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

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

Respectfully submitted,
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Pursuant to Rule 12-213 NMRA, Petitioner/Appellant Board of Regents of New Mexico State University ("Defendant") files this Reply Brief in response to Appellees'/Respondents' ("Plaintiffs") Answer Brief. For the reasons stated below, Defendant requests this Court remand this matter to the district court with instructions to enter summary judgment in favor of Defendant.

ARGUMENT

I. Plaintiffs have not established a valid written agreement upon which they can base their claims for breach of contract.

NMSA 1978, § 37-1-23 (1976) waives governmental immunity for actions which are based on the breach of a "valid written contract." In this case, there is no writing which states that Dona Ana Community College ("DACC") would maintain national accreditation from the National League for Nursing Accreditation ("NLNAC") for any period of time, that it would attempt to maintain accreditation, or how it would go about maintaining such accreditation. Under Section 37-1-23, Plaintiffs cannot rely on unwritten promises to support a claim of breach of written contract, nor does the law permit them to make a breach of implied contract claim based on terms which are outside of a written contract.

A. The documents which Plaintiffs identify do not establish a valid written contract which required Defendant to maintain NLNAC accreditation.

The only document Plaintiffs identified in their Complaint to support their breach of contract claim was "[t]he student handbooks in place at material times

[which] constitute an express written contract." RP 14. Although Plaintiffs argue that New Mexico has a "liberal notice pleading regime" (AB 10), Plaintiffs overlook that in contract actions necessarily based on written documents, they are required to state which documents form the basis of their claims. *See* Rule 1-009(I) NMRA (requiring instruments of writing upon which an action references to be attached and served with the pleading); *Healthsource, Inc. v. X-Ray Associates of New Mexico*, ¶¶ 16, 19, 2005-NMCA-097, 138 N.M. 70, 116 P.3d 861 (recognizing that the failure to allege a matter essential to the relief sought may be grounds for dismissal under Rule 12(b)(6) and that when a plaintiff alleged the parties had an agreement but failed to attach such agreement or contract to the pleadings, court "conclud[ed] that no such agreement existed" and that the parties "did not enter into an agreement" or contract in writing). Plaintiffs have presented a moving target as to what they claim constituted the basis for their contract claim. They argue to this Court that their case is actually based on several "writings," and they contend that "the offer letter, the handbook acknowledge [*sic*] form and the handbook itself – comprise a written contract wherein DACC stated that the education to be provided was a nationally accredited nursing education." AB 12, 13.

Although Plaintiffs have not identified any document which supports their claim that they were promised that DACC would maintain NLNAC accreditation, they argue that a collection of separate documents (which were created at separate

times and for separate purposes) should be read together to form the basis of their contract claim. AB 12-13. Plaintiffs also urge this Court to take an additional step and read terms into the writings which are not there, and ask this Court to conclude that mere factual statements (which lack any terms of obligation or promise) that DACC was accredited by the NLNAC (which was true prior to July 30, 2012) should be read to mean that DACC promised Plaintiffs that it would maintain national accreditation in perpetuity, or at least as long as Plaintiffs attended DACC. AB 7, 25.

Plaintiffs note that they submitted applications to DACC, received acceptance/offer letters from DACC, and then sent letters to DACC stating that they would attend classes. AB 1, 5-6; *see also e.g.* RP 974 (containing Plaintiff Margarita Melendez's application to DACC dated April 13, 2011); RP 982 (containing DACC's offer letter to Plaintiff Margarita Melendez dated May 18, 2011); RP 988 (containing Plaintiff Margarita Melendez's acceptance letter to DACC stating that she would be attending classes, dated May 23, 2011). On their face, these documents pertain only to Plaintiffs' *attendance* at DACC. They do not speak to whether DACC was accredited by the NLNAC, let alone whether such accreditation would continue (or for how long). Importantly, the Handbook acknowledgement forms, which merely states that the student has received and read "the DACC nursing program handbook and the DACC student handbook and agree[s] to abide by them,"

were executed by Plaintiffs well after they had accepted a position in the nursing program. *See e.g.* RP 1008 (containing Plaintiff Margarita Melendez's "Student Acknowledgement Form" dated August 18, 2011).

Plaintiffs never presented evidence to the district court that they received *any* written information from Defendant about NLNAC accreditation *before* they accepted a place at DACC, and they point to no such evidence in their Answer Brief. Put another way, Defendant's Motion for Summary Judgment established that Plaintiffs only received information about NLNAC accreditation in the Handbook and the Catalog *after* Plaintiffs had already agreed to enroll in the nursing program. Plaintiffs provided no evidence that they knew DACC had NLNAC accreditation before they agreed to attend, that the national accreditation was a factor they considered when deciding what school to attend, or that DACC made any representations to them about accreditation (let alone in writing) which influenced their decisions to attend DACC's nursing program. In addition, of the named Plaintiffs who identified written documents as the basis for their claims, none of them referenced the documents Plaintiffs now claim formed a written agreement (the offer letter). Rather, each of the Plaintiffs referenced the DACC Catalog or the Handbook as the documents which they claimed formed the basis of the alleged contract. RP 1236 at fn 3 (highlighting this point to the district court and citing Plaintiffs' deposition testimony (found at RP 693-714)).

In *Campos de Suenos, Ltd. v. Cnty. of Bernalillo,* this Court 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." 2001-NMCA-043, ¶ 18, 130 N.M. 563 (internal quotation omitted). Plaintiffs' attempt to cobble multiple documents together fails for several reasons. In addition to the lack of an affirmative promise that DACC would maintain its accreditation, there is no evidence to support their position that their decision to attend DACC was related in any way to Defendant's written statements about its national accreditation. These failures of proof are fatal to Plaintiffs' claims, and entitle Defendant to immunity pursuant to § 37-1-23.

However, even the entire assemblage of documents Plaintiffs currently point to fails to establish a valid written contract which required DACC to maintain NLNAC accreditation. It is plain that the statement of fact regarding NLNAC accreditation was merely that: a statement of fact, rather than a promissory obligation. The plaintiff in *Ruegsegger v. W. NM Univ. Bd. of Regents* (like Plaintiffs in this case) claimed that Western New Mexico University ("WNMU") breached its contractual obligations to her, which she claimed were based on: (1) her athletic scholarship; and (2) the WNMU student handbook. 2007-NMCA-030, ¶ 4, 141 N.M. 306. This Court considered the two documents separately, and concluded that

the "only explicit written contracts between Plaintiff and WNMU are the Scholarship Agreements" which were "unambiguous." *Id.* ¶ 17. Further, the scholarship documents made "no reference to any duty on the part of WNMU to comply with any university regulations[.]" *Id.* ¶ 18. Although the plaintiff argued that the student handbook was part of her contract because it was "integrated into the contract" by "reference in the Scholarship Agreements," this Court concluded that she had not stated "a valid claim for breach of contract based upon the language of the Student Handbook." *Id.* ¶¶ 21, 22. This Court observed that the handbook did "not contractually guarantee" the services the plaintiff was claiming she was owed, and that the handbook lacked "specific contractual terms which might evidence the intent to form a contract" because the language was of a non-promissory nature and merely a declaration of general procedures. *Id.* ¶ 30. Accordingly, this Court determined, "as a matter of law, that based upon the language of the Student Handbook," the plaintiff could not expect WNMU to provide certain services following her sexual assault, and therefore the handbook did not contain actionable contractual guarantees.[1] *Id.* ¶¶ 24, 30. This Court also noted

[1] The handbook at issue in *Ruegsegger* contained language stating that the University had created a Crisis Intervention Team which was to convene to respond to sexual assaults, identified the members of the team and listed contact information for the team members. 2007-NMCA-030 at ¶ 30. Nonetheless, this Court determined that because this language did not outline "specific types of investigation, support and sanctions," it was not sufficient to create even an *implied* contract. *Id.* This reasoning is particularly important because the handbook language of *Ruegsegger* is

that there was no support for 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.* ¶ 33. As Plaintiffs in this case have observed, New Mexico courts have never held that a student handbook creates a contractual relationship. AB 15.

This Court's decision in *Ruegsegger* provides the dispositive logic which controls this case. The writings identified by Plaintiffs both at the district court and presently do not contain the "specific contractual terms which might evidence the intent to form a contract" required by *Rugsegger*. Plaintiffs' confusion on this issue does not make up for the lack of a written agreement between the parties as to any obligation regarding accreditation, and compels this Court to reverse the district court's denial of Defendant's Motion for Summary Judgment.

B. Neither the Student Acknowledgement Form nor the Program Handbook required Defendant to maintain its national accreditation.

Contracts require 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,

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far more affirmative and specific than the mere statement of fact (that DACC had NLNAC accreditation) at issue in the present case, and therefore similarly insufficient to establish a contractual obligation.

¶ 19, 119 N.M. 415. A contract which makes adherence to its terms an optional condition 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."); *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).

In *Ruegsegger*, this Court observed that valid contracts require a "mutuality of obligation," and that the "mutuality does not require that the consideration provided by both parties be identical[.]" 2007-NMCA-030, ¶ 19. When reviewing the two documents that the plaintiff relied on to establish her contract claim, this Court observed that the scholarship agreement only purported "to bind Plaintiff, not Defendants, to compliance with university 'regulations' as a condition of the contract." *Id.* In addition, this Court noted that the handbook established a procedure for the university's "response to an alleged sexual assault," which included individuals to be notified and actions to be taken. *Id.* ¶ 28. Despite these statements in the handbook, this Court concluded that the handbook did not contractually guarantee any rights to the plaintiff, and although it set out "a general

framework of policies," this Court was not convinced that it obligated any specific type of conduct on behalf of WNMU. *Id.* ¶ 30.

This case involves statements in a student handbook which are far less specific than the handbook at issue in *Ruegsegger*. Additionally, the subject language in this case is more succinct and factual in nature than the detailed descriptions and procedures at issue in *Ruegsegger*, which this Court determined were merely "guidelines for the operation of WNMU." *Id.* In the present case, the Handbook acknowledgement form only binds Plaintiffs to follow the "polices and information" in the Handbook, and there is no affirmative statement on behalf of Defendant that it will provide any type of service, let alone maintain national accreditation in perpetuity, or at all. RP 1008.

The subject Handbook in this case clearly stated that DACC and the ADN program reserved the right to change, modify or alter the contents of the Handbook at any time. RP 778; RP 874[2]. *See Ruegsegger*, 2007-NMCA-030 ¶ 29 (considering a handbook's statement that the University reserved the right to amend the handbook at any time as persuasive evidence that the handbook did not create contractual rights); *Jamieson v. Vatterott Educ. Centers, Inc.*, 259 F.R.D. 520, 540-41 (D. Kan.

[2] To the extent that Plaintiffs rely on statements made in the Catalogs to support their claims, all of the Catalogs for all of the relevant years also stated that "DACC reserves the right to change at any time and without notice any item contained in this publication, including program offerings and content, course offerings and descriptions, procedures, policies, and regulations." RP 777, 812-28.

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"); *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). Although Plaintiffs argue that the disclaimer in the Handbook is somehow inapplicable because it "does not mention national accreditation," (AB 26) Plaintiffs overlook that the Handbook states that the "right to alter without prior notice" pertains to "policies, faculty assignments, time schedules, course assignments, courses, grading, curricula, *and all other matters contained in the DACC Nursing Program Handbook*." RP 874; *see also* RP 812 (disclaiming in the Catalog that

"DACC reserves the right to change at any time and without notice *any item contained in this publication*, including program offerings and content, course offerings and descriptions, procedures, policies, and regulations.") (emphasis added).

The subject Handbooks are devoid of any promises, guarantees, or affirmative statements about the future of DACC's national accreditation. Plaintiffs cannot assert the existence of a "general" contract with Defendant, but must instead identify specific promises regarding NLNAC accreditation.[3] The fact that Plaintiffs have ignored this obligation is both telling and dispositive of their claims. Because the subject Handbooks make no promises or guarantees about accreditation, this Court should conclude, as a matter of law, that Plaintiffs have not made a cognizable breach of contract claim.

II. Plaintiffs cannot bring suit for breach of implied contract.

The immunity from suit articulated in Section 37-1-23 prohibits plaintiffs from proceeding with implied contract claims against governmental organizations. In *Campos de Suenos,* this Court explained that it had "grave reservations" with violating the Legislature's articulation of immunity codified in Section 37-1-23 by

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[3] Plaintiffs argue at length that Defendant's position somehow takes this matter outside the appropriate scope of review for a writ of error. AB 18-25. This argument is fallacious. Defendant's argument, below and presently, is that the Handbook's statement regarding accreditation does not constitute a written agreement, which is appropriate for review under the collateral order doctrine.

allowing a claim for breach of an implied contract to override governmental immunity. 2001-NMCA-043, ¶ 26 (holding that "implied" contracts, which are not based on a valid written document, do not override governmental immunity). Although Plaintiffs appear to advocate for this Court to set aside its reservations and extend the exception recognized in employment cases to this case (AB 16), this Court should decline their request.

The Legislature's limitation of requiring "valid written contracts" as a prerequisite for contract claims against governmental entities places "the risk of loss on a party who transacts business with a governmental entity without a valid written contract." *Id.* ¶ 14. Contracts pertaining to employment relationships are the exception, and they "represent a unique body of law" that must be considered against the at-will employment rule in New Mexico and the accompanying jurisprudence. *Id.* ¶ 26. Although implied contract claims have been recognized in New Mexico against governmental entities in the employment context, this Court has expressly refused to expand the Legislatures articulation of immunity in Section 37-1-23, and Plaintiffs provide no explanation as to why this Court should entertain adopting another exception for this case. *See City of Las Vegas v. Oman*, 1990-NMCA-069, ¶ 35, 110 N.M. 425, 796 P.2d 1121 (stating that the "doctrine of stare decisis presumes that a court will apply the rules of law previously announced by courts of the same jurisdiction to cases involving similar facts.").

In an attempt to circumvent Section 37-1-23, Plaintiffs urge this Court to skip any analysis of whether a specific written promise regarding NLNAC accreditation was made by Defendant, and instead proceed straight to an analysis of the intent of the parties. *See* AB 1 (stating that the interpretation "of a written contract term" is a question for the jury); AB 27 (stating that "the meaning of the handbook disclaimer is a jury question"). Plaintiffs seek to have the Court view any alleged obligation by Defendant with regard to NLNAC accreditation as implied in the purported contract between the parties, and suggest that the Court should depart from well-settled law to create a new exception to Section 37-1-23 in order to accomplish this. This approach is contrary to New Mexico law, which does not allow a court to fill in the gaps left in the only written agreement between the parties, as Plaintiffs urge. *See Campos de Suenos*, 2001-NMCA-043, ¶¶ 21; 29.

The language upon which Plaintiffs rely does not constitute legally enforceable promises, and instead are merely statements of fact which were corrected when DACC lost its NLNAC accreditation. No statement was made to Plaintiffs that they would obtain a degree from an NLNAC accredited school or that DACC promised to maintain its accreditation for any period of time. Plaintiffs' argument that DACC was merely required to maintain accreditation long enough for those students who were already admitted into the nursing program to graduate (AB 25), does not lessen the affront to Legislature's statement of immunity from claims

based upon unwritten agreements. Rather, such an argument seeks to imply yet *another* specific term of contract which was not addressed in any of the written materials and it further attenuates Plaintiffs' case. Taking Plaintiffs' argument to its logical conclusion, Defendant (and every other institute of higher education which issues student handbooks or catalogs) could be sued for failure to comply with *any* statement contained in its handbooks or catalogs. For example, DACC's Catalog states, with regard to DACC's Paralegal Studies Program, "[p]paralegals enjoy the intellectual challenge of assisting attorneys in finding legal solutions for their clients' problems." RP 1375. Following Plaintiffs' logic, any student or graduate of the paralegal program who did not feel they were intellectually challenged by assisting attorneys find solutions for a client's legal problems would have a valid cause of action against DACC for such disappointment. Such a vast expansion of potential liability, in derogation of § 37-1-23, is not what the Legislature intended, nor what this Court has held addressing similar issues in the past.

Simply put, the writings Plaintiffs champion do not contain the specific promise upon which they base their claims, and the only way to reach the end result they seek is to imply terms which are not in any of the documents. Such an approach is forbidden under well settled New Mexico law, and should be rejected by this Court.

III. Defendant is immune from suit for claims of educational malpractice.

As more thoroughly discussed in the Brief-in-Chief, New Mexico has never before recognized claims for educational malpractice. The limited instances where a student's claim for breach of contract against a university has been allowed to proceed are reserved for situations where students received *none* of the services contracted for, or received fewer services (in terms of a quantifiable number of classes or hours) than the amount of education the student contracted for. *Ross v. Creighton*, 957 F.2d 410, 416-17 (7th Cir. 1992) (explaining that claims which address whether academic services are deficient are impermissible inquires for courts to attempt to resolve).

Plaintiffs' contention that they have not plead a claim for educational malpractice is addressed by reference to the numerous cases cited in Defendant's Brief-in-Chief which hold that claims which sound in educational malpractice are impermissible regardless of how they are styled. *See e.g. Ross,* 957 F.2d at 417 (stating that a plaintiff must identify a specific contractual promise which a defendant failed to offer, rather than a general claim that that education was not "of a certain quality."); *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 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.'").

The same policy reasons that have led courts to conclude that educational institutions are immune from suits for educational malpractice claims are implicated by Plaintiffs' claim of breach of implied contract. In both instances, courts are asked to review the quality of education received and the internal decisions educational institutions have made on faculty staffing and school operations, which puts courts in the position of overseeing the daily operations of schools. *See Ross v. Creighton*, 957 F.2d 410, 414, 416-17 (7th Cir. 1992) (observing that educational malpractice claims and breach of contract claims are barred to the extent that they seek to attack the "general quality of an education" and plaintiffs are generally prohibited from "second-guessing the professional judgement of the University faculty on academic matters."); *see also Lidecker v. Kendall Coll.*, 194 Ill. App. 3d 309, 317, 550 N.E.2d 1121, 1126 (1990) (concluding that students of a nursing school presented no

evidence to support their claim for breach of contract when they discovered that the school was not accredited because the school catalog did not contain any "implied promise of a certain quality of education"). To the extent that Plaintiffs request their contract claim to proceed based on writings which did not make any promises to Plaintiffs or specify any procedure Defendant was to follow, such a claim would run afoul of the principals which prohibit educational malpractice claims by asking the district court to second-guess Defendant's operational and managerial decisions which led to the loss of accreditation. The lack of any writing in this regard would require the district court to do so without reference to written guidelines, to instead apply some amorphous standard of care and would expose Defendant (and other governmental entities) to litigation based on terms which are not included in valid written contracts. This is contrary to the law of New Mexico and the vast majority of other jurisdictions, and dispositive of Plaintiffs' claims in this regard.

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.

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