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CONCURRENT SESSION TWO

The University's Duty to Educate: Has the Tort Theory of Educational Malpractice Been Replaces by a Contract Duty in Academic Advisement?
The Impact of Ross v. Creighton University on Student Athletes

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THE UNIVERSITY'S DUTY TO EDUCATE: HAS THE TORT THEORY OF EDUCATIONAL MALPRACTICE BEEN REPLACED BY A CONTRACT DUTY IN ACADEMIC ADVISEMENT? THE IMPACT OF ROSS V. CREIGHTON UNIVERSITY ON STUDENT ATHLETES

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The tort theory of educational malpractice is founded upon the premise that a particular standard of care in the education of students can be established and should be imposed.

Courts have however consistently rejected educational malpractice claims. Indeed, with the exception of the state of Montana, no state has recognized educational malpractice as a viable cause of action. This rejection of educational malpractice has included claims based upon the improper diagnosis and placement of students in special education programs, the failure of schools to provide basic educational skills, the failure of technical programs to prepare its students for jobs, the failure of universities to provide academic oversight of graduate studies, the failure of universities to appropriately train or supervise medical residents, and, as established in Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992), the failure of
universities to provide a meaningful education to student athletes who do not meet admission standards, but who are admitted nonetheless.

Courts have refused to recognize educational malpractice claims, reasoning instead that it is not the court’s, nor a jury’s, province to substitute its judgment for that of professional educators. To hold otherwise would be to embroil the judiciary as the overseer of a college’s administrative practice.

In addition, a number of courts have refused to impose liability out of concern of excessive litigation. Courts have reasoned that recognition could burden administrators and teachers with a flood of litigation each time a dissatisfied student fails a grade or test. Instead, prompt resolution of such claims through administrative proceedings is the proper way to correct erroneous educational practices.

Finally, in rejecting educational malpractice as a viable claim, courts have been hesitant to establish what standard of care is owed to students so as to measure an educator’s conduct. In the absence of a professional standard of care, there can be no breach of duty and accordingly no liability for negligently failing to meet that amorphous standard. If a college student can read and write but not as well as he or she would like, or enough to become employed, or for that
matter, appreciably better than when they entered college, has there been a breach of duty? And if so, how are educational injuries to be measured? Judicial avoidance of such claims focus on the loss of an expectancy interest, or speculative loss, neither of which the law of torts has traditionally compensated.

While courts have uniformly rejected educational malpractice claims, courts continue to recognize that the relationship between a student and university is contractual in nature. The courts, in reviewing breach of contract claims, look to the university catalogue, bulletins, and other regulations as determinative of the nature and scope of the contract. In addition, courts seem to recognize that notwithstanding catalogue requirements, universities have the right to alter educational requirements. As stated in Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976), wherein the court rejected a student’s breach of contract claim based upon a university requirement not described in the university catalogue:

Implicit in the student contract with the university upon matriculation is the students’ agreement to comply with the university’s rules and regulations, which the university clearly is entitled to modify so as to properly exercise its academic responsibility. 529 F.2d. at 450.
The Ross v. Creighton University decision is significant in its extension of breach of contract claims to specific promises made to the student athlete. Prior to an analysis of the Ross v. Creighton University decision, the following overview of caselaw addressing educational malpractice and breach of contract actions should be instructive.

I. OVERVIEW OF CASELAW

Zumbrun v. University of Southern California, 101 Cal. Rptr. 499 (C.A. 2d Dist. 1972) - Action brought by a student for breach of contract, fraud, negligence, conspiracy and breach of fiduciary duty, due to the failure of the student's professor to administer a final examination. The court held that the issue of whether or not the actions of the faculty member were grounds for a refund of tuition was a question of fact to be determined at trial.

Peter W. v. San Francisco Unified School District, 131 Cal. Rptr. 865 (Cal. App. 2d. 1976) - Action brought by a high school graduate against the school district for failing to provide the plaintiff with basic academic skills. The court rejected plaintiff's claim that such a duty was owed.

Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) - Action based upon educational malpractice and breach of contract
brought by a graduate student in an effort to compel a university to grant the student a graduate degree. The student claimed that the failure to provide her with a degree deprived her of her civil rights and constituted a breach of contract. The court found that the university’s decision to require comprehensive examinations was an appropriate and reasonable academic requirement. The court further noted in dismissing the plaintiff’s claim for breach of contract that educational institutions have wide latitude in framing academic degree requirements.

**Dizick v. Umpqua Community College**, 577 P.2d 534 (Or. Ct. App. 1978) - Contract action brought by a community college student alleging that a technical school program curriculum did not include courses involving practical training in the skill. The court found that the plaintiff could not maintain a breach of contract action based upon the college's failure to include practical training absent an express statement that it would do so.

**Hoffman v. Board of Education**, 400 N.E.2d 317 (N.Y. 1979) - Educational malpractice action brought by the parent of a minor child based upon the improper diagnosis and placement of the child in classes for the mentally retarded. The court rejected plaintiff’s educational malpractice claim.

**Wilson v. Continental Insurance Co.**, 274 N.W.2d 679 (Wis.
1979) - Negligence action brought by a student against Marquette University based upon alleged psychological problems experienced by the student who had participated in learning enhancement program established for minority students. The Wisconsin Supreme Court failed to recognize a cause of action as having been stated.

*BM v. State*, 649 P.2d 425 (Mont. 1982) - Educational malpractice claim based upon the placement of a six year old in a special education program. The Montana Supreme Court held that the state owed a duty of care to the student as a result of a state statutory regulation governing student placement in special education programs. Based upon this statutory duty, the plaintiff was entitled to maintain a cause of action for educational malpractice.

*Tubell v. Dade County Public Schools*, 419 So.2d 388 (Fla.3d DCA 1982) - Educational malpractice action based upon improper diagnosis and testing of a child resulting in the child's placement in a special education program. The court expressly rejected the tort theory of educational malpractice.

*Woodruff v. Georgia*, 304 S.W.2nd 697 (Ga. 1983) - Negligence action brought against a university alleging that the university had failed to supervise the plaintiff's graduate studies. The court rejected the plaintiff's claim
for negligence.

Snow v. State, 469 N.Y.S.2d 959 (A.D.2 Dept. 1983) - Medical malpractice and breach of contract action brought against the State of New York based upon the improper diagnosis and treatment of a child resulting in the child's institutionalization. The court, while reaffirming that lawsuits predicated upon educational malpractice are not actionable in New York, found that the essence of the plaintiff's complaint was medical malpractice.

Swidryk v. St. Michael's Medical Center, 493 A.2d 641 (N.J. Super L. 1985) - Educational malpractice and breach of contract action filed by a medical resident against a medical program and its director of medical education for failing to adequately supervise the medical resident and provide a suitable environment for medical education experiences. The court rejected both causes of action.

Wickstrom v. North Idaho College, 725 P.2d 155 (Idaho 1986) - Action for educational malpractice and breach of contract brought by students enrolled in a technical course of study at a junior college for failure to educate the students as allegedly promised. The Idaho Supreme Court, while recognizing that the relationship between students and colleges is contractual in nature, found that there was no showing of how the course of study
failed to comply with the school catalogue. The court further reaffirmed the State of Idaho's rejection of educational malpractice as a viable cause of action.  

**Moore v. Vanderloo**, 386 N.W.2d 108 (Iowa 1986) - Educational malpractice action brought against a chiropractic college based upon its failure to adequately train a graduate of the college on risks associated with chiropractic techniques. The Iowa Supreme Court rejected educational malpractice as a viable cause of action and further rejected the plaintiff's argument that the granting of a diploma creates an express warranty.  

**Cuddihy v. Wayne State University Board of Governors**, 413 N.W.2d 692 (Mich. App. 1987) - Breach of oral contract claim brought by a graduate student alleging that she had been told by an academic advisor that she would be finished with her course of study by a particular date. The court, in dismissing the complaint, held that the statement made by the academic advisor was merely an opinion rather than an enforceable promise.  

**Bindrim v. University of Montana**, 756 P.2d 861 (Mont. 1988) Breach of contract action brought by a student to compel the granting of a college degree. The plaintiff alleged that the University contradicted the terms of its catalogue and reneged on assurances that course work from another
university would satisfy University of Montana requirements. The Supreme Court of Montana held that the University did not breach any implied covenant of good faith by failing to award the student his degree. The Supreme Court, in so holding, relied upon requirements set forth in the University catalog and language therein which provided the University with the authority to change rules and regulations with regard to admission, instruction, and graduation.

Susan M. v. New York Law School, 557 N.Y.S.2d 297 (Ct.App. 1990) - Action brought by a law school student who was dismissed from law school based upon academic deficiencies. The court, declining to intervene in matters related to educational judgement of students’ academic performance, held that it was appropriate that a review of the dismissal be limited to a determination of whether the decision was arbitrary, capricious, or contrary to a constitutional right or statute. The court found that to go beyond this would require the courts to conduct a substantive evaluation of academic performance which is beyond judicial review.

Smith v. Ohio State University, 557 N.E.2d 857 (Ohio Ct. Cl. 1990) - Negligence and breach of contract action brought against a university based upon allegations that
the student received inadequate advice regarding research and drafting of the student's masters thesis. The court rejected both the negligence and breach of contract claim. Malone v. Academy of Court Reporting, 582 N.E.2d 54 (Ohio App. 10 Dist. 1990) Action for breach of contract filed by former paralegal students. The court held that the students stated a cause of action for breach of contract and misrepresentation based upon their representation that it was accredited to issue a degree for paralegal studies when the school was not accredited to do so.

Blane v. Alabama Commercial College, Inc., 585 So. 2d 866 ( Ala. 1991). Educational malpractice and breach of contract action brought by a graduate of a business college based upon her inability to find a clerical/computer job upon graduation. The Alabama Supreme Court rejected educational malpractice as a viable cause of action. The court further held that no action for breach of contract could be maintained unless there was a showing that the college guaranteed the student a job upon graduation.

Cantone v. Rosenblum, 587 N.Y.S.2d 743 (A.D. 2 Dept. 1992) Failure to appropriately evaluate a child resulting in misdiagnosis of hearing impairment constituted medical malpractice and not merely educational malpractice. As such, a cause of action may be maintained.
Cavalier v. Duff's Business Institute, 605 A.2d 397
(Pa. Super. 1992) - Action based upon breach of an implied contract to provide a quality education was filed by a student of a court reporting school. The court held that the action was in essence based upon educational malpractice and could not be maintained.

Bishop v. Indiana Technical Vocational College, 742 F.Supp. 524
(N.D. Indiana 1990) - Breach of contract action based on allegations that the plaintiff received an inferior education. The allegations include a claim that the college had interfered with the plaintiff's "right for the pursuit of happiness". The court held that educational malpractice is not cognizable under section 1983 of the Civil Rights Act and further that educational malpractice does not deprive individuals of their constitutional rights, even when characterized as a breach of contract.

II. EDUCATIONAL MALPRACTICE AND BREACH OF CONTRACT ACTIONS IN THE CONTEXT OF STUDENT ATHLETES

The 1991 decision of Jackson v. Drake University, 778 F. Supp. 1490 (S.D. Iowa 1991), and the 1992 decision of Ross v. Creighton University, 957 F.2d 410 (7th Cir. 1992), raise important questions concerning a college or university's legal duty to student athletes. In these decisions, the courts were asked to evaluate whether there is something unique about the
relationship between a student athlete and his or her university which creates a higher standard of care than is imposed for traditional students. Factors unique about the student-athlete/university relationship might include the athletes' academic preparedness for college, the recruitment process and representations made to the athletes by coaching staffs, the provision of extensive academic advisement and assistance once on campus, and the rigorous demands of athletic participation while enrolled in classes.

Jackson v. Drake University, supra - Terrell Jackson was recruited by Drake University to play basketball. During recruitment, Drake's coach emphasized to Mr. Jackson the quality of education that he would receive if he attended Drake. Mr. Jackson enrolled at Drake in 1988. During his tenure at Drake, basketball practices were scheduled at times which interfered with Mr. Jackson's study time and tutoring schedule. Threats were made that Mr. Jackson's athletic scholarship would be terminated if he did not attend. The coaching staff suggested that Mr. Jackson enroll in academic courses which were considered easy, and went so far as to prepare academic term papers on his behalf. Mr. Jackson refused to enroll in courses suggested by the coaching staff and further refused to accept term papers which he did not prepare. In 1990, Mr. Jackson quit the Drake basketball team due to the coaches' behavior towards him, which included the use of foul
language and derogatory names.

In 1990, Mr. Jackson filed an action against the University claiming breach of contract, negligence, negligent hiring, negligent misrepresentation, fraud, and a violation of his civil rights.

In reviewing Mr. Jackson's claim, the court found that the only contract between Mr. Jackson and Drake was that concerning financial aid. The court held that Drake had fulfilled all of its obligations under the contract. The court further held that the right to play basketball was not implicitly a part of the agreement. The court, in rejecting Mr. Jackson's negligence claim, held that the essence of this claim was educational malpractice which is not recognized under Iowa negligence law.

The court did, however, find that Mr. Jackson had plead facts sufficient to maintain a claim against the University for negligent misrepresentation and fraud. As stated by the court:

Accepting Jackson's version of the facts, Drake, through Abatemarco [the basketball coach], made representations to Jackson that it was committed to academic excellence and that this commitment carried over to the athletic department. Drake promised Jackson a college education and full support services so he could fully utilize his educational opportunity while playing basketball. Jackson relied on Drake's representations, and moved from Chicago to Des Moines to attend Drake. Jackson claims that Drake did not exercise reasonable care in making the representations and had no intention of providing the support services it had promised. Drake argues that these are claims for educational malpractice, a claim not recognized under Iowa law.

The court finds that the policy considerations discussed
previously do not weigh as heavily in favor of precluding the claims for negligent misrepresentation and fraud as in the claim for negligence. Furthermore, Jackson has designated specific facts that show there is a genuine issue for trial on these counts.

*Jackson*, 778 F.Supp. at 1494, 1495.

**Ross v. Creighton University, supra.** - In the spring of 1978, Kevin Ross accepted an athletic scholarship to attend Creighton University and to play on its varsity basketball team. Creighton is acknowledged as an academically superior university. At the time of his enrollment, Mr. Ross was at an academic level far below the average Creighton student. For example, Mr. Ross scored in the bottom fifth percentile of college bound seniors taking the American College Test, while the average freshman admitted to Creighton scored in the upper twenty-seventh percentile. According to Mr. Ross’ complaint, Creighton knew Mr. Ross’ academic limitations when it admitted him, and in order to induce him to attend and play basketball, Creighton assured Mr. Ross that he would receive sufficient tutoring so that he would receive a meaningful education while at the University.

Mr. Ross attended Creighton from 1978 until 1982. During that time he maintained a "D" average. On the advice of the Athletic Department, Mr. Ross enrolled in a number of "bonehead" (Ross' description) courses such as ceramics, basketball, football trade, and track and field theory that would not have been an acceptable curriculum by a non-athlete. After his basketball
eligibility expired, Mr. Ross had earned only 96 of 128 credits he needed to graduate. Mr. Ross alleged that the athletic department employed a secretary to read his assignments and prepare and type his papers. When he left he had an overall language skill of a fourth grader and reading skills of a seventh grader.

In 1982, Creighton made arrangements for Mr. Ross to attend a preparatory elementary/high school to obtain remedial educational assistance. The agreement included Creighton's willingness to pay for Mr. Ross' tuition, special tutoring, books and living expenses. Mr. Ross attended the preparatory school in 1982 and 1983. In July of 1987, Mr. Ross suffered what he termed a "major depressive episode" during which he barricaded himself in a Chicago motel room and threw furniture out of the window. To Mr. Ross, this furniture symbolized Creighton employees who had wronged him. Mr. Ross thereafter filed an action against Creighton for breach of contract as well as three separate theories of negligence, including educational malpractice in not providing him with an education, negligent admissions and negligent infliction of emotional distress. The District Court for the Northern District of Illinois dismissed with prejudice Mr. Ross' complaint, holding that the state of Illinois did not recognize either a cause of action for educational malpractice nor breach of contract based upon alleged instruction and the failure to provide Mr. Ross
with a reasonable opportunity to obtain a meaningful education. Mr. Ross subsequently appealed the District Court decision to the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit upheld the lower court decision that the negligence claims could not be maintained. The court noted that to attempt to establish a standard of care giving rise to a claim for educational malpractice would place the courts in a position of oversight which was not proper. "This oversight might be particularly troubling in the university setting where it necessarily implicates considerations of academic freedom and autonomy." Ross, 957 F.2d at 415, Moore v. Vanderloo, 386 N.W.2d 108, 115 (Iowa 1986). With regard to Mr. Ross' claim for negligent admission, the court noted that the courts cannot determine who is a reasonably qualified student since this requires a subjective assessment of the nature and quality of the defendant university and the intelligence and educability of the plaintiff. The court further noted that to do so would unduly interfere with a university's right to make admissions decisions. Ross, 957 F.2d at 415.

However, in reviewing Mr. Ross' claim that Creighton had breached both oral and written contracts, the court found that Creighton had agreed, in exchange for Ross' promise to participate in Creighton's basketball program, to allow him an opportunity to participate in a meaningful way in the academic program of the University despite his academic deficit. The court further found that
Creighton had breached this contract when it failed to perform the following commitments made to Ross:

(1) To provide adequate and competent tutoring services,
(2) To require [Mr. Ross] to attend tutoring sessions,
(3) To afford Mr. Ross "a reasonable opportunity to take full advantage of tutoring services,
(4) To allow Mr. Ross to red shirt, and
(5) To provide funds to allow Mr. Ross to complete his college education.

Ross, 952 F.2d at 16.

The court noted that Illinois, along with a majority of states, recognizes that the relationship between a university and a student is contractual in nature. These contracts are primarily founded upon catalogues, bulletins, and regulations established by the university. The court made clear, in evaluating Ross' claim for breach of contract, that a breach of contract action which in essence was based upon an educational malpractice claim would not be recognized. As stated by the court: "To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor." Ross, 952 F.2d at 416, 417. The court therefore held that an action could be maintained on the very narrow issue of whether Mr. Ross was barred from any participation in and benefits of the University's academic program. The court believed that the lower court could do so
without second guessing the professional judgment of the University on these academic matters.

III. CONCLUSION

While it appears that a pure educational malpractice claim based upon the negligence of a university to provide the student athlete with an education is doomed, judicial trends recognizing contract, fraud and negligent misrepresentation causes of action are evident. Allowing such claims alleviates the need to define a standard of care and the search for proximate cause. Instead, the analysis hones in on specific representations made during recruitment, as well as curriculum requirements set forth in the university catalogue.

Recent court decisions concerning student athlete claims appear result oriented in nature; the courts tacitly recognizing the fundamental unfairness in not holding a university accountable for requiring student athletes to perform athletically while effectively precluding opportunities for educational advancement.
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The Theory of Liability Based on Breach of Contract

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I. THE CONTRACTUAL RELATIONSHIP BETWEEN A UNIVERSITY AND ITS STUDENTS, AND WHAT THAT RELATIONSHIP MEANS

(1) "It is held generally in the United States that the 'basic legal relation between a student and a ... university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.' Ross v. Creighton University, 957 F.2d 410, 416 (7th Cir. 1992)(emphasis added), quoting Zumbrun v. University of Southern California, 101 Cal. Rptr. 499, 504 (1972).

(2) But it does not follow that "all aspects of [the] university-student relationship [are] subject to remedy through a contract action." Ross, supra, 957 F.2d at 416. In an effort to distinguish legitimate from unwarranted breach-of-contract actions by students against institutions of higher education, the appellate court in Ross enunciated the following rule: "To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, [the student] must point to an identifiable contractual promise that the defendant failed to honor. [957 F.2d at 416-17.]

(3) Let's restate the rule, breaking it down into its constituent parts:

To state a claim for breach of contract, [the student] must point to --

[1] an identifiable contractual promise
[2] that the defendant failed to honor.
(4) A primer on contract law: Before examining the kinds of evidence a student must adduce to make out a claim for breach of contract, let's pause to consider what a "claim for breach of contract" is and how it is ordinarily proved. (The following is with apologies to the attorneys in the audience who specialize in contract law -- they will recognize the extent to which I have sacrificed nuanced accuracy for comprehension.)

(a) The term "contract" is usually defined semi-tautologically, e.g., "[a] promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1.

(b) At the heart of the law of contracts is the notion of an exchange of reciprocal promises. Seller says to buyer, "I will provide certain services to you if you pay for them." Buyer replies, "I will pay you a certain sum of money in exchange for your provision of services." Once the parties agree on the essential terms of the relationship -- what services will be provided, how much they will cost, when they will be performed -- the parties have entered into a contract. If either party reneges on the promises that induced the other party to enter into the contract, the contract is breached, and legal consequences ensue.

(c) Notice that the word "written" does not appear in paragraphs (a) or (b). Promises do not have to be written down to assume contractual force and effect. Any promise, whether written or oral, can give rise to a contract as long as the promise is --

(i) definite,

(ii) unambiguously accepted by the other party, and

(iii) requited -- in other words, exchanged for a meaningful promise from the other party. In the language of contract law, each party must receive consideration in exchange for his or her promise, something of value in return for the performance of the promise. A will provide services to B, but only in exchange for B's money; B will pay A, but only if A provides services.

As a matter of common sense, it is usually easier to demonstrate that the prerequisites for a valid contract -- definiteness of terms,
acceptance, and consideration -- have been satisfied when the contract is written down and signed by the parties. Over the course of one’s life, most of the significant contracts one enters into will be written down -- sales contracts for houses and automobiles, insurance policies, etc. But, to repeat, a contract is no less valid because it is oral rather than written.

(d) What gives cases involving students’ allegations of breach-of-contract by universities their special vitality is that student plaintiffs are forced to cobble together the contract on which they sue from several different sources, some oral, some written, but none embodied in a traditional-looking written contract between the parties:

[A] formal university-student contract is rarely employed and, consequently, "the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication."


II. THE ELEMENTS OF A BREACH-OF-CONTRACT CLAIM BY A STUDENT AGAINST A UNIVERSITY

(1) The starting point restated:

To state a claim for breach of contract, [the student] must point to --

[1] an identifiable contractual promise
[2] that the defendant failed to honor.
When a student plaintiff bases a legal claim on the theory that the university defendant has breached a promise, the plaintiff must identify the specific contractual promise the university defendant is alleged to have breached. In other words, the student must demonstrate that the university made the promise in a form the law recognizes as contractually binding. Categorized below are the kinds of evidence a plaintiff would rely on to make out a viable breach claim. The plaintiff might endeavor to show, for example, that the promise allegedly breached by the university was:

(a) Contained in an institutional policy or regulation the university has committed itself to honor. My favorite, if somewhat archaic, example is one that sheds interesting light on the institution of higher education that employs our host Bob Bickel: John B. Stetson University v. Hunt, 102 So. 637 (Fla. 1924). University authorities expelled a young student named Helen Hunt for fomenting "numerous disorders ... in the girls' dormitory," including "ringing cow bells, parading in the halls of the dormitory at forbidden hours, cutting the lights, and such other events as were subversive of the discipline and rules of the University." Miss Hunt was summoned before the University's President, and, "on being briefly interrogated, Miss Hunt was commanded to go home that day." Her family then brought suit against Stetson for "maliciously, wantonly, and without cause in bad faith expel[ling her] from said University ...." 102 So. at 639.

Analyzing the case as a straightforward breach-of-contract claim, the Florida Supreme Court pointed out that Stetson's Board of Trustees had adopted institutional policies governing the conduct of students, and that the University had faithfully adhered to its policies in inviting Miss Hunt to study elsewhere. The Court concluded:

As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family. [Id. at 640.]
(b) Derived from a *descriptive course catalogue, student handbook, course syllabus, or manual*. This is probably the most common approach taken by student plaintiffs.

(i) *Zumbrun v. University of Southern California*, 101 Cal. Rptr. 499 (Cal. App. 1972): The facts in this often-cited case were unusual. Jean Zumbrun, then 63 years old, entered the University of Southern California in the fall of 1969 to complete a college education that had been interrupted years earlier. At the beginning of the spring semester in early 1970, she enrolled in a sociology course taught by Professor Jon Miller. Just as the course was ending, President Nixon's decision to send ground troops into Cambodia precipitated a general faculty strike at USC. On May 1, 1970, Professor Miller canceled the remaining classes and the final examination and gave every student, including Ms. Zumbrun, a grade of "B". Ms. Zumbrun filed suit, alleging that the professor's decision to cancel classes breached the implicit promise contained in the course syllabus that the class would continue to meet until the end of May. The court agreed with Ms. Zumbrun that she "did not receive all that she had bargained for when she enrolled in" Professor Miller's class, and held that her complaint stated facts sufficient to make out a claim for breach of contract against USC. 101 Cal. Rptr. at 504-505.

(ii) *Lyons v. Salve Regina College*, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978): The plaintiff, a nursing student, accused the college of breaching her contract by failing to process her appeal of a failing grade in accordance with the "Grade Appeal Process" spelled out in the academic information booklet she received when she registered. The court agreed with the plaintiff that the written grade appeal process amounted to a contractually enforceable promise on the college's part that those procedures would be provided -- but dismissed the lawsuit anyway on the theory that the college had faithfully followed the terms of the written policy.
(c) Reflected in institutional custom or practice.

(i) *DeMarco v. University of Health Sciences [Chicago Medical School]*, 352 N.E.2d 356 (Ill. App. 1976): Pasquale DeMarco graduated from college in 1940, enrolled briefly in an unaccredited medical school in Massachusetts, then in 1941 applied for admission to Chicago Medical School ("CMS"). In answer to a question on the CMS application form inquiring whether he had ever attended medical school elsewhere, he wrote "No," innocently believing he was required to answer the question affirmatively only if he were seeking to transfer credits from another school. Mr. DeMarco was admitted to CMS and did well as a student there. But six weeks short of graduation, CMS expelled him. CMS asserted the expulsion was due to its discovery that Mr. DeMarco had falsified his application three years earlier.

Over the next two decades, Mr. DeMarco thrived as a businessman and nursing home operator, and amassed a considerable fortune. In 1968, he explored with CMS's dean the possibility of completing his medical education. He was conditionally readmitted, but later declared ineligible for a degree when he failed Parts I and II of the National Medical Board Examination. A frustrated Mr. DeMarco then filed suit against CMS, alleging that the school had actually expelled him in 1944 because of his failure to satisfy an unwritten rule requiring students to make large charitable contributions as a precondition for award of a degree -- a rule that was not explained to him at the time as a term of his contract with CMS.

At trial, Mr. DeMarco supported his claim by providing compelling evidence about CMS's practice of requiring charitable pledges as a condition of admission:

- Statistical summaries of the pledge records of admitted students, showing that in 1973, for example, 86 percent of admitted students made pledges, and that the average pledge that year was $48,000.
• Damaging testimony from the dean of admissions, who stated that he was given no role in individual admission decisions but was told to refer all calls to the President's Office; and from a member of the Board of Trustees to the effect that the Board expressed concern about admissions criteria when it learned about the President's use of contribution "guidelines" in making admission decisions.

The court found that CMS was, in effect, selling spots in its entering class to wealthy applicants who were willing to make pledges, and refusing to graduate students who did not pay a premium for the privilege. The court ruled that CMS breached its contract with Mr. DeMarco by expelling him on a ground that was not clearly explained to him when he enrolled.

(d) Oral. See, for example, Taylor v. Wake Forest University, 191 S.E.2d 379 (N.C. App.), cert. denied, 192 S.E.2d 197 (N.C. 1972): Prior to the recent decisions in Jackson v. Drake University, 778 F. Supp. 1490 (S.D. Iowa 1991), and Ross v. Creighton University, supra, this was probably the most notorious reported case dealing with a breach-of-contract claim by an intercollegiate athlete against the university that awarded him his scholarship. Gregg Taylor, a highly recruited high school football player, accepted a scholarship from Wake Forest University and enrolled there in 1967. In the first semester of his freshman year, he received failing grades. He declined to participate in spring football practice, and his grades rose to a level high enough to make him eligible for intercollegiate competition in his sophomore year. He nevertheless decided to forego football and concentrate on his studies. The University responded by taking away his athletic scholarship. Mr. Taylor sued, alleging that he and one of the football coaches had orally agreed that in the event he could not maintain a satisfactory level of classroom performance his participation in football "could be limited or eliminated to the extent necessary to assure reasonable academic progress." (191 S.E.2d at 382.) Nonsense, responded the court: "It would be a strained construction of the contract [between student and university] that would enable the [student] to determine the 'reasonable academic progress' of [himself]." (Id.) The court refused to accept the plaintiff's claim that he and the football
coach had agreed to an oral contract term so patently inconsistent with the objectives of the intercollegiate football program.

(e) *Derived from some other source.* Plaintiffs have exhibited great creativity -- albeit without much success -- in seeking to extract contractually enforceable commitments from extrinsic sources. In *Marquez v. University of Washington*, 648 P.2d 94 (Wash.App.), *review denied*, 97 Wash.2d 1037 (Wash. 1982), *cert. denied*, 460 U.S. 1013 (1983), for example, Alonzo Marquez enrolled at the University of Washington Law School under a special affirmative-action admissions program. Low grades after the first year led to his expulsion, and he sued. His theory was that a short, general, one-paragraph description of the Washington affirmative action program appearing in a pre-law handbook published by the Association of American Law Schools created a contractual entitlement to a formal, structured, tutorial assistance program -- which the Law School did not provide. The court, reacting skeptically to the notion that the University of Washington could be contractually bound by a document it did not write, pointed out that Mr. Marquez did not take full advantage of the academic aid opportunities the Law School did offer, and dismissed the contract action.

(3) If the student plaintiff succeeds in proving the existence of an identifiable contractual promise, then the student plaintiff must show in addition that the defendant university *failed to honor* that promise.

(a) The case law makes it very clear that general gripes about qualitative deficiencies in the educational services provided will not suffice to state a cause of action for breach of contract. When decisions are premised on academic or pedagogical considerations, courts are usually reluctant to substitute their judgments for those of trained academics. *E.g.*:

Professional educators -- not judges -- are charged with the responsibility for determining the method of learning that should be pursued for their students. When the intended results are not obtained, it is the educational community -- and not the judiciary -- that must resolve the problem. For, in reality, the soundness of educational methodology is always subject to question and a court ought not in hindsight substitute its notions as to what
would have been a better course of instruction to follow for a particular pupil.


(b) As one leading case has implicitly suggested, the plaintiff's likelihood of success on a breach-of-contract claim increases if the promise the university has allegedly breached is *objective* and *specific*. Claims based on the failure to provide "objective fundamentals" are more likely to succeed than claims based on "the more subjective nuances of the teacher-student relationship." *Wickstrom v. North Idaho College*, 725 P.2d 155, 157-58 n. 1 (Ida. 1986).

(c) The case law draws a distinction between a university's failure to perform a promise *adequately* and its unwillingness to perform it *at all*. See, e.g., *Ross v. Creighton University*, *supra*, 957 F.2d at 417 ("[T]he essence of the plaintiff's complaint [must] not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all"); *Wickstrom v. North Idaho College*, *supra*, 725 P.2d at 160 (Donaldson, C.J., dissenting):

*There may be narrow circumstances where an action for breach of contract may lie, such as where an educational institution accepts a student's tuition and thereafter provides no educational services at all. Similarly, if the contract -- whether express or implied -- with the school provides for certain specified services, such as a designated number of days or hours of instruction, and the school fails to meet this obligation, then an action for a breach of contract may be available. These are conditions of the agreement between a student and the school that do not relate to the adequacy of the instruction, and hence, are capable of evaluation and remedy in the courts based on contract principles.... [But when the] asserted breach is predicated upon the quality and the adequacy of the course of instruction[, the] claim requires the fact finder to enter the classroom and determine whether or not the judgments, curricula, and teaching styles of the professional educators involved were deficient.*
III. CONCLUSIONS

(1) Students who file breach-of-contract actions against universities face a decidedly uphill battle. They rarely benefit from unambiguous written contracts. Their claims are usually based on implied contract terms, the existence of which is difficult to prove and the scope and meaning of which are vigorously contested.

(2) Rules of contract construction benefit university defendants. Courts admonish plaintiffs:

(a) Don’t be literal. A court commits reversible error by insisting on "the rigid application of commercial contract doctrine" to relationships between universities and their students. *Slaughter v. Brigham Young University*, 514 F.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975).

(b) Don’t be greedy. Courts will entertain modest breach-of-contract claims (the teacher didn’t meet until the end of the semester!) more willingly than they will tolerate sweeping qualitative complaints that smack of "educational malpractice" claims disguised in the language of contract law.

(c) If your institution makes specific promises to student-athletes, be sure somebody is monitoring those promises to see they’re kept. Keep in mind, too, that the complex documentation surrounding the award of scholarships to athletes -- documentation that involves three or more parties (university, student, NCAA, possibly the athletic conference too) -- heightens the possibility that the relationship may look suspiciously contractual. *See Taylor v. Wake Forest University*, 191 S.E.2d 379 (N.C. App.), *cert. denied*, 192 S.E.2d 197 (N.C. 1972), discussed on page 8 of this outline.
THE UNIVERSITY’S DUTY TO EDUCATE: HAS THE TORT THEORY OF EDUCATIONAL MALPRACTICE BEEN REPLACED BY A CONTRACT DUTY IN ACADEMIC ADVISEMENT? THE IMPACT OF ROSS V. CREIGHTON UNIVERSITY ON STUDENT ATHLETES

PRESENTED BY:

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Presented at the Stetson University
College of Law Conference:

14th ANNUAL NATIONAL CONFERENCE ON LAW AND HIGHER EDUCATION: ISSUES IN 1993
Sheraton Sand Key Resort Hotel
Clearwater Beach, Florida
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ILLINOIS STATE UNIVERSITY STUDENT GRIEVANCES

Among the powers and functions of the Student Code Enforcement and Review Board (SCERB) is the supervision of the student grievance process. The following includes portions of the text of the Student Handbook and comments by the Executive Secretary of SCERB.

SCERB has established the Student Grievance Committee, which shall review grievances concerning individual members of the University community and, when appropriate, facilitate resolution of such grievances. A grievance is a complaint arising out of any alleged unauthorized or unjustified act or decision by a member of the University community which in any way adversely affects the status, rights, or privileges of any member of the student body. A student must seek redress within ninety days of the alleged grievance. The burden of proof rests with the person making the complaint.*

Prevention of Grievances
Much can be done to prevent grievances, including: written policy statements, written course syllabus, clear statement of attendance policy and whether or not it is included in evaluation, clear statement regarding methods of evaluation and criteria used, and the weight of exams, papers, etc. These are things that faculty-staff can do. Students can ask for clarification whenever they are not sure about faculty-staff policy or procedure. All members of the University community should be familiar with the Student Handbook and other pertinent documents.

Membership - Grievance Committee
The members of the Student Grievance Committee shall be:

A. Six students and six faculty nominated by the Academic Senate and appointed by the President. The Executive Secretary of SCERB serves as a non-voting member. The Chairperson of the Committee shall be elected by the Committee. Faculty are appointed for three-year staggered terms. Students are appointed on an annual basis. Undergraduate students serving on this committee must be full-time students. Graduate students must have been admitted to an authorized advanced degree or credential program.

B. Four alternates, two students and two faculty, are selected by the above process.*

Procedure
Informal discussion between persons directly involved in a grievance is essential in the early stages of the dispute and should be encouraged at all stages. An equitable solution to the problem should be sought before the respective persons directly involved in the case have assumed official or public positions that might tend to polarize the dispute and render a solution more difficult. If a problem still exists after discussion, the student should bring the complaint to the attention of the department chairperson, administrative officer, or staff supervisor. Where informal recourse fails, the student may file a petition in writing to the Student Grievance Committee, accompanied by available documentary evidence.

The vast majority of grievances can be settled in an informal manner. Important to this method of solution is an approach by the student to the faculty-staff member that is not threatening, that does not put the faculty-staff member on the defensive, and that is honest, sincere, and diplomatic. Hopefully, the student will be received respectfully. Good personal communication skills can help solve the problem early. The responsibility for initiating discussion falls
upon the student. He/she may seek assistance on how to best accomplish this from the Student Judicial Office, Counseling Service personnel, resource students, other faculty-staff and students, etc.

Any student alleging violation of rights on the basis of sex, race, color, national origin, age, handicap, or veteran's status, shall contact the Affirmative Action Office of the University at Hovey Hall. The Affirmative Action Officer shall designate the appropriate university officer to investigate the allegations on the following basis: The Affirmative Action Officer shall investigate all cases alleging discrimination on the basis of race, color, national origin, religion, age, and veteran's status. The Title IX Coordinator shall investigate all cases alleging discrimination on the basis of sex. The Director of the Office of Disability Concerns shall investigate all cases alleging discrimination on the basis of handicap.

As soon as a student perceives the need to examine the possibility of a grievance, he/she should begin to document the evidence and put thoughts in writing while they are fresh. It may be beneficial to be able to refer to notes made while one's memory was clear. Faculty-staff would be wise to do the same if they feel a grievance is possible.

**Steps Followed by the Committee**

1. The Committee, as a whole, determines from the written grievance whether or not the case merits investigation. If not, the grievance is denied at that point, and the complainant is so notified. If the grievance is accepted for investigation, the Committee notifies the complainant and respondent in writing, and arranges for a swift and comprehensive investigation. An attempt is made to resolve the matter, if appropriate, at this level.*

2. After the investigation, the Committee may deny the grievance, recommend a resolution, or, if the case merits further consideration, arrange for a formal hearing. The parties involved including the appropriate university investigating officer shall be notified in writing of the decision and the reasons for that decision.*

3. When a formal hearing is required, such a hearing will be scheduled promptly and the parties will be notified in writing of the scheduled time and place. At the hearing, the parties directly involved and witnesses may testify and be questioned by the opposite party and the Committee members. Only evidence presented at the hearing will be considered in the final judgement.*

4. Either party may, for cause, request that any member(s) of the Committee be excluded from consideration of the case. Such a request must be made to the Executive Secretary. Any member of the Committee may disqualify himself/herself for any reason.*

5. Should a disqualification occur, the Executive Secretary shall appoint an alternate for the remainder of the case. Such an alternate should have the same status (student or faculty) as the member of the Committee being replaced.*

6. After a hearing, the Committee may deny the grievance or recommend a resolution. The parties involved, including the appropriate University investigating officer, shall be notified in writing of the decision and the reason for that decision.*

7. Either party may appeal a decision of the Committee to SCERB. Such an appeal must be in written form and received within ten days of the Committee's decision.*

8. Records regarding the grievance, including the tape recording of any formal hearing, will be destroyed or erased thirty days after a final decision.*

9. Should a person or University agency decline to follow the recommended resolution of the grievance, the President or his/her designated representative shall seek to resolve the impasse. If no resolution can be effected, the final decision will rest with the President or his/her designated representative. If necessary, the President or his/her designated representative will take appropriate action and enforce it.*
10. Nothing in the above procedures for dealing with grievances may be construed to abridge or modify rights and privileges granted in other sections of the Student Handbook.*

To file a formal grievance or inquire about the grievance process, contact the Student Judicial Office, 202 Fell Hall 438-8621.

* From the Student Handbook
GUIDELINES FOR SUBMITTING STUDENT GRIEVANCES

The deadline for grievances is 90 days from the date the alleged act or decision took place. It is on the written grievance that the Student Grievance Committee decides whether or not a case has been made for accepting the grievance. The burden of proof is on the student filing the grievance.

Your grievance should:

1. be legible

2. be signed and dated

3. include your local address and phone number

4. be concise and specific, with names and dates wherever relevant and possible

5. include name(s) of the party or parties against whom the grievance is being filed

6. clearly state the act or decision being challenged (in academic grievances include name and number of course, semester it was taken, and grade received)

7. clearly state why the act or decision is unauthorized or unjust (in academic grievances submit a copy of the syllabus or clearly explain the criteria for grading exams, papers, participation, etc. and weight)

8. briefly describe your discussion regarding the act or decision with the party or parties against whom the grievance is being filed

9. briefly describe your discussion with the department chairperson or supervisor

10. stick to the facts and avoid libelous remarks

Should you have any questions, please contact the Student Judicial Office Annex, 202 Fell Hall, 438-8621.

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