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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,

Plaintiff-Appellee,

v.

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

Defendants-Appellant.



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

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**DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF**
**ORAL ARGUMENT REQUESTED**
Appeal from the Honorable Jerry H. Ritter, Jr
D-307-CV-2013-01113

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Pursuant to Rule 12-213 NMRA, Petitioner Board of Regents of New Mexico State University ("Defendant") files its Brief in Chief requesting that this Court reverse the district court's order denying its Motion for Summary Judgment. Specifically, Defendant seeks reversal of the district court's ruling that statements of fact published in student catalogs and handbooks constitute a valid written agreement sufficient to waive Defendant's immunity from suit pursuant to NMSA 1978 § 37-1-23. Defendant further requests this Court remand this matter to the district court with instructions to enter summary judgment in favor of Defendant.

Defendant requests oral argument on this appeal pursuant to Rule 12-214 NMRA. This case involves the application and interpretation of New Mexico precedent, and Defendant believes that oral argument would assist the Court in resolving this case.

## BACKGROUND FACTS

Plaintiffs are a class of former students of Dona Ana Community College ("DACC"), a branch of New Mexico State University ("NMSU")[1]. RP 1-2. As of

[1] There were only eight named Plaintiffs when the original suit was filed on May 10, 2013. RP 1-17. Plaintiffs moved the district court for class certification on August 22, 2014. RP 434. Defendant filed its Motion for Summary Judgment on October 7, 2014, arguing that it was immune from suit. RP 770. Although a dispositive motion was pending, the district court granted class certification on May 13, 2015 (RP 1274), then subsequently denied Defendant's Motion for Summary Judgment (RP 1302).

July 30, 2012, Plaintiffs were all enrolled as students in DACC's nursing program, seeking an Associate's Degree-Nursing ("ADN"). RP 773. In 2012, DACC's ADN Program was accredited by the New Mexico Board of Nursing; this accreditation allowed graduates of DACC's nursing program to take the national licensure examinations required to become a registered nurse in New Mexico and throughout the United States. RP 773. From 1997-2012, DACC also maintained an optional national accreditation from the National League for Nursing Accreditation ("NLNAC")[2]. RP 775. NLNAC accreditation was not required for students to become licensed registered nurses or to sit for licensure exams, but was required by some employers and advanced nursing education programs. RP 775. Information regarding NLNAC accreditation, including current accreditation status of any particular program, was available on NLNAC's website. RP 774. In addition, NLNAC staff provided accreditation information in response to inquiries from students, employers and others. RP 774.

At the commencement of each academic year material to this matter, DACC issued students a "Catalog", which contained information regarding courses available at DACC, including the ADN program. RP 775. The Catalogs issued to Plaintiffs contained a statement indicating that "[t]he DACC Nursing Program is

[2] The NLNAC changed its name to the Accreditation Commission for Education in Nursing ("ACEN") in 2013. *See* RP 774 at fn 2.

accredited by the National League for Nursing Accreditation." RP 776-777. The ADN Program also issued a program-specific "Handbook" to students, which contained an identical statement indicating that the ADN Program was accredited by the NLNAC. RP 778. Beginning in the 2011-2012 academic year, the Handbook contained a form titled "Appendix-D," a worksheet which allowed students to track their progress towards degree completion. Appendix-D contained a statement that DACC's nursing program was accredited by NLNAC and the New Mexico Board of Nursing, and provided a link to the NLNAC website. RP 779-780. Notably, these statements of fact regarding NLNAC accreditation were the *only* written mention of NLNAC accreditation provided to Plaintiffs and other current or prospective nursing students at DACC. RP 777-778. Both the Catalog and the Handbook reserved DACC and the ADN program's right to change, modify or alter the contents of those documents at any time. RP 777-778. Students in the ADN program were required to acknowledge, in writing, that nursing job opportunities might be limited in Las Cruces, that relocation might be necessary, and that admission to or graduation from DACC's nursing program did not ensure licensure or employment as a nurse. RP 778-779.

On July 30, 2012, NLNAC informed DACC that it was denying continuing accreditation of the ADN program at DACC. RP 775. NLNAC based its decision on numerous managerial and academic issues, such as faculty hiring and

qualifications, program administration and management, and documentation issues. RP 775. The loss of accreditation meant that upon graduation, currently enrolled students at DACC would not be considered to have graduated from an NLNAC accredited school, which could limit employment or educational options as described above.[3] Because DACC maintained Board of Nursing accreditation, nursing students could still sit for licensure exams and become registered nurses. DACC immediately notified students enrolled in the nursing program of the loss of NLNAC accreditation, and provided the enrolled students (including Plaintiffs) the opportunity to transfer to the NMSU School of Nursing's Bachelor of Science-Nursing ("BSN") program. RP 780-781. These students were not required to enter the competitive admissions process and NMSU paid all tuition and fees for the duration of each student's studies, which was substantially more than DACC tuition. RP 781. The majority of DACC ADN students accepted this offer, and successfully completed BSN degrees. A BSN degree is a higher level degree than an ADN degree, it is more expensive to obtain than an ADN degree, it provides an individual with more job opportunities than an ADN, and holders of BSN degrees have a significantly higher earning capacity than holders of ADN degrees. RP 781-782, 801.

[3] During the pendency of this lawsuit, DACC's ADN Program reapplied for and was granted accreditation through ACEN.

## SUMMARY OF PROCEEDINGS

On May 10, 2013, Plaintiffs filed suit claiming that Defendant breached its contract with them by losing its NLNAC accreditation.[4] RP 1-17. Plaintiffs claimed that because the Handbook and Catalog contained statements about NLNAC accreditation, they formed a valid written contract that required NMSU to maintain that accreditation in perpetuity. RP 14.

On October 7, 2014, Defendant filed its Motion for Summary Judgment, seeking dismissal of Plaintiffs' claims in their entirety. RP 772-809. Defendant argued that it was entitled to the immunity granted in NMSA 1978 § 37-1-23(A) because Plaintiffs could not demonstrate the existence of a valid written contract.[5] RP 772-789. Defendant argued that the factual statements regarding NLNAC accreditation contained in the Catalog and Handbook were merely that: factual statements which were immediately changed when they became inaccurate, rather

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[4] Plaintiffs also made claims for promissory estoppel and breach of the covenant of good faith and fair dealing, but they voluntarily dismissed these claims on December 10, 2015 following briefing on Defendant's Motion for Summary Judgement which addressed these claims. RP 1311.

[5] In addition to arguing that Plaintiffs could not establish a claim for breach of contract because Plaintiffs could not demonstrate the existence of a valid written contract, Defendant also argued that: (1) Plaintiffs' claims were in fact impermissible claims for educational malpractice; (2) Defendant made no misrepresentation of its accreditation status which would support a breach of contract claim; (3) Plaintiffs received the benefits that they sought and paid for; and (4), in the alternative, that the parties had substituted their agreements when the DACC lost accreditation and Plaintiffs accepted the offer to attend NMSU's School of Nursing and pursue another type of degree at no cost. RP 792-809.

than a valid written agreement sufficient to waive NMSU's immunity to suit. RP 787. Defendant pointed out that New Mexico case law specifically rejected the notion that a student handbook could constitute a valid written agreement for purposes of Section 37-1-23, and that it was thus entitled to immunity from Plaintiffs' claims for breach of contract. *See generally* RP 782-89

Plaintiffs filed their Response to Defendant's Motion on November 11, 2014. RP 922. They contended that because courts outside New Mexico have generally treated the student/university relationship as a contractual one, the factual statements regarding accreditation in the Catalog and Handbook constituted an implied term of that contractual relationship which required DACC to provide Plaintiffs with graduation from an NLNAC accredited program. Plaintiffs urged the district court to ignore the specific terms of any written agreement between the parties and instead hold that if it found any type of contractual relationship, express or implied, between the parties, it could imply certain terms in that agreement, similar to the district court's role in the employment law context. RP 943-953. Plaintiffs argued that the district court could simply imply a contractual agreement between the parties that NMSU would maintain NLNAC accreditation, even if those specific terms of the agreement were not evidenced in any writings, because such a course was supported by public policy. RP 943-953.

Defendant replied to Plaintiffs' response on December 23, 2014, arguing that under clear New Mexico law, the district court could not ignore the lack of a valid written agreement and imply terms of agreement between the parties where no written evidence of such agreement existed. RP 1225-1247. Defendant explained that there was no legal support for the notion that the district court could imply binding terms where they did not exist in a written agreement as required by NMSA 1978 § 37-1-23.

The district court held a hearing on Defendant's Motion for Summary Judgment on November 30, 2015. RP 1300. After hearing oral argument on the Motion, the district court denied the Motion. RP 1302. The district court determined that a valid written agreement existed which required Defendant to maintain NLNAC accreditation for an unspecified duration. The district court did not specifically identify what documents formed such an agreement. 11-30-2015 CD 10:04:56 – 10:05:31.[6] The district court also determined that NLNAC accreditation "added value" to DACC's ADN Program and suggested to "the market" that the quality of the program was of a certain level. 11-30-2015 CD 10:05:37 - 10:07:54. The district court determined that Plaintiffs' claims were not educational malpractice

[6] The proceedings were recorded by audio in this matter. The references herein are to the applicable CD's for the referenced proceeding, and are referred to by the date of the proceeding. The time stamp references are those that appear when the CD is played using For The Record Player, version 5.7.1.0. *See* Appendix to Rule 23-112 NMRA, Section X(A).

claims because the quality of the ADN Program could be determined simply by the presence or absence of NLNAC accreditation. 11-30-2015 CD 10:06:34 - 10:07:54. The district court further denied Defendants' Motion on the remaining grounds. RP 1302. Defendant petitioned this Court for a writ of error. RP 1315-1327. Defendant's petition was granted and resulted in the present appeal. RP 1513-1516.

## ARGUMENT

### I. There was no valid written agreement within the meaning of Section 37-1-23 which required Defendant to maintain NLNAC accreditation in perpetuity.

#### *A. Neither the Catalog nor the Handbook obligated DACC to obtain or maintain NLNAC accreditation.*

Plaintiffs alleged in their Complaint that a "written agreement existed between [the parties] whereby DACC agreed that it would provide a nationally accredited education in nursing in exchange for the students enrollment and tuition." RP 14, ¶ 96. Specifically, Plaintiffs claimed that "[t]he student handbooks in place at material times constitute an express written contract." RP 14, ¶ 97. Plaintiffs did not rely upon any other writings to support Plaintiffs' claim for breach of contract. RP 14, ¶¶ 96-100 (identifying the "student handbooks" as the only "written agreement" and the sole basis for Plaintiffs' breach of contract action). In response to Defendant's Motion for Summary Judgment, Plaintiffs retreated from this position, and instead contended that documents they signed upon admission to Defendant's ADN

Program formed the requisite valid written contract.[7] RP 944-945. The district 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. 11-3-2015 CD 10:04:56-10:05:31.

Plaintiffs' contentions and the district court's rulings in this regard completely ignore the record evidence in this case. Although Plaintiffs contended (and the district court concluded) that they were promised graduation from an NLNAC accredited program upon admission to DACC, there is absolutely no evidence to support this contention and no written agreement in this regard. There was no writing before the district court to demonstrate that Plaintiffs were provided *any* information about NLNAC accreditation *before* their admission to the ADN Program.[8] As discussed below, the district court's analysis should have ended once

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[7] This representation was blatantly contradicted by the Plaintiffs' own testimony. During their depositions, each Plaintiff who identified a written document as the basis for their claims referenced either the Catalog or the Handbook. Not a single Plaintiff identified the admissions documents identified in Plaintiffs' Response to Defendant's Motion as the basis for their breach of contract claims. RP 1236 fn 3; RP 693-714.

[8] To the extent Plaintiff' claims or the district court's conclusions were based on Plaintiffs' undisclosed intentions regarding NLNAC accreditation, those intentions cannot form the basis for liability on the part of Defendant. *See ConocoPhillips Co. v. Lyons*, 2013-NMSC-009, ¶ 67 (stating that courts must give effect to writings as they are written and that they will not "give effect to a party's undisclosed intentions" and they "cannot create a new agreement for the parties").

it became clear that there was no written promise by Defendant to maintain NLNAC accreditation for some unspecified duration.

NMSA 1978, § 37-1-23 waives governmental immunity for actions which are based on the breach of a "valid written contract". As the New Mexico Supreme Court has explained, the Legislature drafted Section 37-1-23 "to reinstate sovereign immunity" in the wake of *Hicks v. State,* 1975-NMSC-056, 88 N.M. 588, which abolished common-law sovereign immunity. *See Hydro Conduit Corp. v. Kemble,* 1990-NMSC-061, ¶¶ 13-17, 110 N.M. 173. Accordingly, Section 37-1-23 grants governmental entities complete immunity from actions sounding in contract, *except* for actions that are premised on "valid written contract[s]". *Campos de Suenos, Ltd. v. Cnty. of Bernalillo,* 2001-NMCA-043, ¶ 12, 130 N.M. 563. Contrary to Plaintiffs' assertions and the district court's conclusions, neither the Catalog nor the Handbook constitute an enforceable contract.

In *Ruegsegger v. W. NM Univ. Bd. of Regents*, 2007-NMCA-030, 141 N.M. 306, this Court concluded that a student handbook, on its face, was not a contract. *Id.* ¶ 30. In that case, the plaintiff (who had been sexually assaulted) filed a suit premised on the University's alleged failure to investigate the incident and to provide her with support services following her attack. She alleged that her scholarship agreement with the University and the student handbook worked together to constitute an implied contract. *Id.* ¶¶ 20-21. This Court noted that it had recently

held that an implied contract could not override the Legislature's statement of governmental immunity stated in Section 37-1-23. *Id.* ¶ 22. However, because this Court concluded that the student handbook could not support a valid claim for breach of contract in the first instance, it was unnecessary to revisit its holding on governmental immunity. *Id.*

In the instant case, Defendant argued that *Ruegsegger* compelled dismissal of Plaintiffs claims. Defendant explained that the handbook language in *Ruegsegger* was far more specific than any language at issue in the present case, and at least appeared to require WNMU to take certain steps to investigate the sexual assault of a student. The *Ruegsegger* court determined that even such explicit language was still insufficient to create contractual obligations on the part of the university. As a result, Defendant argued that Plaintiffs could not prevail where the alleged contractual promises were mere factual statements, and thus far weaker than those rejected by the *Ruegsegger* court. The district distinguished *Ruegsegger* by concluding that it was inapplicable because it dealt with "non-academic" requirements in the student handbook. 11-30-2015 CD 10:07:40-10:08:42. This conclusion was error. Neither *Ruegsegger* nor other applicable law draws such a distinction, and the district court improperly ignored the case most factually and legally similar to the present case.

The *Ruegsegger* court ("assum[ing] without deciding" that the plaintiff could precede with an implied contract claim against the University) held that the plaintiff had failed to state a "cognizable claim for breach of contract". *Id.* ¶ 22. The plaintiff's allegations pertained to the University's actions following her assault. Her claims did not allege a breach of her scholarship agreement by the University "to provide scholarship assistance in the form of financial payments", and therefore, the court concluded she had not made a valid claim under the "only explicit written contract[] between Plaintiff and [the University]". *Id.* ¶¶ 17, 20. As for the plaintiff's contract claims premised on the student handbook, the *Ruegsegger* court held that in order to establish a claim for breach of contract based on the terms of the handbook, the plaintiff was "required to demonstrate that those terms created a reasonable expectation of contractual rights." *Id.* at ¶ 24. In analyzing whether the plaintiff's expectation was reasonable, the court held that "[t]he reasonableness of the student's expectation is measured by the definiteness, specific or explicit nature of the representation at issue." *Id.* Given the factual context of plaintiff's allegations, the court examined whether "based upon the language of the [s]tudent [h]andbook, Plaintiff could reasonably expect that WNMU would be obligated to perform a more comprehensive investigation into her claims and to provide her with more 'support' after she informed WNMU officials of the assault." *Id.* This Court found that rather than "contractually guaranteeing a right to specific types of

investigation, support, and sanctions in the event of a sexual assault, [the student handbook] provide[s] guidelines for the operation of WNMU" and therefore did not contain actionable contractual guarantees. *Id.* at ¶ 30. The "guidelines" did not constitute a contract (implied or otherwise) because the language did not "contractually obligate [ the University] to conduct any specific type of investigation [or] provide support services". *Id.* This Court also pointed out that none of the cases cited by the plaintiff supported the argument that "merely because there is a contractual relationship between a university and a student, the university is contractually bound to honor every provision found in a student handbook." *Id.* at ¶ 33. Instead, this Court pointed out, the analysis should focus on "what is reasonable." *Id.*

It is not "reasonable" for Plaintiffs to contend that because Defendant listed its NLNAC accreditation status in printed materials that Defendant was somehow contractually obligated to maintain that status in perpetuity where the writings do not reflect such intent. Like the *Ruegsegger* plaintiff, Plaintiffs in this case are attempting to hold Defendant liable for failing to undertake certain obligations that the purported "contract" did not require it to undertake. The student handbook in *Ruegsegger* established a crisis intervention team, but did not require WNMU to convene the crisis intervention team or require that team to take *any* specific action. The case here is even more attenuated. Defendant's written materials simply stated

DACC's NLNAC accreditation status. They did not require or promise that Defendant would take any action to maintain that status, let alone for any duration. Implying such a requirement retrospectively is a plain violation of Defendant's immunity, and would expose Defendant to suits based on unwritten "agreements" in violation of Section 37-1-23.

The *Ruegsegger* court also observed that the handbook explicitly stated "that its provisions are not to be regarded as a contract and [the University] specifically reserve[d] the right to amend the handbook at any time". *Id.* ¶ 29. Moreover, because the handbook did not require the University to take any actions, and because the handbook was void of terms "expressly guaranteeing" the services the plaintiff was allegedly denied following her assault, the court concluded that the plaintiff "failed to state a cognizable claim for breach of contract, express or implied, against [the University]." *Id.* ¶¶ 31, 33, 36; *see also Sanchez v. The New Mexican,* 1987-NMSC-059, ¶ 12, 106 N.M. 76 (affirming the dismissal of an implied contract claim on grounds that "the handbook lacked specific contractual terms which might evidence the intent to form a contract ... [insofar as the] language is of a non-promissory nature and merely a declaration of defendant's general approach"); *Harris v. Mott Cmty. Coll.*, 313403, 2014 WL 1320256 at *5 (Mich. Ct. App. Apr. 1, 2014) ("This Court has declined to find that a student handbook creates a contract, express or implied, between universities and students."); *Lucero v. Curators of Univ.*

*of Missouri*, 400 S.W.3d 1 at *6 (Mo. Ct. App. 2013), *reh'g and/or transfer denied* (Mar. 26, 2013) (determining that a school's statements in its "Collected Rules and Regulations" did "not constitute specific promises, but rather [were] aspirational in nature" and amounted to "general statements" about the educational environment the school sought to achieve and therefore they could not "constitute the basis for a breach of contract claim."); *Feyissa v. Seattle Pac. Univ.*, 131 Wash. App. 1024, at *2 (2006) (concluding that a student handbook did "not include all the essential elements of a contract" and therefore a plaintiff's breach of contract claim was untimely under the applicable statute of limitations); *Kent Literary Club of Wesleyan Univ. v. Whaley*, CV040104195S, 2004 WL 2361686, at *4 (Conn. Super. Ct. Sept. 16, 2004) (recognizing that a party "can avoid creating a contract implied by the language of a handbook or manual by including appropriate disclaimers", and concluding that when a handbook stated it was "subject to change at the University's discretion", the handbook's language created "a legal impediment to the plaintiffs' ability to prevail on their claim of breach of contract and promissory estoppel.") (internal quotation omitted); *Cavaliere v. Duff's Bus. Inst.*, 413 Pa. Super. 357, 370 (1992) (holding that the plaintiffs' allegations premised on a student handbook did not establish that "the representations made by the institute... were false.").

The Catalog and the Handbook contained only statements that DACC's ADN Program was accredited by NLNAC. This statement was accurate from 1997 through

the 2011-2012 academic year. DACC amended its 2012-2013 Handbook to reflect the loss of the NLNAC's accreditation at the end of the 2011-2012 academic year. These simple statements do not constitute legally enforceable promises. At best, they are statements of fact which were immediately corrected when they became inaccurate. They did not obligate Defendant to take any action with regard to accreditation and they cannot form the basis of a contract between the parties.

For a contract to be legally valid and enforceable, it must be factually supported by an offer, acceptance, consideration, and mutual assent. *Garcia v. Middle Rio Grande Conservancy Dist.,* 1996-NMSC-029, ¶ 9, 121 N.M. 728. Additionally, a valid contract must possess "mutuality of obligation". *Bd. of Educ., Gadsden Indep. Sch. Dist. No. 16 v. James Hamilton Const. Co.,* 1994-NMCA-168, ¶ 19, 119 N.M. 415. A contract which leaves it optional whether one of the parties *may* or *may not* perform is not founded on mutual promises. *Id.* (recognizing that a "purported promise that actually promises nothing because it leaves the choice of performance entirely to the offeror is illusory, and an illusory promise is not sufficient consideration to support a contract."); *see also Ruegsegger*, 2007-NMCA-030 ¶¶ 30-31, 33, 36 (concluding that a student handbook did not "contractually obligate" the defendant to perform any actions and because it was void of language "expressly guaranteeing" any of the services the plaintiff was allegedly denied, the plaintiff failed to state a meritorious claim for breach of contract); *Stieber v. Journal*

*Publ'g Co.*, 1995-NMCA-068, ¶ 13, 120 N.M. 270 (holding that general policy statements in a handbook are "insufficient to create an implied contract" because they are merely declarations of a general approach to the subject matter).

The Catalog and Handbook each state that they are subject to revisions at any time. *See Ruegsegger*, 2007-NMCA-030 ¶ 29 (considering a handbooks statement that the University reserved the right to amend the handbook at any time as persuasive evidence that the handbook did not create a contractual rights); *Jamieson v. Vatterott Educ. Centers, Inc.*, 259 F.R.D. 520, 540-41 (D. Kan. 2009) (concluding that an enrollment agreement that stated that a school "reserves the right to make changes" to its course content and class schedules did not support a plaintiff's breach of contract claim for failure to "keep classes in session" for an entire four and a half hour period); *see also Miller v. Loyola Univ. of New Orleans*, 2002-0158 (La. App. 4 Cir. 9/30/02), 829 So. 2d 1057, 1062 *writ denied*, 2002-3093 (La. 3/14/03), 839 So. 2d 38 (holding that course descriptions are "given to inform the student" and they "are not contractual provisions that bind the school to teach exactly what is written in the description"). By their plain language, the Catalog and the Handbook do not make the "promise" that DACC's programs would be accredited or that DACC would not lose its accreditation. Nor do these documents state that DACC promised to engage in any actions pertaining to accreditation on the students' behalf. *See Espinoza v. Town of Taos*, 1995-NMSC-070, ¶¶ 2, 15, 120 N.M. 680 (holding

that an application for participation in a summer day camp operated by a town made no mention that it would ensure the safety of children, so the town did not undertake a contractual obligation for liability in the event of injury to a child); *Bd. of Educ., Gadsden Indep. Sch. Dist. No. 16,* 1994-NMCA-168, ¶ 19 ("A purported promise that actually promises nothing because it leaves the choice of performance entirely to the offeror is illusory, and an illusory promise is not sufficient consideration to support a contract."). Because the subject documents made no promise or guarantee about accreditation, this Court should conclude, as a matter of law, that Plaintiffs failed to demonstrate the existence of a valid written agreement sufficient to override Defendant's immunity, and reverse the district court's ruling in this regard.

*B. The district court erred when it relied on unwritten, implied contractual terms to waive Defendant's immunity from suit.*

The district court (at Plaintiffs' urging) ignored the actual writings which purportedly created written agreements between the parties, and instead chose to imply contractual terms between the parties based on a nebulous relationship between Plaintiffs and Defendant. The district court gave no weight to the complete absence of writings obligating Defendant to take any action to maintain or preserve NLNAC accreditation status; rather, the district court determined that a requirement that Defendant maintain NLNAC accreditation could be implied. This holding by the district court was plainly erroneous. The policy behind the Legislature's granting of immunity for contract claims is to "protect the public purse" by requiring that

"parties seeking recovery from the [S]tate for benefits conferred on it have valid written contracts". *Hydro Conduit Corp.*, 1990-NMSC-061, ¶ 23 (internal quotation omitted). The Legislature's limitation on contract claims against the State places "the risk of loss on a party who transacts business with a governmental entity without a valid written contract." *Campos de Suenos,* 2001–NMCA–043, ¶ 14. This Court has held that "partial writings" do not meet the standards of an executed contract, and allowing a party to "cobble together a contract in such a manner undermines the purpose of having a comprehensive document, a valid written contract, that defeats governmental immunity." *Id.* ¶ 18 (internal quotation omitted). This Court explained that it had "grave reservations" with violating the Legislature's articulation of immunity codified in Section 37-1-23. *Id.* ¶ 26 (holding that "implied" contracts, which are not based on a valid written document, do not override governmental immunity outside of the exception recognized in the employment context); *see also Ruegsegger*, 2007-NMCA-030, ¶¶ 4, 17, 30 (concluding that Western New Mexico University's student handbook was not an "explicit written contract" but merely a statement of "guidelines for the operation of [the University]."); *see also Stieber,* 1995-NMCA-068, ¶ 13 (stating in the context of an alleged implied contract that "policy statements of a non-promissory nature" in an employee handbook "are insufficient to create an implied contract").

The district court determined that because Plaintiffs applied to and were admitted to Defendant's ADN Program, an implied promise existed whereby Defendant would maintain NLNAC accreditation forever. To reach this conclusion, the district court erroneously ignored the plain language of the documents at issue, which contained no such promises. The district court's error in this regard compels reversal and entry of judgment in favor of Defendant.

## II. Plaintiffs' Claim For Breach Of Contract Is In Fact An Impermissible Claim For Educational Malpractice.

New Mexico has never recognized a claim for educational malpractice. *Rubio ex rel. Rubio v. Carlsbad Mun. Sch. Dist.*, 1987-NMCA-127, ¶ 14, 106 N.M. 446 ("While conceding that a majority of jurisdictions considering the question has rejected a claim for educational malpractice...plaintiffs nevertheless urge this court to recognize one. We decline."). As the Seventh Circuit noted in *Ross v. Creighton*, 957 F.2d 410, 414 (7th Cir. 1992), "the overwhelming majority of states that have considered [a claim for educational malpractice] have rejected it." The *Ross* court examined the case law rejecting educational malpractice claims and identified several policy reasons for the bar against such claims.[9] First, the court noted the

[9] *See also Smith v. Alameda County Social Servs. Agency*, 90 Cal. App.3d 929, 153 Cal. Rptr. 712, 719 (1979); *Swidryk v. St. Michael's Medical Ctr.*, 201 N.J. Super. 601, 493 A.2d 641, 643 (Law. Div. 1985); *Moore v. Vanderloo*, 386 N.W.2d 108, 114-15 (Iowa 1986); *Hoffman v. Board of Educ.* 49 N.Y.2d 121, 424 N.Y.S.2d 376, 400 N.E.2d 317, 320 (1979); *Hunter v. Bd. Of Educ.*, 929 Md. 481, 439 A.2d 582,

lack of a satisfactory standard of care by which to evaluate an educator. *Id.* at 414 . Second, "inherent uncertainties exist in this type of case about the cause and nature of damages." *Id.* Third, permitting educational malpractice claims presents a significant risk for a flood of litigation against schools. *Id.* Finally, claims for educational malpractice "[threaten] to embroil the courts in overseeing the day-to-day operations of schools. *Id.* On the basis of these concerns, courts have rejected claims that sound in educational malpractice regardless of whether they are pled as breach of contract, fraud or misrepresentation. *Id.* at 416 ("[T]he policy concerns that preclude a cause of action for educational malpractice apply with equal force to bar a breach of contract claim attacking the general quality of an education."); *Alsides v. Brown Institute, Ltd.,* 592 N.W.2d 468, 476 (Minn.App.1999) ("Claims by students, whether styled as breach of contract, fraud, or misrepresentation, that attack the general quality of education provided are claims for educational malpractice and are not actionable.").[10]

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585 (1982); *Finstad v. Washburn Univ. of Topeka*, 252 Kan. 465, 845 P.2d 685 (Kan. 1993).

[10] *See also Paladino v. Adelphi Univ.* 89 A.D.2d 85, 454 N.Y.S.2d 868, 872 (1982) ("Where the essence of the complaint is that the school breached its agreement by failing to provide an effective education, the court is again asked to evaluate the course of instruction...[and] is similarly called upon to review the soundness of the method of teaching that has been adopted by an educational institution."); *Christensen v. S. Normal Sch.,* 790 So. 2d 252, 256 (Ala. 2001) ("Likewise, if the plaintiffs' negligence claims require an analysis of the quality of education received and in making that analysis the fact-finder must consider principles of duty, standards of care, and the reasonableness of the defendant's conduct, then the

Educational malpractice claims, however presented, are barred when the claim implicates the quality of education a student received. This is true where a student alleges a failure to provide "an entry level education" or "effective education" in a particular field; where a student claims that they were promised training in "the current version" of particular computer programs and languages, or allege that they received a "poor educational experience" which rendered them unprepared for employment. *See Jamieson*, 259 F.R.D. at 540-41 (holding that plaintiffs' claims against technical school failed where school allegedly breached its agreement to provide them with an "entry level education" in respective fields and training in the "current versions" of particular computer programs and languages); *Christensen v. S. Normal Sch.*, 790 So. 2d 252, 256 (Ala. 2001) ("In any event, to allow a negligence, breach-of-contract, or fraud claim alleging a poor educational experience or insufficient academic achievement would violate the public policy against putting courts in the business of second-guessing the academic performance of an educational institution."). Claims that implicate the quality of instructors,

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plaintiffs have asserted an educational-malpractice claim"); *Bittle v. Oklahoma City University,* 6 P.3d 509, 514 (Okla.Ct.App.2000) ("[W]e are persuaded by the overwhelming weight of authority from other jurisdictions that, absent a specific, identifiable agreement for the provision of particular services, the public policy ... militates against recognition of a claim by a student against a private educational institution arising from the institution's alleged improper or inadequate instruction however denominated—either in tort or contract—for 'educational malpractice.'").

instruction, curriculum, the effectiveness of materials, methods or teachers "permit a court or jury to assess what is and is not material to a particular course of study, and to substitute their judgment for the judgment of professional educators", and are rejected as claims for educational malpractice, regardless of the underlying legal theory. *Jaimieson*, 259 F.R.D. at 538.

Breach of contract claims against educational institutions have been allowed in a few, narrowly defined circumstances. The benchmark of this category of claims is an "identifiable contractual promise that the defendant failed to honor." *Ross*, 957 F.2d at 416-417. The *Ross* court explained the contours of such a claim: "if the defendant took tuition money and then provided no education, or alternatively, promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available." *Id.* at 417, *citing Paladino*, 454 N.Y.S.2d at 873. The *Ross* court suggested that a breach of contract action might lie "if a student enrolled in a course explicitly promising instruction that would qualify him as a journeyman, but in which the fundamentals necessary to attain that skill were not even presented." *Id.* Summarizing, the court noted "[i]n these cases, *the essence of the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that if failed to perform that service at all.*" *Id.* (emphasis added). Ruling on this issue, the court held, "would not require inquiry into the nuances of educational processes and theories, but rather

an objective assessment of whether the institution made a good faith effort to perform on its promise." *Id.* The *Ross* court found such circumstances in the case before it because a student athlete, who was not qualified academically to participate in the university's academic program, was promised that accommodations would be made to allow him to participate in the university's curriculum. *Id.* Because the plaintiff alleged that the university refused to provide the promised accommodations, resulting in the plaintiff's inability to participate in the university's academic programs, the court found that a valid breach of contract claim existed. The *Ross* court was careful to identify the parameters of this claim: "To adjudicate such a claim, the court would not be required to determine whether Creighton had breached its contract with Mr. Ross by providing *deficient* academic services. Rather, its inquiry would be limited to whether the University provided any real access to its academic curriculum at all." *Id.* (emphasis in original). Only the Seventh Circuit's belief that "the district court can adjudicate Mr. Ross' specific and narrow claim that he was barred from *any* participation in and benefit from the University's academic program without second-guessing the professional judgment of the University faculty on academic matters" allowed this claim to proceed. *Id.*

Other courts have held similarly. In *Vatterot*, former students of a vocational school sued, claiming that the school breached its contract with them because it failed to provide an "effective education" which would prepare them for "entry level

employment." *Jamieson*, 259 F.R.D. at 535. The court rejected these claims as improper claims for educational malpractice. *Id.* However, the court recognized that "when students allege that educational institutions have failed to provide specifically promised services- for example, a failure to offer any classes at all or a failure to deliver a promised number of hours of instruction—such claims have been upheld on the basis of the law of contracts." *Id.* at 538. Thus, to the extent any claims alleged a failure to provide the number of hours of instruction promised, those claims were allowed to proceed. *Id.* at 541. Likewise, in *Miller v. Loyola Univ. of New Orleans*, 829 So.2d 1057, 1060, the plaintiff sued his law school following a course in legal ethics and professionalism. *Id.* at 1058-59. Plaintiff alleged that the school failed to hire a qualified professor to teach the course, failed to have enough professors to teach the courses offered in their catalog, failed to provide adequate course material to prepare the student to take the MPRE exam and otherwise engage in the practice of law, and changed the time of the course, contrary to the school's catalog. *Id.* at 1059. The court rejected these claims under both a tort and contract theory. *Id.* at 1061. Examining the contract theory, the court held that "[w]hile there are instances where a contractual breach has been found between a university and student, it has been based on the university's failure to provide a guaranteed service. This is not the case here." *Id.* The court held that in order to entertain plaintiff's contract claims, it would be required to "*micro-manage* the adequacy of instruction

or management at institutions of higher learning." *Id.* (emphasis added). The court declined this invitation. *Id.* The court also rejected plaintiff's claim that the course description contained in the catalog was a binding contractual provision: "Course descriptions are given to inform the student of what is generally covered in the course; they are not contractual provisions that bind the school to teach exactly what is written in the description." *Id.* at 1062.

A review of the substance of Plaintiffs' allegations against Defendant in this matter make it clear that they are all directed at discretionary administrative and educational functions, and thus constitute an impermissible claim for educational malpractice. Plaintiffs are not contending that Defendant failed to provide the requisite number of instructional hours, or that Defendant did not provide them educational services at all; they are complaining instead about the quality of the educational services they received, and administrative and academic decisions which led to the loss of accreditation. Plaintiffs' allegations regarding Defendant's alleged breach of contract make this clear: "DACC breached the contractual agreement by refusing to take the actions necessary to maintain its national accreditation." RP 14, ¶ 98. In support of this allegation, Plaintiffs allege that Defendant took a series of actions that "ensured it would lose its national accreditation." RP 5-7. Plaintiffs list a series of alleged actions that led to the loss of accreditation, including: (1) a failure to correct the ratio of faculty members with masters degrees to faculty members with

only bachelor degrees by hiring more faculty with masters degrees; and (2) the hiring a Program Director, Tracy Lopez, who NLNAC believed to lack requisite experience. RP 5-7.

The Final Site Visitor's Report issued by NLNAC tells a similar but significantly more complex story. NLNAC found that Defendant failed to comply with two required standards: Standard 2, Faculty and Staff, and Standard 6, Outcomes. RP 775, ¶¶ 9-10. NLNAC found that with regard to Standard 2, Defendant was not in compliance because: (1) the majority of part-time faculty were not credentialed with a minimum of a master's degree with a major in nursing; (2) the number and utilization of the full-time faculty did not ensure that the program outcomes were met; (3) part-time faculty were not consistently oriented and mentored in their areas of responsibilities; (4) systematic assessments of full-time and part-time faculty was not consistently implemented. RP 775, ¶ 10. In regard to Standard 6, NLNAC concluded that Defendant was noncompliant because: (1) there was a lack of evidence of systematic and consistent implementation of the systematic plan for evaluation; (2) there was a lack of evidence that evaluation of student learning outcomes was integrated into the systematic plan for evaluation; (3) aggregated evaluation findings were not documented for all components of the evaluation plan; (4) there was a lack of evidence of consistent documentation of decision-making to improve student learning outcomes. RP 775, ¶ 10. The NLNAC

provided a highly detailed explanation of the standards and criteria, and its bases for its conclusions that Defendant had failed to comply with the standards and criteria outlined in the report. RP 775, ¶¶ 9-10.

The district court explicitly held that NLNAC accreditation was an indicator of the "quality" of Defendant's ADN Program; that NLNAC accreditation "add[ed] value" to the Program, that it could "open doors" for graduates, and that it was an indicator of a "quality program." 11-30-2015 CD 10:05:37-10:06:33. By making these findings, the district court accepted Plaintiffs' contention that Defendant gave them a deficient or lesser education by failing to maintain NLNAC accreditation. This claim is an educational malpractice claim of the sort specifically rejected by the case law. Plaintiffs made no claim that Defendant failed to provide educational services at all; the core of their complaints go to the adequacy of these services, which they judge by the loss of accreditation. The district court adopted this argument as a valid one, despite the weight of authority against this position. The district court attempted to distinguish the present case by holding that it would not need to analyze the quality of Defendant's ADN Program because the loss of NLNAC accreditation itself indicated a reduced quality. 11-30-2005 CD 10:06:34-10:07:41. This ruling ignores entirely the fact that all of the alleged actions which led to the loss of NLNAC accreditation were based on judgment calls made by the institution and professional educators. Any analysis of the adequacy of such

decisions would require the district court to impermissibly second-guess those judgment calls, and would plainly constitute an impermissible suit for educational malpractice.

The district court acknowledged that Plaintiffs' claims sounded in educational malpractice, but erred in permitting those claims to proceed. As a result, the district court must be reversed.

## CONCLUSION

For the foregoing reasons, Defendant respectfully requests this Court reverse the district court's ruling and remand this matter with instructions to the district court to enter summary judgment in favor of Defendant.

Respectfully submitted,

MILLER STRATVERT P.A.

By_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2016, that a true and correct copy of the foregoing was sent to the following:

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