THE SUPREME COURT OF IOWA

Supreme Court No. 18-2201

Scott County No. CVCV297911

DARREN PETRO, Plaintiff-Appellant

vs.

PALMER COLLEGE OF CHIROPRACTIC, Defendant-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY

THE HONORABLE STUART WERLING

THE HONORABLE MARY E. HOWES

PLAINTIFF-APPEELANT FINAL BRIEF

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because it presents substantial and previously unaddressed questions of Iowa law regarding the enforceability of local civil rights laws and breach of contract actions against private educational institutions. It also presents substantial questions regarding the district court's jurisdiction to review agency decisions outside of a 17A action for judicial review.

STATEMENT OF THE CASE

On April 25, 2014, Appellant Darren Petro ("Petro") filed a complaint with the Iowa Civil Rights Commission ("ICRC") alleging disability and age discrimination and retaliation in education against Palmer College of Chiropractic ("Palmer"). (APP.000005-13) On September 18, 2014, the ICRC administratively closed Petro's complaint in part because age discrimination in education is not prohibited by the Iowa Civil Rights Act ("ICRA"). (APP.000014-22) Petro then filed a complaint alleging disability, perceived disability, and age discrimination and retaliation in education with the Davenport Civil Rights Commission ("DCRC"). (APP.000080-86)

This DCRC complaint was cross-filed with the ICRC pursuant to the agreement between the DCRC and ICRC. (APP.000029) On November 12, 2014 the Palmer asked the ICRC to close Petro's cross-filed complaint

because it was duplicative of an earlier complaint. (APP.000027-28) In an undated memorandum, the ICRC analyzed Palmer's argument and rejected it, finding that Petro's previous complaint and his cross-filed complaint were distinct. (APP.000025-26)

After investigation of his complaint, the DCRC found probable cause that discrimination occurred on every one of Petro's allegations. (APP.000034-35, APP000036-79) However, on October 10, 2017 the DCRC administratively closed Petro's complaint. (APP.000033) The DCRC's October 16 letter to Petro stated, in pertinent part:

> An administrative closure is not a final determination of the merits of the case but merely a determination based on the limited resources of the commission. However, it does not mean that your client is without a remedy.
>
> A complainant who wishes to take the case into district court can do so by requesting a right to sue letter from the Davenport Civil Rights Commission before 2 years have elapsed from the issuance date of the administrative closure.

(APP.000033)

Petro then requested a right to sue letter from the DCRC on October 19, 2017 and filed the present action in the Iowa District Court for Scott County on January 16, 2018. (APP.000031; APP.000087)

On January 25, 2018 Palmer filed a motion to dismiss Petro's discrimination claims, arguing the DCRC lacked authority to issue a right to

sue letter. (APP.000097) That same day Petro requested a right-to-sue letter from the ICRC on Petro's cross-filed ICRC complaint. (APP.000024) Petro received his right-to-sue letter from the ICRC on January 29, 2018. (APP.000023) Petro then amended his complaint on January 30, 2018 to include the ICRC right-to-sue letter, as well as including an additional breach of contract claim. (APP.000106) The issuance of the right-to-sue letter and Petro's amendment mooted Palmer's arguments on the motion to dismiss for all claims except Petro's age discrimination in education claim, brought under the Davenport Civil Rights Ordinance. Palmer then moved to stay the district court proceeding on February 20, 2018 citing its intent to challenge the ICRC's issuance of the right-to-sue letter. (APP.000117) The Motion to Dismiss was fully argued and briefed, but the Scott County District Court granted the motion to stay and held its ruling in abeyance. (APP.000130)

On April 6, 2018 Palmer filed a Petition for Judicial Review in Scott County District Court pursuant to Iowa Code Chapter 17A challenging the ICRC's issuance of the right-to-sue letter on Petro's cross-filed complaint. (APP.000126) Palmer argued that right-to-sue letter was improperly issued because the cross-filed complaint was duplicative of Petro's previously filed and closed ICRC complaint. (*Id.*) The District Court denied Palmer's

petition, finding that the right-to-sue letter was properly issued. (APP.000138) The Scott County District Court also stated that Palmer could raise this same argument through a Motion to Dismiss/Motion for Summary Judgment in the pending discrimination case, despite Chapter 17A's exclusivity provision. (*Id.*)

On August 24, 2018 the District Court lifted its stay. (APP.000148) On August 29, 2018 Palmer moved for summary judgment on Petro's remaining claims of perceived discrimination/retaliation and breach of contract. (APP.000150) Palmer raised the exact same arguments—that Petro's first ICRC complaint and his second cross-filed complaint were duplicative. Palmer also argued that any contract between Petro and Palmer either did not exist or was unenforceable. (*Id.*)

On November 30, 2018 the District Court granted Palmer's Motion to Dismiss, finding that the court lacked jurisdiction because Davenport Civil Rights Ordinance provision allowing a complainant to file suit in District Court was invalid. (APP.000334) On December 7, 2018 the District Court granted Palmer's Motion for Summary Judgment in full, finding that Petro's two ICRC complaints were duplicative, and that the contract between Palmer and Petro was not supported by consideration. (APP.000348)

Petro timely filed a notice of appeal on December 21, 2018.

STATEMENT OF FACTS

Darren Petro ("Petro") enrolled at Palmer College of Chiropractic ("Palmer") as a second career. Petro was a Naval officer for nine years, and was employed with the federal government as both a civil servant and contract consultant—primarily with the Central Intelligence Agency. Petro is a graduate of the Naval Academy, served five years flying F-14's, three plus years attached to the SEAL's, and approximately 10 years with the CIA in various capacities. (APP.000080-86)

First Trimester

Petro began attending classes at Palmer in the spring of 2012. During his first trimester Petro had a class with Professor Steven Torgerud ("Torgerud"), who constantly made discriminatory comments during his lectures. Torgerud would make comments such as: "since all Palmer students are in their twenties" and "none of you were alive in the '80's." Occasionally he would comment on the unique suitability of young students at Palmer and in the chiropractic field. Petro and his friends counted the number of age-related comments for a period of time because it was odd: they quit counting at sixty-five incidents. Torgerud would typically make student age some kind of issue 6-8 times per 50 minute lecture. (APP.000080-86)

At the end of April 2012, Petro sent Torgerud an email with an article on ageism which Petro thought was a non-confrontational approach. This didn't work. Petro had Professor Torgerud for Biomechanics from July through October 2013, and Torgerud continued making the same age related comments. Additionally, Torgerud would give Petro one-word answers to the two or three questions he asked over that four-month period. This behavior was Torgerud's way of retaliating against Petro for complaining about his ageist comments. (APP.000080-86)

At the end of the first trimester in May 2012, Petro approached his class staff representative, Dr. Judy Bhatti, and asked her to address the age discrimination informally with the staff. Dr. Bhatti did nothing to help. (APP.000080-86)

Second Trimester

During the second trimester (July, 2012 through October, 2012) Petro had a number of conversations with the Provost Dan Weinert ("Weinert"), who also instructed Biochemistry II. Weinert at one point told Petro that Palmer "really didn't have a fit for people like him." Petro replied that this wasn't acceptable. Instructor Dr. Dave Patterson later that same trimester told Petro to quit school and that Petro "didn't belong at Palmer." (APP.000080-86)

In September or October 2012, Petro approached class representative Dr. Judy Bhatti a second time asking for help with these issues. She did nothing to correct the situation. After making these complaints, a pattern of retaliatory behavior continued to occur. Petro typically sat in the back row of each class and rarely asked questions. On those occasions where Petro did ask a question, Petro was always treated with a "Yes sir! No Sir!" routine. Petro was the only person treated in this manner. This was a common practice by a number of instructors including Torgerud, Robert Rowell, Victor Strang and Vernon Hagen. (APP.000080-86)

Third Trimester

In the third trimester (November, 2012 through February, 2013) Petro had a professor named Dr. Michelle Barber ("Barber") who constantly made age related comments throughout nearly every lecture. Petro sent her an email on February 4, 2013 asking her to stop "making discriminatory comments regarding the age of Palmer students." Barber apologized by email that same day. Barber then retaliated against Petro by filing an Early Alert Reporting System ("EARS") report against Petro in February 2013. Petro was surprised at being summoned to Vice Chancellor Kevin Cunningham's office in mid-February 2013. This was the first time Petro met him. Cunningham was not prepared for the meeting and had no idea

who Petro was. The takeaway from this meeting was that this situation was Petro's fault for "not having a better sense of humor." This was the first time Petro became aware of the EARS used by Palmer to document problem students. Petro requested Barber's EARS report on him four times, including the last by certified letter, but has never received a copy. (APP.000080-86)

Petro then approached class representative Dr. Judy Bhatti a third and final time asking her to call Cunningham to assist in getting the EARS report removed. She refused. (APP.000080-86)

Fifth Trimester

In the fifth trimester (July, 2013 through October, 2013) Petro attended a class taught by Dr. Tom Brozovich. On the first day Petro approached Brozovich at the end of class and asked him if he should get the $100 or $300 model of the stethoscope that was required for the course. Brozovich replied: "How old are you? What are you doing here?" Petro told him it was none of his business, that his tuition checks weren't bouncing and to forget it, he'd just go ask someone else. Brozovich refused to take questions from Petro for the rest of the trimester. (APP.000080-86)

On January 14, 2014, Instructor Tom Brozovich publicly accused Petro and another student of cheating on an orthopedic practical exam. Petro

was waiting to be called for testing and was sitting by himself in a waiting room reading class notes. Another student, Marcus Robinson, approached Petro for a brief discussion about his plans to go hunting on vacation. After approximately one minute, Brozovich appeared and created a public scene in front of perhaps two dozen students, teachers, TA's and strangers. Petro contacted Brozovich's supervisor, Professor Lisa Killinger, later that day asking her to address this grossly unprofessional behavior; and to ensure all staff and students understood that neither Marcus nor Petro were cheating. (APP.000080-86)

Sixth Trimester

In November 2013, Professor O'Neill-Bhogal threatened to write a second EARS report because Petro was "too quiet" in class. Petro immediately went to HR and told them it was a ridiculous accusation and should be dispensed with immediately. (APP.000080-86)

In January, 2014 Petro stopped to ask Dr. Robert Rowell a question in the hall and referenced a high school class. He cut Petro off with "When were you in high school? 1912?" Petro just told him to forget it and left. Later Rowell assisted in Dr. Brozovich's NMS I class. Petro asked a question about the otoscope which he had trouble using due to nearsightedness. Rowell responded during class: "I don't really care, we

usually don't have people your age here." This occurred in November, 2013. (APP.000080-86)

On January 15, 2014 Professor Van Natta handed out a test. He wrote at the bottom how much he enjoyed working with "young students." This was the only exam Van Natta felt the need to conclude with a personal statement. VanNatta (the lead instructor and Brozovich's brother-in-law) submitted two ethics charges against Petro and Robinson. On January 22, 2014, the cheating accusations were dropped. (APP.000080-86)

On January 24, 2014 VanNatta and Brozovich each filed a "Charge of Misconduct" against Petro accusing him of (1) disrupting a classroom; and (2) failing to follow instructions. Both assertions were unfounded. On January 31, 2014, Petro attended a 07:30 meeting with Ethics Officer Lori Larsen. Petro and Larsen had some difficulty scheduling a meeting and in the meeting she looked at Petro's schedule, called him a liar about his availability and threatened to go forward with the ethics process without Petro's involvement. Petro requested that the charges be dismissed and that VanNatta and Brozovich apologize. She refused to pass this message on, refused to let Petro speak at all and eventually threatened to have Petro arrested for "disrespecting her." He immediately left both the meeting and the campus. (APP.000080-86)

On February 4, 2014, Petro met with Vice Chancellor of Student Affairs Kevin Cunningham at 9:20 AM, who brought along the Head of Security Jesse Moody. At this meeting Petro was informed that all faculty and security were told that Petro was a threat to the campus, and that campus security had Petro's name and photo. Petro was later told that security guards were staged out-of-sight around the office. Later that day at approximately 2:40 PM Petro was told a text from a security staffer had been sent to several of my classmates. The text stated that Petro is a mentally ill ex-CIA officer, he has threatened two female professors in the classroom, and that the school has posted guards outside specific classrooms where Petro was likely to attack. There is absolutely no factual basis for any of these assertions. This text message was passed around in class and the following weekend at the Groston seminar on Palmer campus. (APP.000080-86) After this, Petro departed campus and did not return. (APP.000080-86)

The DCRC conducted a thorough review of the documents produced in the administrative proceeding and interviewed numerous witnesses for both sides. On July 17, 2017 the DCRC issued its Probable Cause Determination finding probable cause that Palmer discriminated against Petro because of his disability and was retaliated against for asserting his

civil rights. The DCRC initially found no probable cause for age discrimination. Petro filed a timely Motion to Reconsider and on September 26, 2017, the DCRC amended its previous Probable Cause finding and determined that there was Probable Cause that Palmer engaged in age discrimination against Petro. (APP.000034-35; APP.000036-79)

BRIEF POINT I

THE PROVISION OF THE DAVENPORT CIVIL RIGHTS ORDINANCE ALLOWING COMPLAINANTS TO FILE SUIT IN DISTRICT COURT IS VALID AND PETRO MAY MAINAIN HIS SUIT FOR AGE DISCRIMINATION IN EDUCATION

PRESERVATION OF ERROR AND STANDARD OF REVIEW

Petro preserved error with regard to Brief Points I, II, and III by timely filing a notice of appeal from the District Court's Ruling and Order on Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and the district court's Ruling and Order on Defendant's Motion for Summary Judgment.

An appellate review of a summary judgment ruling and of a ruling on a motion to dismiss is for correction of errors at law. *Baker v. Iowa City*, 867 N.W.2d 44, 51 (Iowa 2015). On review, the appellate court examines the "record before the district court to determine whether any material fact is in dispute, and if not, whether the district court correctly applied the law."

J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C., 589 N.W.2d 256, 258 (Iowa 1999) (quoting *Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997)). The appellate court views "the record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record." *Estate of Gray ex. rel. Gray v. Baldi*, 880 N.W.2d 451, 455 (Iowa 2016) (quoting *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 806 N.W.2d 282, 286 (Iowa 2011)).

An appellate review of a ruling on a motion to dismiss is for correction of errors at law. *Wernimont v. State*, 312 N.W.2d 568, 570 (Iowa 1981). "Ordinarily on motions to dismiss, the questions are legal and all well-pleaded facts are taken to be true in deciding the issue." *Mormonn v. Iowa Workforce Development*, 913 N.W.2d 554, 564 (Iowa 2018).

ARGUMENT

The issue before the Court is whether the provision of the Davenport Civil Rights Act ("DCRA") allowing a complainant to bring suit in district court is a valid exercise of municipal power. This ordinance is only invalid if the legislature intended to prohibit local jurisdictions from exercising this power. It is clear from the Iowa Civil Rights Act ("ICRA") and this Court's prior case law that the legislature did not have such an intent. Therefore, the

provision of the DCRA allowing a complainant to bring suit in district court is a valid exercise of municipal power.

A. The DCRO Provision Allowing Complainants to Bring Suit in District Court is a Valid Exercise of Municipal Power

i. Legal Standard

When considering whether a municipal ordinance is a valid exercise of municipal power, this Court has found a well-established framework in the Iowa Constitution, Iowa Statutes, and this Court's prior decisions. "The Iowa Constitution gives municipalities authority to regulate matters of local concern, subject to the superior power of the legislature: 'Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs.'" *Baker v. City of Iowa City*, 750 N.W.2d 93, 99 (Iowa 2008) (quoting Iowa Const. art. III. § 38A). An exercise of municipal power is only inconsistent with state law if it is irreconcilable with state law; and an exercise of municipal power is only irreconcilable with state law if the legislature intended to prohibit the act allowed by the ordinance. *Baker*, 750 N.W.2d at 99-100.

Therefore, in order to invalidate the ordinance at issue here, the legislature must have intended to prohibit complainants from bringing suit in

district court based on local ordinances. Palmer has consistently argued for and applied the opposite standard: that Petro must show the legislature intended to allow enforcement of local civil rights law in district court. This is incorrect, ignores longstanding and unquestioned precedent of this Court, and perverts the very intent of the home rule amendment to the Iowa Constitution. It is well established that "[a]n ordinance is presumed to be reasonable and valid, and the burden is upon one who attacks it to show it is not." *Incorporated Town of Carter Lake v. Anderson Excavating & Wrecking Co.*, 241 N.W.2d 896, 901 (Iowa 1976). Palmer's attempt to place the burden on Petro is clearly impermissible and a gross misstatement of Iowa law.

ii. The Legislature did not intend to prohibit the enforcement of local civil rights laws in district court

To determine the legislature's intent, the text of the statute is examined. In this case, Section 216.18 titled "Rules of Construction" is particularly apt. It states: "This chapter shall be construed broadly to effectuate its purposes." Iowa Code § 216.18(1) (2017). One of the main purposes of the ICRA was to provide for effective enforcement mechanisms of its provisions. *See* Arthur Earl Bonfield, *State Civil Rights Statutes: Some Proposals*, 49 Iowa L. Rev. 1067 (1964) (stating that unenforceable

laws are not desirable, and civil rights laws are enforceable "so long . . . as adequate enforcement machinery and procedures are provided); Arthur Earl Bonfield & Alan Vestal, *Origin and Rationale of the Iowa Civil Rights Act*, Celebration of the Fiftieth Anniversary of the Iowa Civil Rights Act, May 20, 2015 (Exhibit "D") (stating one of the four main goals in enacting the ICRA of 1964 was to provide "an enforcement scheme that would really work.") In order to effectuate the ICRA's purposes, therefore, provisions should be read broadly to allow for enforcement. *See* Iowa Code § 216.18(1) (2017).

Additionally, the ICRA's provisions pertaining to local commissions similarly show no intent to prohibit enforcement of local civil rights laws in district court. *See* Iowa Code § 216.19 (2017). The first iteration of this provision in the Civil Rights Act of 1965 read as follows:

> Nothing contained in any provision of this chapter shall be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter that deal with the same subject matter.

Iowa Code § 105A.12 (1966). This language has remained in place in much the same form over the past fifty-four years, and evinces a legislative intent to not curtail a local jurisdiction's powers in the civil rights arena.

The current section on a local jurisdiction's powers in the ICRA, Section 216.19, similarly fails to show an intent to prohibit the enforcement of local civil rights laws in state court. Section 216.19(1) states, in pertinent part:

> Nothing in this chapter shall be construed as indicating any of the following: . . . (b) An intent to prohibit an agency or commission of local government having as its purpose the investigation and resolution of violations of this chapter from developing procedures and remedies necessary to insure the protection of rights secured by this chapter…. (c) Limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.

The right at issue in this case is Petro's right to be free from age discrimination in education, found in the DCRO. Because this protection in the DCRO was explicitly authorized by subsection (c) above, this right stems from the ICRA. Subsection (b) above therefore allows Davenport to "develop[] procedures and remedies necessary to insure the protection of" Petro's right to be free from age discrimination in education. *See* Iowa Code § 216.19(1). Instead of showing an intent to prohibit the enforcement of Davenport's Civil Rights Ordinance in district court, this section shows an intent to allow its enforcement in district court. *See id.*

Finally, the administrative rules issued by the ICRC also support Petro's position. Iowa Administrative Code rule 161-1.6(216) deals with local civil rights commissions. Rule 1.6(3) states:

> 1.6(3) *Procedure for obtaining referral status.*
>
> *a. Guidelines for designation.* The executive director will evaluate the applications of agencies and may designate agencies as referral agencies where they conform to the following guidelines:
>
> (1) The agency should have professional staff to enable it to comprehensively investigate complaints and to ensure the processing of the charges expeditiously.
>
> **(2) The ordinance or enabling legislating under which the agency is established must provide at a minimum the same rights and remedies to discrimination available under the Act, and**
>
> (3) The enabling legislation of the agency shall provide, at a minimum, that the agency may hold public hearings, issue cease and desist orders, and award damages to injured parties which shall include, but are not limited to, actual damages.

Iowa Admin. Code r. 161-1.6(3) (2019) (emphasis added). This is clear evidence that the legislature intends for local commissions to have the same powers to provide rights and remedies as the ICRC, as long as those powers accord with the ICRA. Because the Davenport Civil Rights Ordinance's section allowing a complainant to file suit in district court derives from and accords with the ICRA—and the DCRC is required to have this power by the ICRC's own rules in order to qualify as a deferral

agency—Petro may pursue his action for violation of the Davenport Civil Rights Ordinance in district court.

B. The DCRO Provision Allowing Complaints to Bring Suit in District Court is Valid Because it Derives From and Accords With State Law

A municipal corporation may confer jurisdiction on the district court if it derives from and accords with state law. *See Molitor v. City of Cedar Rapids*, 360 N.W.2d 568, 569 (1985). Citing to the *Molitor v. City of Cedar Rapids* case, Palmer has argued that a municipal corporation may confer jurisdiction on the district court only if permission is expressly provided by the legislature. However, this argument misrepresents the holding of *Molitor*, especially in its application to local civil rights ordinances.

This Court in *Molitor* considered the question of "whether a city has power to confer jurisdiction in the district court by city ordinance." *Id.* at 568. While the *Molitor* court invalidated the city ordinance at issue, it was not because a city can *never* confer jurisdiction in the district court by city ordinance. Rather, the Court concluded that a grant of jurisdiction on the district court must "derive from and accord with state law" and that the ordinance at issue did not do this. *Id.* at 569-70. The *Molitor* court favorably cited and discussed two cases that exemplify this principle in the civil rights arena, *Cedar Rapids Human Right Commission v. Cedar Rapids*

Community School District, 222 N.W.2d 391 (Iowa 1974) and *City of Iowa City v. Westinghouse Learning Corporation*, 264 N.W.2d 771 (Iowa 1978).

In *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District*, this Court invalidated a local civil rights ordinance because it did **not** contain a provision allowing judicial review of its decision. 222 N.W.2d 391, 402 (Iowa 1974). The Court considered the ICRA's section which provided "detailed procedure for review of orders, directives and findings of the Commission" and the provision requiring that "local laws must not be inconsistent with [the ICRA] which deal with the same subject matter." *Id.* (citing Iowa Code §§ 601A.10, 601A.12 (1973)). At that time, the ICRA lacked any explicit grant of authority to local jurisdictions to confer jurisdiction on the district court, either through judicial review or as a separate cause of action. *Compare* Iowa Code § 216.19(7) (2017) *with* Iowa Code § 601A (1975). Nevertheless, the court invalidated the local law because it did not provide a statutory procedure for judicial review consistent with the ICRA. *Id.* at 402-03.

In *City of Iowa City v. Westinghouse Learning Corp.*, the Court considered the validity of Iowa City's civil rights ordinance. Both the ICRA and Iowa City's ordinance "provides for the filing of a complaint, investigation to determine probable cause, and conciliation." *Id.* at 773. "At

this point, the ordinance repudiates the underlying purpose of the [ICRA] by transferring to the courts the task of originally deciding whether a discriminatory practice exists." [1] The Court invalidated the ordinance for two reasons. First, the ICRA "established a procedure for exercising the power granted, and [] the city failed to follow it." Second the court found "the plan the city adopted to be so in conflict with the underlying intent and purpose of [the ICRA] that the two are irreconcilable."

Applying these principles to this case, it is clear that the provision of the DCRO allowing a complainant to file suit in district court is a valid exercise of municipal authority. The DCRO's provisions derive from and are in accord with the ICRA. Section 2.58.090 of the DCRO sets out the process for granting an administrative release which allows a claimant to sue in district court. The DCRO requires a claimant to first seek administrative relief by filing a complaint with the commission, and requires the complaint to remain on file for sixty (60) days. Then, upon request, a complainant will receive an administrative release to file in district court. In addition, the DCRO states:

[1] When *Westinghouse* was decided, the ICRA did not allow a complaint to request a right to sue letter and file suit in district court. *See* Iowa Code Chapter 601A (1975).

> A release under this subsection shall not be issued if any of the disqualifying conditions found in the corresponding state or federal law are present, including:
> (1) A finding of no probable cause has been made on the complaint by the commission;
> (2) A conciliation agreement has been executed;
> (3) The commission has served notice of hearing upon the respondent; or
> (4) The complaint is closed as an administrative closure and two years have elapsed since the issuance date of the closure.

Davenport, Iowa, Municipal Code § 2.58.090.

This provision is nearly identical to the administrative release provisions of the ICRA. *Compare id*. *with* Iowa Code § 216.16 (2017). Any slight disparity in these provisions is further remedied by the catchall statement in the Davenport ordinance, which states that an administrative release will not be issued "if any of the disqualifying conditions found in the corresponding state or federal law are present;" this effectively adopts all of the ICRA' requirements for issuing an administrative release. Davenport, Iowa, Municipal Code § 2.58.090.

In no way does the DCRO fail to follow an established procedure for exercising city power, and therefore it is not in conflict with the ICRA. *See City of Iowa City*, 264 N.W.2d at 773. The DCRO's process for conferring jurisdiction on the district court to adjudicate complaints clearly "derives from and accords with state law." *See Molitor*, 360 N.W.2d at 570.

Therefore, the DCRO's provision allowing complainants to file suit in district court is a valid exercise of municipal power.

BRIEF POINT II

THE DISTRICT COURT LACKED JURISDICTION TO RULE ON PALMER'S MOTION FOR SUMMARY JUDGMENT ON PETRO'S PERCIEVED DISABILITY AND RETALITION CLAIMS

ARGUMENT

The lower court granted Palmer's motion for summary judgment on Petro's perceived disability and retaliation claims, concluding that Petro's complaint to the DCRC was duplicative of his previous complaint to the ICRC. However, because the ICRC previously ruled that these complaints were not duplicative, the district court lacked jurisdiction to rule on this argument. Palmer's remedy was to file an appeal from this determination pursuant to Iowa Code Chapter 17A, which provides the exclusive means to seek judicial review of an agency action. Palmer failed to file a proper administrative appeal and therefore was estopped from raising the argument in a motion for summary judgment.

When Petro cross-filed his DCRC complaint with the ICRC, Palmer asked the ICRC to close Petro's complaint on the basis that it was duplicative of his earlier complaint. (APP.000027-28) The ICRC denied Palmer's motion, finding that the complaints were not duplicative because

Petro did not allege perceived disability discrimination in his first complaint, but did allege perceived disability discrimination in his second.

(APP.000025-26)

The ICRC's denial of Palmer's request was agency action under Chapter 17A. Section 17A.2(2) defines "agency action" as:

> the whole or a part of an agency rule or other statement of law or policy, order, decision, license, proceeding investigation, sanction, relief, or the equivalent or a denial thereof, or a failure to act, or any other exercise of agency discretion or failure to do so, or the performance of any agency duty or failure to do so.

Iowa Code § 17A.2(2) (2017). This definition is exceptionally broad and the ICRC's denial of Palmer's request to close Petro's complaint falls into any number of these categories, including: an order, a denial of relief, and an act of agency discretion. Clearly, the ICRC's denial of Palmer's motion to close the case was "agency action" governed by Chapter 17A.

Section 17A.19 of the Administrative Procedures Act states:

> Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the **exclusive means** by which a person or party who is aggrieved or adversely affected by **agency action** may seek judicial review of such agency action. However, nothing in this chapter shall abridge or deny to any person or party who is aggrieved or affected by any agency action the right to seek relief from such action in the courts.

Iowa Code § 17A.19 (2017) (emphasis added). Palmer's sole avenue to seek judicial review of the ICRC's denial of their motion was through Chapter

17A. Instead, it filed a motion for summary judgment and made the identical argument to the district court that was rejected by the ICRC; that Petro's claims were duplicative. Nevertheless, the district court accepted Palmer's argument and granted summary judgment.[2] The district court lacked jurisdiction to do so.

Petro began his foray into this legal morass in 2014. Palmer's procedural shenanigans have effectively delayed justice for a man who was mocked repeatedly because of his age and disability simply because he wanted to further his education and become a chiropractor. This Court should remand Petro's perceived disability and retaliation complaints to the district court.

BRIEF POINT III

THE CONTRACT BETWEEN PETRO AND PALMER IS SUPPORTED BY SUFFICIENT CONSIDERATION AND PETRO MAY MAINTAIN HIS BREACH OF CONTRACT ACTION AGAINST PALMER

ARGUMENT

The district court also granted Palmer's motion for summary judgment on Petro's breach of contract claim finding that the contract lacked

[2] In ruling on the issue of duplicativeness in Palmer's motion for summary judgment, the district court utilized a *de novo* standard of review. This standard is much more favorable than any standard of review available under Chapter 17A.

consideration. However, this ruling failed to consider the entirety of the contract as alleged by Petro both in his Petition and briefing below. Because the contract Petro alleged was supported by sufficient consideration, Petro should be allowed to maintain his breach of contract action.

A. A Contract Existed Between Petro and Palmer

Palmer has argued that it cannot breach its contract to perform services for students by violating its own policies, procedures, regulations, catalogue and/or handbook. This is simply not true, and Palmer has previously been on the losing side of this argument. "Certainly, the proposition that once an organization has established rules for itself it must follow them is not a radical position . . . We agree with those courts which hold that a student at a private school should be able to rely upon the school to follow the established procedures it voluntarily promulgated." *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 445-45 (Iowa App. 1984). Furthermore, "a private university may not expel a student arbitrarily, unreasonably, or in bad faith." *Id.* at 444.

For private schools, this rule is generally based on contract principles: private schools are contractually obligated to follow the rules they voluntarily promulgated. *Id.* at 443. In addition, the fundamental concept that "[t]he basic relation between a student and a private university or

college is contractual in nature" and that the college's "catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract," is neither new, nor is it novel to Iowa. *Zumbrun v. Univ. of Southern California*, 25 Cal. App.3d 1, 10 (Cal. App. 1972); *Carr v. St. John's Univ.*, 17 A.D.2d 632, 633 (N.Y. App. Div. 1962), *affirmed* 187 N.E.2d 18; *Anthony v. Syracuse Univ.*, 231 N.Y. 435, 438-39 (N.Y. App. Div. 1928); *Goldstein v. New York Univ.*, 78 N.Y.S. 739, 740 (N.Y. 1902); *Cecil v. Bellevue Hosp. Medical College*, 14 N.Y.S. 490 (N.Y. App. Div. 1891), *affirmed* 28 N.E. 253; *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1925); *Univ. of Miami v. Militana*, 184 So.2d 701, 704-04 (Fla. App. 1966); *Barker v. Trustees of Bryn Mawr College*, 122 A. 220, 221 (Pa. 1923); *Greene v. Howard Univ.*, 271 F. Supp. 609, 613 (D.D.C. 1967); see *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961), *cert. den.* 368 U.S. 930; *see also Harvey*, 363 N.W.2d at 444. Palmer, as a private college, is contractually bound to follow its own policies and procedures. (APP.000378)

B. The Contract Between Petro and Palmer Was Supported By Sufficient Consideration

"It is fundamental that a valid contract must consist of an offer, acceptance, and consideration." *Margeson v. Artis*, 776 N.W.2d 652, 655

(Iowa 2009). "Consideration constitutes either a benefit to the promisor or a detriment to the promisee. Consideration may consist of a performance or a return promise, and it must be 'bargained for.' " *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). "Any performance that is bargained for is consideration. A performance is bargained for if it is sought by the promisor in exchange for his or her promise and is given by the promisee in exchange for that promise." *Id.* (citing Restatement (Second) of Contracts §§ 71-72).

In this case, the alleged contract was clearly supported by sufficient consideration. In Paragraph 58 of Petro's Amended Petition, Petro alleged: "Petro and Palmer College entered into a legally binding contract. Petro paid tuition to Palmer College in exchange for instruction in the field of chiropractic science." (APP.000115 ¶ 58) Petro promised to pay tuition, which is a performance bargained for that is a detriment to him and a benefit to Palmer. Palmer agreed to provide Petro with instruction in the field of chiropractic sciences, which is a detriment to Palmer and a benefit to Petro. The bargained for consideration was actually exchanged by the parties. Petro attended Palmer college for from the Spring of 2012 to February 2014 and was provided instruction on chiropractics by Palmer instructors. (APP.000107-111 ¶ 13-41) Because the contract between Petro and Palmer

is supported by adequate consideration, the district court's decision should be reversed.

C. A Promise to Comply with Existing Law is an Enforceable Term of a Contract and Does Not Merge with a Tort

Palmer also argued below, and the district court considered, whether the promise Palmer made in its handbook to refrain from discrimination is an enforceable contract term. Palmer argued that because this was a promise to comply with existing discrimination law, it is not an enforceable contractual term. Palmer also argued, in the alternative, that if it was an enforceable term, then any breach of contract action would be subsumed by the ICRA. Neither of these arguments are consistent with Iowa law, or the law of other jurisdictions.

First, a promise to comply with existing laws is absolutely an enforceable term of a contract. While this Court has not directly addressed this question, the Court has commented on this type of contract term in *State Public Defender v. Iowa Dist. Court for Linn County*, 728 N.W.2d 817, 821 (Iowa 2007). In that case, a court appointed attorney, Amsler, entered into a contract with the State Public Defender and later sought payment pursuant to that contract. *Id.* at 818-19. The Court noted that "[a]lthough the contract requires Amsler to 'comply with all applicable federal, state and local laws,'

the State Public Defender fails to specify what law, if any, Amsler violated by accepting the appointment[.]" Notably the Court did not find this contractual term was unenforceable, only that there was no evidence it was breached. *See id.* Logic therefore tells us the Court felt this was an enforceable term of the contract. *Cf. id.*

If this Court explicitly holds that these terms are enforceable, it would not be an outlier. The rule that promises to comply with existing laws are enforceable terms of contracts has been recognized by other courts across the country. *See Fata v. S.A. Healy Co.*, 46 N.W.2d 401 (N.Y. 1943); *Wells Fargo v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812 (Md. 2003); *Ansley v. Banner Health Network*, 419 P.3d 552, 557 (Ct. App. Ariz. 2018); *Dep't of Labor & Indus. v. Lanier Brugh*, 147 P.3d 588 (Wash. 2006); *Asamoah-Boadu v. State*, 328 S.W.3d 970 (Mo. Ct. App. 2010); *Miller v. E.I. Du Pont De Nemours & Co.*, 244 P.2d 810 (Okla. 1952); *Glasgow Educ. Ass'n v. Bd. of Trustees, Valley Cty., Sch. Districts 1 & 1A*, 791 P.2d 1367 (Mont. 1990); *St. Joseph's Reg'l Health Ctr. v. Munos*, 934 S.W.2d 192 (Ark. 1996); *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010); *Backus v. Chilivis*, 224 S.E.2d 370 (Ga. 1976); *Freeto v. State Highway Comm'n*, 166 P.2d 728 (1946).

Palmer's other argument, that any breach of contract action is subsumed by the ICRA, is similarly untenable. As Palmer must

acknowledge, the ICRA does not protect age discrimination in education. Therefore any breach of contract action based on age discrimination cannot be preempted by the ICRA. Palmer has also argued that the DCRO cannot be enforced in state court. Palmer cannot then argue that the DCRO preempts a breach of contract action. Palmer cannot have its cake and eat it too.

CONCLUSION

Because the ICRA does not prohibit the enforcement of a local jurisdiction's civil rights ordinance in district court, and the DCRO provisions derive from and accord with the ICRA, the DCRO section allowing Petro to file suit in district court is valid and Petro may maintain his age discrimination action. Additionally, the district court lacked jurisdiction to hear Palmer's argument regarding duplicative complaints. The ICRC's refusal to dismiss Petro's complaint on the same grounds was agency action, therefore Palmer's only avenue to seek judicial review was through Chapter 17A. Finally, the district court erred in granting summary judgment on Petro's breach of contract claim

WHEREFORE Petro respectfully requests the Court reverse the Iowa District Court for Scott County's rulings on Palmer's Motion to Dismiss and

Motion for Summary Judgment, and remand this case to district court for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests to be heard at oral argument.

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CERTIFICATE OF FILING AND SERVICE

I certify that on **MAY 14, 2019** I electronically filed this Final Brief with the Clerk of Court using the ECF system, which sent notification of same to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 6,725 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 pt.

By: **/s/THOMAS J. DUFF**