claim for educational malpractice. *See also Self v. United Parcel Service, Inc.*, 1998-NMSC-46, ¶ 17 *quoting Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) (under "the well-pleaded complaint rule" it is manifest "that the plaintiff is the master of the complaint," and it follows that defense arguments based on claims that do not appear on the face of the complaint should fail). Instead, Plaintiffs brought a claim for breach of written contract and that is all that is before this Court with this § 37-1-23(A) appeal. This last-ditch argument is so far afield from the § 37-1-23(A) immunity issue that it should not even be considered.

If DACC's educational malpractice argument is considered, it has no application to this lawsuit. The opinions that DACC cites to push forward its argument do not help its cause. These opinions show instead that this lawsuit is properly brought under a breach of written contract theory. Plaintiffs challenge DACC for its failure to live up to its written contract to provide a nationally accredited nursing education. As explained above, this claim arises out of specific and definite contractual language dealing with national accreditation. *See infra* at § I. In this lawsuit, Plaintiffs does not wage a broad "attack [on] the general quality of education provided," *see Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468, 476 (Minn. Ct. App. 1999) *cited in* Appellant's Brief at 21, or on DACC's alleged failure "to provide an effective education." *See Paladino v. Adelphi University*, 89 A.D.2d 85, 89-90, 454 N.Y.S.2d 868, 872 (N.Y. Sup. Ct. 1982) *cited in* Appellant's Brief at 21, n.10. As made clear by *Ross v. Creighton University*, 957 F.2d 410, 417 (7th Cir. 1992) – the very opinion most heavily relied upon by DACC – because this lawsuit is centered on an "identifiable contractual promise that the defendant failed to honor" it is properly brought under a breach of contract theory.

DACC's effort to recharacterize Plaintiffs' breach of contract claim into an impermissible educational malpractice claim is not well taken. In *Malone v. Academy of Court Reporting*, 582 N.E.2d 54 (Ohio Ct. App. 1990), the court

considered this same argument in a lawsuit similar to this lawsuit. The court noted that the "plaintiffs [had] not mentioned educational negligence or malpractice anywhere in the complaint" but instead had brought a breach of contract claim because the school "had not been certified or accredited" as promised. *Id.* at 57. The court further noted that '[t]he so-called educational malpractice claim has not been well received" but ruled that fact meaningless because the plaintiffs' breach of contract claim was predicated on an unfulfilled promise of an accredited education and "breach of contract . . . claims by students against educational institutions have been entertained by the courts for some time." *Id.* at 58 (citations omitted). The same reasoning applies here.

CONCLUSION

Plaintiffs and the Class request that the Court deny DACC's Writ of Error.

Respectfully submitted:

TREINEN LAW OFFICE PC

ROB TREINEN
500 Tijeras Ave NW
Albuquerque, New Mexico 87102
(505) 247-1980
(505) 843-7129 (fax)

ALMANZAR & YOUNGERS PA
JOLEEN K. YOUNGERS
P.O. Box 7256
Las Cruces, New Mexico 88006-7256
(575) 541-8000
(575) 541-9000 (fax)

THE PICKETT LAW FIRM LLC
LAWRENCE M. PICKETT
P.O. Box 1239
Las Cruces, New Mexico 88004-1239
(575) 526-3338
(575) 526-6791 (fax)

ATTORNEYS FOR PLAINTIFFS AND THE CLASS

REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA 12-214, Plaintiffs-Appellees respectfully request that this Court hold oral argument. The issues raised are important. Justice will be furthered if the contractual rights of New Mexico higher education students are elucidated. In the employment context, New Mexico courts, including this Court, have repeatedly found contractual rights to be predicated on statements in handbooks, provided the statements are sufficiently definite and specific, and this lawsuit presents a factual scenario for explaining how this same analysis translates into the higher education context. Moreover, this lawsuit presents an opportunity to explain what sort of arguments are properly before this Court in a Writ of Error predicated on an argument based on NMSA § 37-1-23(A) immunity. The scope and importance of these issues warrants oral argument.

STATEMENT OF COMPLIANCE

As required by NMRA 12-210(G), I certify that this Answer Brief complies with the page limitation set forth in NMRA 12-210(F)(2). The body of this Answer Brief, which uses Times New Roman in 14-point font, is 30 pages.

Respectfully submitted:

TREINEN LAW OFFICE PC

ROB TREINEN
500 Tijeras Ave NW
Albuquerque, New Mexico 87102
(505) 247-1980
(505) 843-7129 (fax)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading, Plaintiff/Appellee's Answer Brief, was served, via U.S. Mail, to Cody R. Rogers and Luke A. Salganek, attorneys for Defendant/Appellant the Board of Regents for New Mexico State University in its capacity as the body politic for New Mexico State University and Dona Ana Community College, at Miller Stratvert PA, 3800 E. Lohman Ave.. Suite H, Las Cruces, New Mexico 88011, on June 16, 2016.

Respectfully submitted:

TREINEN LAW OFFICE PC

ROB TREINEN
500 Tijeras Ave NW
Albuquerque, New Mexico 87102
(505) 247-1980
(505) 843-7129 (fax)